

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.08.2017

CORAM

THE HON'BLE MR. JUSTICE R.SUBRAMANIAN

A.S.No.971 of 1991

1. Venkatachalam @ V.P.V.Salem (Deceased)
2. Harimuthammal ..Appellants 1 & 2/Defendants 3 & 4
3. P.Alagarasi ..3rd Appellant/LR of Defendant 3(1st Appellant)

[3rd Appellant brought on record as LR of the deceased 1st Appellant vide order in CMP.Nos.12870 to 12872 of 2017 in AS.No.971 of 1991 dated 07.08.2017] ...Appellants

Vs.

- 1.Kaliammal ...1st Respondent/Plaintiff
- 2.Karinussa Bevi
- 3.Kamaludeen ... Respondents 2 & 3/Defendants 1 & 2

Appeal Suit is filed under section 96 of Civil Procedure Code to set aside the judgment and decree of the learned Additional Subordinate Judge, Salem in O.S.No.276 of 1986 dated 24.09.1991.

For Appellants : Mr.K.Raman Raj

For Respondents : Mr.P.Mathivanan for R1.

J U D G M E N T

The defendants 3 and 4, subsequent purchasers, who had suffered a decree of Specific Performance in O.S.No.276 of 1986, are the appellants. The said suit was filed by the 1st respondent claiming that she is the assignee of the agreement entered into between the defendants 1 and 2 and one Dastageer on 23.06.1985. As per the agreement dated 23.06.1985 the defendants 1 and 2 had agreed to convey the suit property in favour of the said Dastageer for a total consideration of Rs.64,500/- and received an advance of Rs.10,000/-, time for performance was fixed as 6 months. The said Dastageer assigns the right under the agreement to the plaintiff by a deed dated 03.09.1985. While so, the defendants 1 and 2 had sold the property subject matter of the agreement dated 23.06.1985 in favour of the defendants 3 and 4 on 21.04.1986. The present suit came to be filed claiming

specific performance on 16.06.1986.

2. It was also contended by the plaintiff that the defendants 3 and 4 namely subsequent purchasers were aware of the agreement dated 23.06.1985 as well as assignment dated 03.09.1985.

3. The defendants 1 and 2 resisted the suit contending that they never entered into an agreement with the said Dastageer. According to them, they had authorized one C.K.Zafarullah, who is the sisters son of 2nd defendant to collect rents. The said C.K.Zafarullah claiming that he need certain signatures to enable him to collect rents, obtained the thumb impression of the 1st defendant and signature of the 2nd defendant and it has been used by the said C.K.Zafarullah and one Mohammed Ali, who was originally appointed as power agent of defendants 1 and 2, to create the suit agreement.

4. It is also contended that they have no knowledge of assignment in favour of the plaintiff. The defendants 3 and 4 who are subsequent purchasers, prior to the suit, filed a separate written statement contending that the agreement is not true and valid. The assignment dated 03.09.1985 was also disputed by them and they would also contend that they are bonafide purchasers for value without notice of the pre-existing agreement and assignment.

5. On the above pleadings, the learned Additional Subordinate Judge, Salem framed the following issues:

1. Whether the agreement dated 03.06.1985 is true and valid?
2. To what relief is the plaintiff entitled to?

An additional issue was also framed which reads as follows:

1. Whether the defendants 3 and 4 had purchased the suit property without giving any notice to the plaintiff regarding the agreement and the assignment?

(Translated as found in the judgment of the trial Court.)

Probably the learned Subordinate Judge, Salem meant the issue to be as to, whether the defendants 3 and 4 could be said to be the purchasers for value without notice of the agreement and the assignment?

6. The plaintiff was examined as PW1 and she also examined PW's 2 to 4. PW2 and PW3 are the attesting witnesses to the agreement Ex.A3 and PW4 is Dastageer, the original agreement holder. Exs.A1 to A5 were marked on the side of the plaintiff. The 2nd defendant was examined as DW1 and the 3rd defendant Venkatachalam was examined as DW2. Ex.B1 was marked on the side of the defendants.

7. On an analysis of the evidence on record, the learned trial Judge concluded that the agreement dated 23.06.1985 and assignment dated 03.09.1985 are true and valid. He has also concluded that the plaintiff has proved that she has been ready and willing to perform her part of the contract. On the additional issue, the learned trial Judge found that the defendants 3 and 4 had knowledge of the agreement. On the above findings the learned trial Judge decreed the suit as prayed for. Aggrieved the defendants 3 and 4, who are subsequent purchasers, are on appeal.

8. I have heard Mr.K.Raman Raj, learned counsel appearing for the appellants and Mr.P.Mathivanan, learned counsel appearing for the 1st respondent/plaintiff. Though respondents 2 and 3 namely defendants 1 and 2 have been served they have not chosen to appear either in person or through counsel.

9. Mr.R.Raman Raj, learned counsel appearing for the appellants would make two submissions. Firstly, the learned counsel would contend that the agreement is dated 23.06.1985 and a period of six months was fixed in the agreement for performance of the obligations of the agreement holder namely Dastageer. The time fixed for performance under Ex.A3 agreement expired on 23.09.1985. Though the plaintiff had obtained the assignment of agreement on 03.09.1985 itself, she had not chosen to file the suit or even to demand performance before the time fixed for performance i.e., 23.12.1985. In support of his submissions, learned counsel would point out that the plaintiff has not even issued a pre-suit notice. It is also contended that the plaintiff had in fact filed suit for permanent injunction in OS.No.597 of 1986 on 02.05.1986 restraining the defendants 1 and 2 from alienating the property.

10. Secondly, Mr.K.Raman Raj, learned counsel for the appellants would submit that the appellants are bonafide purchasers for value without notice of the subsisting agreement and the assignment. Taking me through the discussions of the trial Court on the question of knowledge that could be attributed to defendants 3 and 4 about the existence of the agreement, the learned counsel would submit that the learned Subordinate Judge went astray and on consideration of wholly irrelevant materials held that the defendants 3 and 4 should have given notice to the plaintiff about the purchase. This approach of the learned trial Judge according to the learned counsel is totally erroneous and therefore, the finding that the defendants 3 and 4 had notice of the earlier agreement of sale cannot be sustained.

11. Per contra, Mr.P.Mathivanan, learned counsel appearing for the 1st respondent/plaintiff would contend that the defence set up by the defendants 1 and 2 is one of total denial of the agreement dated 23.06.1985 as well as assignment dated 03.09.1985. The execution of the agreement and the assignment has been proved by examination of PW1 to PW4. Therefore, the trial Court was right in accepting the truth and validity of the agreement.

12. On the question of readiness and willingness the learned counsel Mr.P.Mathivanan would contend that the plaintiff has spoken about the readiness and willingness and there is no contra evidence on the side of the defendants to show that the plaintiff was not ready and willing. The learned counsel would also invoke the settled position of law that time is not the essence of the contract in respect of contracts relating to sale of immovable properties.

13. On the above contentions, the following points arise for determination in this appeal :

1. Whether the plaintiff has established that she has been continuously ready and willing to perform her part of the contract?
2. Whether the defendants 3 and 4 could be said to be bonafide purchasers for value without notice of the pre-existing agreement?

Point No.1 :

14. The agreement is dated 23.06.1985 and the right was assigned in favour of the plaintiff on 03.09.1985. The last date for the performance of the agreement is 23.12.1985. The suit came to be filed on 16.06.1986. The fact that there was no pre suit notice is also admitted. The plaintiff had averred in the plaint that she has been ready and willing to perform her part of the contract and it was the defendants 1 and 2, who had not come forward to execute the sale deed. The said statements have not been denied in the written statement specifically.

15. The defence of the defendants 1 and 2, who are the executants of the agreement, is that there was no such agreement and the defendants 3 and 4, apart from claiming that Dastageer, the agreement holder, was not in a position to perform his part of the contract, would claim that they are bonafide purchasers for value without notice.

16. PW1 stated that several demands have been made to the defendants 1 and 2 for sale of the property. Though she would claim that she had issued notice demanding performance, no such notice has been produced. In any event, the readiness and

willingness of the plaintiff has not been very seriously questioned before the trial Court and therefore, the trial Court concluded that the agreement is true and valid and the plaintiff is ready and willing to perform her part of the contract. I do not see any reason to interfere with the said finding. So, the 1st point is answered in favour of the 1st respondent/ plaintiff.

Point No.2 :

17. Coming to the question of knowledge about the agreement on the part of the defendants 3 and 4, if the defendants 3 and 4 are able to show that they are bonafide purchasers for value without notice of the pre existing agreement, the suit for specific performance cannot be decreed.

18. On the question of notice, plaintiff as PW1 in her chief examination had deposed that she had issued notice to defendants 3 and 4 but she has not produced any notice before the trial Court. The case of the defendants 3 and 4 is that they did not receive any notice. PW2 has very clearly stated that the plaintiff did not inform the defendants 1 and 2 about the made over and her being ready to get the sale deed executed.

19. The evidence of the plaintiff as PW1, is that she had gone to the house situated in the suit property and met the daughter and son-in-law of the 3rd defendant and informed them about the assignment of agreement dated 23.06.1985. Having said so in the chief examination, the plaintiff in her cross examination, would depose that she had filed a suit against the defendants 1 and 2 seeking an injunction restraining them from alienating the property.

20. She would also claim that she had issued a written notice to defendants 1 and 2 informing them about the assignment. In her cross examination, she would further depose that the agreement holder namely Dastageer had informed her that he would take steps to evict the defendants 3 and 4 when the assignment was executed. This evidence in cross examination certainly belies the claim of the plaintiff that she had informed the daughter and son-in-law of the defendants 3 and 4 about the assignment.

21. Apart from the said evidence, the plaintiff as PW1 would also claim that she had issued the notice to the defendants 3 and 4. However, no document has been produced to evidence the issuance of such notice. The learned trial Judge has found that the stamp papers for the sale deeds in favour of the defendants 3 and 4 namely Exs.A1 and A2 had been purchased during June 1986 and therefore, he has concluded that the sale deeds have been executed in April 1986 on the stamp papers which were purchased in June 1986. This finding of the learned trial Judge has

influenced them to hold that the defendants 3 and 4 had knowledge of the agreement.

22. A perusal of the Exs.A1 and A2 sale deeds in favour of defendants 3 and 4 would show that the observations of the learned subordinate Judge are totally erroneous. What has been produced as Exs.A1 and A2 are the certified copies of sale deeds dated 21.04.1986. The same have been written as stamp papers of value of Rs.10 which were purchased on 03.06.1986. The registration endorsements made in these documents would show that the stamp papers for these documents were purchased at Salem in the name of the defendants 3 and 4 prior to 21.04.1986 from a stamp vendor called Amirthavalli.

23. Therefore, the conclusion of the learned subordinate Judge on the question of knowledge of the defendants 3 and 4 of the pre existing agreement is based on wholly erroneous reasons. I am therefore unable to agree with the said conclusion.

24. Apart from the said erroneous conclusion the evidence of PW1 and that of PW2 itself shows that the defendants 3 and 4 had no knowledge of the agreement dated 23.06.1985 and the assignment dated 03.09.1985. Therefore, the defendants 3 and 4 are bound to succeed on the contention that they are the bonafide purchasers for value without notice of the pre existing agreement of sale.

25. In view of the said conclusion that the defendants 3 and 4 are bonafide purchasers for value without notice, the appeal is allowed. The suit in OS.No.276 of 1986 will stand dismissed. However, in the circumstances of the case, I make no orders as to costs.

-s/d-

Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

dsa

To

The Additional Subordinate Judge,
Salem.

Copy to

The Section officer
VR Section, High Court, Madras.

+1 CC to Mr.K. Ramanraj, Advocate sr 59732.

A.S.No.971 of 1991

SV(CO)

sp(27/10/2017)