THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

C.M.S.A. Nos. 400, 587 & 651 OF 2004

COMMON JUDGMENT:

These three appeals are filed against the common judgment and decree, dated 24.11.2003, passed in A.S.Nos.133, 134 & 135 of 2000, by II Additional District Judge, Visakhapatnam, where under the District Judge reversed the order holding that the objector is a bonafide purchaser for a valuable consideration and directed to reimburse the value of the improvements made on schedule property to the appellant, and seeks eviction of appellant there-from or to sell the property at the prevailing market rate to objector.

Respondent no.1 remained exparte, respondent No.2 filed counter. The main contention of respondent no.1 is that he is not liable for eviction from the suit schedule property. The second respondent contended that he purchased 127.77 square yards of land out of Ac. 0.09 cents of land in S.No.107 of Chinagantyada from the first respondent under a registered sale deed, dated 29.04.1991, which is included in the schedule property and that ever since the said purchase, he is in possession of the suit schedule property. The second respondent has been enjoying the property without any interruption by anybody and also constructed two shops in the said site and that he received compensation from the R&B authorities for a part of the land which was acquired for expansion of NH5 road i.e., at southern side of his site. The second respondent purchased an extent of 127 square yards of land, whereas the extent of land in Ex.A.1 is 210 square yards and that the measurement of the property pertaining to second respondent is not one and the same and that the said 127 square yards was purchased by second respondent from Koribilli Chinnarao, who is the first respondent by virtue of the said purchase and the second respondent has became legal and rightful owner of the property to an extent of 127 square yards situated in S.No.107 of Chinagantyada Village. Respondents 3 to 5 did not contest the application.

The respondent in E.A's also raised same contentions and all the petitions were tried together and the following issues were framed:

1. Whether the sale in favour of appellant is hit by doctrine of lis-pendency and also by virtue of temporary injunction granted against Judgment Debtor and if so, whether the appellant is entitled in equity to be reimbursed?

2. Whether the appeals are maintainable?

3. Whether the 1st respondent herein who is the Decree Holder is entitled for the relief of delivery of possession of the property by removing the obstructons and by demolishing the structures therein? If so, on what terms and conditions?

4. Whether the appellant herein can be arrested if he makes any obstruction at the time of delivery of the schedule property to Decree Holder?

5. Whether the Court Amin can be permitted to break open doors and demolish the structures existing in the schedule property at the time of effecting delivery of possession of property to Decree Holder?

6. Whether the 1st respondent/Decree Holder and the Court Amin are entitled for police protection at the time of effecting delivery of schedule property to Decree Holder?

During the course of enquiry, on behalf of the petitioners, the petitioner himself was examined as P.W.1 marked Exs. A.1 to A.7 and on behalf of the respondents, R.W.1 was examined and Exs. B.1 to B.9 and C.1 were marked.

Upon hearing argument of the learned counsel, the trial court held that the objector purchased the property subsequent to the suit filed by Decree Holder for specific performance and hence he cannot contend that the title will prevail as against the agreement of sale, and the objections raised by second respondent, was overruled while allowing petitions.

Aggrieved by the said order, the objector filed appeals challenging the findings recorded by the trial court and after hearing both the counsels, the appellate court i.e., II Additional District Judge, Visakhapatnam, by common judgment dated 24.11.2003 allowed the appeals setting aside the order and decree passed by the trial court and granted reliefs mentioned in Para No.1 of the order.

Challenging the said common judgment, the Decree Holder filed these appeals mainly contending that the objector is not entitled to claim benefit under Section 51 of the Transfer of Property Act, 1882 (for short, 'the Act'), as he is not a *bona fide* purchaser for valuable consideration as per Section 52 of the Act, but the trial court did not consider the same, as such prayed this court to allow the appeals by setting aside the impugned orders and decrees passed by the II Additional District Judge, Visakhapatnam.

During the course of arguments, learned counsel for the appellant reiterated the same contentions and requested to appreciate the evidence on record to find out whether the objector is a *bona fide* purchaser for valuable consideration or not. However, when the purchase is hit by Section 52 of the Act, the objector is not entitled to claim equities under Section 51 of the Act and prayed to allow the appeals.

The counsel for respondent no.1 alone contested this appeal, but did not advance any argument, since it is allegedly a dispute between the objector and Decree Holder, and requested to pass appropriate orders.

While admitting the appeals, this court did not frame any substantial question of law. However, at the time of hearing, the following substantial question of law is framed:

Whether the objector/second respondent is entitled to claim equities as he purchased the property from the first respondent during the pendency of the suit, and during subsistence of interim injunction, claiming to be a *bona fide* purchaser for valuable consideration?

Point:

The trial court while passing common order held that the objector purchased the property during the pendency of this suit while the interim injunction was in force. Therefore, he is not a *bona fide* purchaser for valuable consideration and dis-believed the contention of the objector. In the appeals, the II Additional District Judge, held that the objector is a *bona fide* purchaser for valuable consideration and is entitled to the benefit under Section 51 of Transfer of Property Act. The findings of the trial court is that the objector is not a *bona fide* purchaser for valuable consideration, is purely a question of fact and this court while exercising powers under Section 100 of CPC cannot disturb the findings of fact in view of the law declared by this court in **Dwarampudi Nagaratnamba vs Kunuku Ramayya And Anr**[1]. Even otherwise, the facts and circumstances and the evidence on record clearly established that the objector is a *bona fide* purchaser for valuable consideration. Therefore, I am not inclined to interfere with the fact finding recorded by the Appellate Court as to the nature of acquisition of property under registered sale deed by the objector and he is *bona fide* purchaser for valuable consideration.

One of the contentions before the first appellate court is that the objector is entitled to claim equities under Section 51 of the Act, as he is a *bona fide* purchaser for valuable consideration and made improvements during the pendency of the suit and appeal thereon. The trial court only on the premise that interim injunction was granted in favour of the decree holder and against the first respondent/judgment debtor restraining him from alienating the property during pendency of this suit, thereby the sale of the property is hit by Section 52 of Transfer of Property Act and such sale is voidable at the option of either of the parties. However, the objector could establish that he is a *bona fide* purchaser for valuable consideration. In such a case, the objector is entitled to claim equities under Section 51 of Transfer of Property Act, when the transferee makes any improvement on immovable property, believing in good faith that he is absolutely entitled thereto, and he subsequently evicted there-from by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell the property to the transferee at the then market value thereof, irrespective of the value of such improvement. Therefore, the principle under Section 51 of the Act is purely based on equity.

Upon hearing the argument, the appellate court recorded a categorical finding that the objector/second respondent was a *bona fide* purchaser for valuable consideration without notice of the pendency of this suit. In such case, he is entitled to claim benefit under Section 51 of the Act for the improvements made by him believing that he is entitled to do so.

To invoke the jurisdiction of the court, while claiming equities under Section 51 of Transfer of Proprty Act, the petitioner has to prove the following two ingredients:

1. The person evicted is a transferee.
2. He must have made improvements in good faith that he is entitled to immovable property by virtue of which he had authority to make improvements, as held in Emerald valley Estate ltd., Vs State of Kerala in AIR 2001 Kerala.

29.

A similar question came up for consideration before another judgment in (J.Narayana Rao Vs V G Basavarayappa andothers) AIR 1956 Supreme Court 727. Of course, the principle laid down in the above judgment pertaining to mortgage suit. The Apex Court while deciding the rights of the purchasers placing reliance on the decision of Privy

Council between **Narayana-swami Ayyar Vs. Rama Ayyar**[2] held that Section 51 of the Act merely lays down an equitable principle and enables a Court to determine the equities between the parties. A decree in the form in which it has been passed in this case, which was a suit for redemption and possession, could have been passed. We regard the decision of the Privy Council as an authority which supports our opinion. We think, however, having regard to the provisions of Section 51 of the Act, that if the evidence enables a Court to do so, it should assess the valuation of the improvement as on the date as near as possible to the date of actual eviction rather than the date of election as has been done in this case.

In view of the principles laid down in the cases cited above and the present facts of the case, certainly the objector/second respondent though purchased the property during pendency of this suit and while interim injunction was in force, he is not aware about the pendency of the proceedings but purchased with a *bona fide* intention, he is entitled to claim immovable property. In such case, he can claim equities under Section 51 of the Act.

In similar situation in Prapul Chandra Mukpalkar & Anr Vs., **P.Rama Chandra Reddy & Anr**.[3], the single judge of this court in Para 18 held as follows:

"It is true that the law in this regard has been settled by precedents including of this court in **Dwarampudi Nagarathnamba Vs. Kunuku Ramayya**[4], and in a latest pronouncement dealing with a similar matter in **R.B.Bharatha Charyulu Vs. R.K.Alivelu Manga Thayaru**[5], the rule of equity enshrined in Article 226 of the Constitution of India and Section 51 of the Transfer of Property Act has been followed to do the true justice in equity. Where the parties to a litigation act bonafide either by acquiring the property or by putting up the construction, the equities are to be worked out to place them in the original positions. Dwarampuri Nagaratnamba's case was dealing with the rights of the members of the joint family in applying the principles under Section 51 of the Transfer of Property Act in regard to the improvements made by the transferee in good faith, which is held to be a question of fact."

Therefore, the bona fide purchaser for valuable consideration, who made improvements, is entitled to claim equities under Section 51 of Transfer of Property Act.

The Appellate Court, after elaborate discussion with reference to various judgments of Supreme Court and other High Court, concluded that the objector/second respondent is entitled to claim equities and even placing reliance on the principles referred *supra*, the objector is entitled to claim benefit under Section 51 of Transfer of Property Act. Therefore, I find no illegality in the finding recorded by the Appellate Court. However, the trial court did not look at Section 51 of Transfer of Property Act, but allowed the petition only on the ground that the objector purchased the property during pendency of the suit while interim injunction was in force. The trial court did not disbelieve anything about the knowledge of pendency of the suit and prior agreement between the decree holder and the judgment debtor before purchase of property. It is not known whether judgment debtor informed about pendency of the suit, but the evidence on record established that the pendency of the suit was not informed by judgment debtor to the objector/respondent no.2. Therefore, the Appellate Court reversed the said finding holding that the second respondent is a *bona fide* purchaser and granted relief.

As the objector/second respondent established two requirements stated above, he is entitled to claim equities under Section 51 of Transfer of Property Act, on the principles of equity.

One of the contentions raised by the counsel for the appellant/decree holder is that when the suit is pending based on an agreement of sale for specific performance and interim injunction was in force, sale of the property by the judgment debtor to the objector is hit by Section 52 of Transfer of Property Act. There is substance in this contention. However, the sale is voidable but not void. Even under Section 52 of Transfer of Property Act, a *bona fide* purchaser for valuable consideration, without notice of the pendency of the suit, is protected. The principle enunciated both under Sections 51 and 52 of the Act is almost identical. However, while working out the equities, decree holder cannot be put to serious loss on account of sale of property the judgment debtor cannot be allowed to enrich himself unjustly during pendency of the suit.

Conduct of the parties is also relevant to claim equities under Section 51 of Transfer of Property Act. A person with a *prima facie* claim to priority for interest may lose it through his won misconduct. A distinction needs to be drawn between the principle applicable to competing legal and equitable interest and those applicable to two competing equitable interest. In relation to competing equitable interest, a second distinction must also be drawn between dealing with registered land and other kinds of property. The priority of interests in registered land is determined by the order in which they are created and the fault of the owner of the prior interest is not relevant.

A prior legal interest will be postponed to a subsequent equitable interest if the owner of prior interest has connived at or assisted in some fraud which has led to the creation of subsequent equitable interest without notice of prior interest. In the present facts of the case the 1st respondent fraudulently sold the property to objector without disclosing the pendency of the suit and interim injunction in force, while incorporating general covenants of title. Hence, the judgment debtor-first respondent played fraud on the purchaser and sold the property in dispute, in such case working out equities the decree holder is permitted to recover amount whatever he paid to objector though no such claim is put forth in the pleadings but based on equity.

In such circumstances, I find that decree holder is also entitled to claim equity and recover the amount whatever he paid to the objector from the judgment debtor, who sold the property during pendency of the suit despite interim injunction was in force. Accordingly, I hold that decree holder has to pay the value of the constructions raised by the objector who is a *bona fide* purchaser for valuable consideration, without notice of the pendency of the suit and he is entitled to recover the amount whatever he paid to objector, directly from the judgment debtor on the principle of equity and that to, the intention of the legislature is not to allow the judgment debtor whose conduct was blame worthy to enrich himself unjustly. The Appellate Court did not get estimate the value of the constructions raised therein to enable the decree holder to pay the value of the construction. In those circumstances, I find that it is a fit case to appoint an advocate commissioner or an engineer to estimate the value of the constructions raised in the suit schedule property enabling the decree holder to pay the value of the constructions to the objector and after such payment, he is at liberty to proceed against the judgment debtor to recover the same together with interest, if any, subsequent to such payment, basing on this judgment and decree on the principle of equity.

With the above directions, the appeals are allowed in part directing the decree holder to pay value of the constructions raised by the objector/second respondent on estimation made by a qualified engineer appointed by the appellate court on such payment he is entitled to recover the said amount directly from the judgment debtor by proceeding in accordance with law basing on the decree and judgment in this appeal without filing separate proceeding.

Miscellaneous petitions, if any, pending in this appeal shall stand closed. No costs.

M.SATYANARAYANA MURTHY, J

Date: 03.07.2015
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[1] AIR 1963 AP 177

[2] MANU/PR/0189/1930.

[3] 1998 (2)ALD569

[4] AIR 1963 AP 177

[5] AIR 19 AP 238