

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

SECOND APEPAL No.152 OF 2002

JUDGMENT:

This appeal, under Section 100 of the Code of Civil Procedure, 1908 (for short, 'the Code'), is filed challenging the Decree and Judgment dated 19.10.2001 in A.S. No.33 of 1998 passed by the I Additional District Judge, West Godavari, Eluru, setting aside the Judgment and Decree dated 16.12.1997 in O.S. No.73 of 1991 passed by the Subordinate Judge at Narsapur, allowing the appeal and directing the appellant herein, along with respondents 2 and 3 herein, to execute sale deed in favour of the first respondent herein, within two months.

02. The appellant herein is the third defendant, first respondent herein is the plaintiff and the respondents 2 and 3 herein are the defendants 1 and 2 in O.S. No.73 of 1991. They will hereinafter be referred to as arrayed before the trial court, for convenience.

03. The plaintiff filed suit for specific performance of contract of sale dated 11.03.1991 against defendants 1 to 3. Defendants 1 and 2 are the vendors of the plaintiff and the third defendant is the subsequent purchaser of the property under registered sale deed dated 29.08.1991 for Rs.17,500/- from defendants 1 and 2. The plaintiff purchased the property originally from defendants 1 and 2 under contract of sale dated 11.03.1991 for Rs.30,000/- and paid an amount of Rs.17,000/- towards advance agreeing to pay balance of sale consideration within specified period.

04. It is specifically contended that the sale was in favour of the third defendant is sham and nominal and it would not bind the plaintiff and thereby the third defendant has to join in execution of the registered sale deed, being, the subsequent purchaser with notice of prior agreement of sale. The defendants 1 and 2, though contested the suit and first appeal, did not prefer any appeal before

this Court aggrieved by the direction issued by the first appellate court directing them to execute registered sale deed. Therefore, the specific pleadings of defendants 1 and 2 need not be referred for decision in this second appeal.

05. The third defendant's contention is that he is the bonafide purchaser for valuable consideration without notice of agreement of sale executed in favour of the plaintiff and thereby he is entitled to protection under sub-Section (2) of Section 19 of the Specific Relief Act, 1963 (for short, 'the Act'). But, no written statement was filed before the trial court, filed a Memo adopting the written statement filed by the defendants 1 and 2 in the main suit.

06. The trial court formulated as many as nine issues. On behalf of the plaintiff, P.Ws.1 to 3 were examined and Exs.A.1 to A.16 were marked. On behalf of the defendants, D.Ws.1 to 3 were examined and Ex.B.1 was marked.

07. Upon hearing both the counsel, the trial court dismissed the suit for specific performance.

08. Aggrieved by the Decree and Judgment dated 16.12.1997, the unsuccessful plaintiff preferred an appeal before the I Additional District Judge, West Godavari, Eluru. The first appellate court allowed the appeal by Decree and Judgment dated 19.10.2001, directing the defendants 1 to 3 to execute registered sale deed in favour of the plaintiff for the suit amount on receipt of balance of sale consideration within two months.

09. Aggrieved by the Decree and Judgment of the first appellate court, the third defendant preferred the present appeal on various grounds.

10. During hearing, Sri Pratap Narayana Sanghi, learned counsel for the appellant/third defendant, confined his contention to sub-Section (2) of Section 19 of the Act, i.e., he is a bonafide purchaser for valuable consideration without notice of agreement of sale and he also raised a specific contention that the plaintiff is not

entitled to claim relief of specific performance without seeking cancellation of registered sale deed dated 29.08.1991, which was marked as Ex.A.10, executed in favour of the third defendant. It is the specific contention before this Court that the third defendant had no knowledge about the execution of agreement of sale in favour of the plaintiff and that he paid entire sale consideration, and thereby he is a bonafide purchaser for valuable consideration. It is also further contended that the suit for specific performance of contract simplicitor without seeking relief of cancellation of registered sale deed dated 29.08.1991 under Section 31 of the Act or declaration under Section 34 of the Act, the suit is not maintainable.

11. Whereas Sri Chidambaram, learned counsel appearing for the first respondent/plaintiff supported the Decree and Judgment of the first appellate court, in all respects.

12. Admittedly, the plaintiff filed a suit for specific performance of contract for sale based on agreement of sale dated 11.03.1991 for Rs.30,000/-, paid an amount of Rs.17,000/- to the defendants 1 and 2 towards advance. on 06.05.1991 the plaintiff paid Rs.8,000/- as part of balance of sale consideration, later issued a legal notice dated 31.08.1991 marked as Ex.A.3 demanding the defendants 1 and 2 to execute registered sale deed receiving balance of sale consideration. Receipt of the notice was acknowledged by the defendants 1 and 2. The third defendant is a bonafide purchaser for a valuable consideration. In fact, the third defendant did file no written statement, except adopting the written statement filed by the defendants 1 and 2 by filing a Memo. In the written statement filed by defendants 1 and 2, there is a specific plea that third defendant is a bonafide purchaser. At paragraph 11 of the written statement, it was averred that the third defendant is a bonafide purchaser of the schedule property for a valuable consideration.

13. The trial court framed the issue placing initial onus of proof on the plaintiff instead of placing on the third defendant, who is claiming to be a bonafide purchaser of the schedule property for a valuable consideration without notice of agreement of sale-Ex.A.1 executed in favour of the plaintiff. The plaintiff was examined before the trial court as P.W.1 besides examining other witnesses. However, initial onus of proof is on the third defendant to prove that he is a bonafide purchaser for a valuable consideration, since he is the person who raised a specific plea, and it is within his exclusive knowledge as per Section 106 of the Indian Evidence Act, 1872. But he did not enter into witness box tendering himself for cross-examination by adversary to prove that he is the bonafide purchaser for a valuable consideration without notice of prior agreement of sale-Ex.A.1 in favour of the plaintiff.

14. The learned counsel for the appellant/ third defendant, while raising several contentions, drawn attention of this Court to a Judgment of this Court in **B. RAJAMANI V. AZHAR SULTANA AND OTHERS**^[1] wherein a similar question was decided by the single Judge of this Court and held at paragraph 26 as follows:

“Section 19(b) read with Section 20 of the Act does not permit enforcement of specific performance of a contract against a transferee of the immovable property for value, who has paid money in good faith and without notice of the original contract. That is to say, if third party has purchased the suit schedule property subsequent to the date of original contract under bonafide impression and in good faith for value, in equity, the vendee would not be entitled for specific performance of the contract. When a third party comes to the Court with such a plea; on whom the burden lies. The law in this regard is well settled. A subsequent purchaser is required to come to the box and make a statement that he/ she has purchased the property subsequently for a consideration and that he/ she had no knowledge of the earlier contract. That would be sufficient to discharge the burden and the burden to lead rebuttal evidence would shift to the plaintiff seeking specific performance of original agreement.”

15. Thus, in view of the principle laid down in the above Judgment, the initial onus of proof is on the third defendant, who is claiming to be a bonafide purchaser of the schedule property for a valuable consideration without notice of prior agreement in favour of the plaintiff, which was marked as Ex.A.1. But obviously, for different reasons, he was not examined as a witness before the trial court to discharge the initial onus of proof rested on him and avoided tendering himself for cross-examination by adversary. When the third defendant failed to discharge his initial onus of proof, question of shifting onus of proof to the plaintiff, who is seeking relief of specific performance, does not arise. An identical question came up before the Apex Court in **RAM NIWAS (DEAD) THROUGH L.RS. Vs. SMT. BANO AND OTHERS**^[2]. While deciding the similar question, the Apex Court held at paragraphs 18, 19 and 20 as follows:

“18. Both the learned single Judge as well as the learned Judges of the Division Bench of the High Court dealt with the question whether the purchasers had actual knowledge of Ext.1, the earlier contract, and on evidence found that the purchasers did not have any knowledge of it. But they failed to notice the provisions of Explanation II to Section 3 of the Transfer of Property Act which is germane on the point of notice. Indeed, issue No.10 was not properly framed. The word ‘notice’ should have been used in issue No.10 instead of ‘knowledge’ because S.19(B) uses the word ‘notice’. From the definition of the expression, “a person is said to have notice” in S.3 of the Transfer of Property Act, it is plain that the word ‘notice’ is of wider import than the word “knowledge”. A person may not have actual knowledge of a fact but he may have notice of it having regard to the aforementioned definition and Explanation II thereto. If the purchasers have relied upon the assertion of the vendor or on their own knowledge and abstained from making enquiry into the real nature of the possession of the tenant, they cannot escape from the consequences of the deemed notice under Explanation II to Section 3 of the Transfer of Property Act. On this point, in the light of the above discussion, we hold that

the purchasers will be deemed to have notice of Ext.1, should it be found to be true and valid.

19. The last point, whether on the facts and circumstances of this case, it will be just and proper to grant discretionary relief of the specific performance of the contract in favour of the tenant or will it be inequitable to enforce Ext.1 against the purchasers remains to be decided?

20. The Division Bench in agreement with the learned single Judge took the view that the plaintiff is not entitled to the relief of specific performance of Ext.1. As on the question of genuineness and validity of Ext.1, we are remanding the case to the learned Single Judge. We do not propose to express any opinion on this point and leave it to be decided afresh with reference to the provisions of Section 20(2) of the Specific Relief Act by the learned Single Judge after recording finding on issue No.1.”

16. In the facts of the above Judgment, the issue was wrongly framed placing burden on the plaintiff instead of placing initial onus of proof on the plaintiff, who is claiming to be a bonafide purchaser, but remanded the matter to the trial court.

17. In the present facts, the third defendant did not enter into the witness box and failed to make any attempt to prove his contention, though the issue was wrongly framed and both parties went on trial, and even before trial or appellate Court, no attempt was made to get the issue amended or re-casted placing burden on the third defendant/ appellant. Therefore, the Judgment of the Apex Court in **RAM NIWAS (DEAD) THROUGH L.RS.** referred to supra is of no assistance to the third defendant/ appellant. However, it is evident from the material on record that the third defendant miserably failed to discharge initial onus of proof and failed to establish that he is a bonafide purchaser for a valuable consideration without notice prior to agreement-Ex.A.1. Therefore, the first appellate court rightly decided the issue in favour of the plaintiff and directed the third defendant to join with the defendants 1 and 2 in execution of registered sale deed, since the title is

already vested on him and to divest the title on the plaintiff, he is required to join with the defendants 1 and 2.

18. One of the major contentions of the third defendant/appellant is that the plaintiff has to seek relief of cancellation of registered sale deed-Ex.A.10. But this contention is without any substance. Since the plaintiff is not a party to the registered sale deed-Ex.A.10, and relief under Section 31 of the Act, 1963 can be claimed by a party to the document, not by a third party. If a third party wanted to annul the document, the remedy opened to him is to file a suit under Section 34 of the Act.

19. A similar question came up before the Apex Court in **SUHRID SINGH @ SARDOOL SINGH V. RANDHIR SINGH AND OTHERS**^[3]. Wherein the Apex Court while deciding the issue of Court Fee payable under Sections 6 and 7 of the Court Fee Act, 1870, incidentally held at paragraph 6 of the Judgment as follows:

“Where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or non-est, or illegal or that it is not binding on him. The difference between a prayer for cancellation and declaration in regard to a deed of transfer/conveyance, can be brought out by the following illustration relating to 'A' and 'B' – two brothers. 'A' executes a sale deed in favour of 'C'. Subsequently 'A' wants to avoid the sale. 'A' has to sue for cancellation of the deed. On the other hand, if 'B', who is not the executant of the deed, wants to avoid it, he has to sue for a declaration that the deed executed by 'A' is invalid/void and non-est/illegal and he is not bound by it. In essence both may be suing to have the deed set aside or declared as non-binding. But the form is different and court fee is also different. If 'A', the executant of the deed, seeks cancellation of the deed, he has to pay ad-valorem court fee on the consideration stated in the sale deed. If 'B', who is a non-executant, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed court fee of Rs.19.50 under Article 17(iii) of Second Schedule of the Act. But if 'B', a non-executant, is not in possession and

he seeks not only a declaration that the sale deed is invalid, but also the consequential relief of possession, he has to pay an advalorem court fee as provided U/s.7(iv)(c) of the Act. Sec.7(vi)(c) provides that in suits for a declaratory decree with consequential relief, the court fee shall be computed according to the amount at which the relief sought is valued in the plaint. The provision thereto makes it clear that where the suit for declaratory decree with consequential relief is with reference to any property, such valuation shall not be less than the value of the property calculated in the manner provided for by clause (v) of section 7.”

20. In view of the Judgment of the Apex Court in **SUHRID SINGH @ SARDOOL SINGH** referred to supra, the plaintiff is not competent to seek relief of cancellation under Section 31 of the Act. A vain attempt is made to convince this Court that the plaintiff is required to seek the relief under Section 34 of the Act i.e. to declare of original sale deed - Ex.A.10 as null and void, not binding on the plaintiff. Since he did not seek such relief, the agreement of sale- Ex.A.1 cannot be enforced and compelling the defendants 1 to 3 to execute registered sale deed in his favour. He also placed reliance on **HABEEBA BEGUM AND ANOTHER V. GULAM RASOOL AND OTHERS**^[4], **KASIREDDY RAMAYAMMA V. KASIREDDY RAMA RAO**^[5] and **K. V. SUDHA RANI V. VIJAYAWADA, GUNTUR, TENALI, MANGALAGIRI URBAN DEVELOPMENT AUTHORITY, VIJAYAWADA AND OTHERS**^[6].

21. Whereas Mr.Chidambaram, learned counsel for the first respondent, refuted the contention of the counsel for the appellant/third defendant and contended that the purpose of directing the third defendant to join in execution, is only to divest the title which vested on him. Therefore, he need not seek declaration that original of Ex.A.10 equivalent to Ex.B.1 is null and void, not binding on the defendants.

22. In view of rival contentions, it is my duty to examine the

issue in detail. The purpose of Section 19 of the Act is impleading subsequent purchaser after execution of the registered sale deed and prior to filing of the suit and directing the third defendant is only to divest the title, which vested on him, on account of execution of registered sale deed, otherwise there is no need to implead the subsequent purchaser as a party to the suit for specific performance, since the real dispute was between the parties to the contract or agreement of sale and issuing such direction itself is sufficient to divest the title, thereby ceased to be the owner of the property, hence, no further relief of declaration under Section 34 of the Act need be asked.

23. In **HABEEBA BEGUM AND ANOTHER and KASIREDDY RAMAYAMMA** relied on by the counsel for the appellant/ third defendant, this Court discussed about the requirements to claim relief of cancellation. But in view of the principles laid down by the Apex Court in **SUHRID SINGH @ SARDOOL SINGH**, the principle laid down by this Court in **HABEEBA BEGUM AND ANOTHER and KASIREDDY RAMAYAMMA** has no application to the present facts of the case, since the plaintiff is not a party to the original sale deed-Ex.A.10.

24. In **K.V. SUDHA RANI's** case, the single Judge of this Court at paragraph 19 discussed about the transfer effected subsequent to the agreement. The plaintiff is required to seek relief of cancellation. Otherwise, the subsequent decree is not binding on the defendant/subsequent purchaser. But the said principle cannot be applied to the present facts of the case, since the very purpose of impleading the third defendant in a suit for specific performance under Section 19 of the Act is to divest the title, which is already vested on him.

25. Therefore, I am of the view that the plaintiff is not under obligation to seek relief, either under Section 31 or under Section 34 of the Act for cancellation or declare that the sale deed original of

Ex.A.10 as null and void.

26. In view of my foregoing discussion, these two contentions are answered against the appellant/ third defendant in favour of the plaintiff. Hence, I find no substantial question of law, since the issues involved in this matter were already decided by the first appellate court. Consequently, the appeal is liable to be dismissed.

27. In the result, the appeal is dismissed. No costs.

28. Miscellaneous petitions, if any, pending in this appeal shall stand closed.

M. SATYANARAYANA MURTHY, J

Date: 25.07.2016

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[\[1\]](#) 2005(2) ALD 862

[\[2\]](#) AIR 2000 SC 2921

[\[3\]](#) 2010 SAR (CIVIL) 402

[\[4\]](#) 1999 (6) ALD 20

[\[5\]](#) 1999 (4) ALD 491

[\[6\]](#) 2008(4) ALD 545