

Judgment Reserved on: 20.04.2017

Judgment Pronounced on: 27.04.2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

A.S.No.569 of 2006

and

M.P.No.2 of 2006

Govindan

.. Appellant/4th Defendant
Versus

1.P.Mahendran

..1st Respondent/Plaintiff

2.Shanmugam

3.Mani

4.Devendran

.. Respondents 2 & 4/Defendants 1 to 3

Appeal Suit filed under section 96 of Code of Civil Procedure against the judgment and decree dated 23.01.2006 passed in O.S.No.79 of 2004 by the learned Additional District Sessions Judge/Fast Track Court, Kallakurichi.

For Appellant : Mrs.Hema Sampath, for
Sr.Counsel, for M/s.R.Meenal

For Respondent-1 : Mr.S.V.Jayaraman, Sr.Counsel
for Mr.V.Ravi

R-2 : Dispensed with vide Court
order dt.15.03.2017

R3 & R4 : No appearance.

JUDGMENT

Aggrieved over the decree and judgment decreeing the suit for specific performance the present appeal came to be filed by the appellant. For the sake of convenience, the parties are arrayed as per their own ranking before the trial Court.

2.Brief facts of plaintiff's case is as follows:- The first defendant has agreed to sell the suit property in favour of the plaintiff on 07.08.2002 for a total sale consideration

of Rs.7.00 lakhs. On the date of agreement the first defendant has admitted the receipt of a sum of Rs.6.00 lakhs already from the plaintiff. The balance sale consideration of Rs.1.00 lakh was agreed to be paid by the plaintiff within six months, viz., by 06.02.2003. The first defendant has also delivered possession of the suit properties to the plaintiff on the date of agreement. The plaintiff was always ready and willing to perform his part of contract of paying the balance amount of Rs.1.00 lakh. The first defendant with a view to defraud the plaintiff, had absconded. The defendants 2 and 3 are the friends of the first defendant and the 4th defendant is a relative of first defendant. They have created some documents as if the first defendant has conveyed the properties to the defendants 2 to 4. The defendants 2 to 4 are not bona fide purchasers for value without notice. On 20.01.2003 the defendants 2 to 4 have been attempted to forcibly enter into the suit properties and to dispossess the plaintiff from his lawful possession. The plaintiff was always ready and willing to perform his part of contract. Hence the suit.

3.The first defendant remained ex parte. The second denying the entire agreement, has stated that the suit agreement is a fabricated one. The first defendant has executed a power of attorney in favour of the second defendant on 8.10.2002. Based on the power of attorney, the second defendant had entered into an agreement for sale in favour of the third defendant for total sale consideration of Rs.5.00 lakhs. Thereafter, on 18.11.2002 he has executed a sale deed in favour of the third defendant. The third defendant in turn sold the property to the fourth defendant. Now the suit property is in possession of the fourth defendant. Hence, he prayed for dismissal of the suit.

4.The fourth defendant is the subsequent purchaser from the third defendant submitted that the suit agreement is fabricated and forged. He has purchased the property from the third defendant on 8.1.2003 for a sum of Rs.5.00 lakhs and ever since from the date of purchase, he was in possession of the suit properties. Before the purchase he has made reasonable enquiry about the suit properties and he has also verified the encumbrance with regard to the suit properties. He has also obtained patta in respect of the suit properties and he has been in enjoyment of the suit properties. The suit amount is not supported by any consideration. Hence, he prayed for dismissal of the suit.

5.On the basis of the above pleadings, the following issues are framed:-

1. Whether the suit sale agreement is true and enforceable?

2. Whether the plaintiff is entitled to specific

performance?

3. Whether the defendants 2 to 4 are bona fide purchasers?

4. To what relief?

6. On the side of the plaintiff, the plaintiff examined himself as P.W.1 and also examined P.W.2 and P.W.3 and marked two documents Exhibits A1 and A2. On the side of the defendants D.W.1 to D.W.3 were examined and Exhibits B1 to B6 were marked.

7. On the basis of the evidence and materials the learned trial Judge has decreed the suit filed by the plaintiff for specific performance. Aggrieved over the same, the present appeal came to be filed by the fourth defendant.

8. The learned counsel appearing for the appellant has submitted that the suit agreement was fabricated and anti-dated to defeat the rights of the fourth defendant who is a bona fide purchaser without notice. The first defendant has remained ex parte and colluded with the plaintiff to defeat the rights of the fourth defendant. The agreement Ex.A2 is a fabricated one. The manner in which the recitals were accommodated in between the signature itself clearly prove the fact that the same has been created at a later point of time. Similarly, Ex.A2 agreement is also not supported by any consideration and the alleged pronote has not been established and it has also not been filed. The suit has been filed even without issuing notice to the first defendant. The conduct of the plaintiff in filing the suit itself clearly show that the agreement itself came to be executed at a later point of time by anti-dating. P.W.2 and P.W.3 are interested witnesses. Their evidence do not prove the validity of the agreement. Their evidence in fact clearly prove the factum of the alleged sale agreement dated 7.8.2002 as fabricated one. Hence, he prayed for allowing the appeal.

9. Whereas it is the contention of the learned Senior Counsel appearing for the 1st Respondent that the only person competent to challenge the agreement is the first defendant, but he has chosen to remain ex parte. The conduct of the first defendant clearly show that he is colluded with the other defendants only to defeat the suit agreement. The manner in which the power of attorney dated 8.10.2002 and subsequent agreement and sale deed executed within a span of short period clearly vouch safe the fact that the subsequent transactions were made only to defeat the agreement dated 7.8.2002. The conduct of the third defendant in selling the property to fourth defendant for the same value even without claiming the stamp duty spent by him on the sale deed clearly show that subsequent document is nothing but created one and without any

consideration. Bona fide transaction has not been established. Hence, prayed for dismissal of the appeal. In support of his arguments, he has also relied upon the following judgments reported in (1) R.K.Mohammed Ubaidullah v. Hajee C.Abdul Wahab [AIR 2001 SC 1658] and (2) Veeramalai Vanniar v. Thadikara Vanniar [AIR 1968 Mad. 383].

10. In the light of the above submissions now the points that arise for consideration are:-

1. Whether the agreement dated 7.8.2002 is validly executed and enforceable in the Court of law?
2. Whether the plaintiff is entitled for specific performance of the suit agreement dated 7.8.2002?
3. Whether the defendants 3 and 4 have purchased the properties for valid consideration?
4. To what relief?

11. Points 1 to 4:- The suit has been laid to enforce the agreement dated 7.8.2002 said to have been executed by the first defendant in favour of the plaintiff for sale of the suit properties for a total sale consideration of Rs.7.00 lakhs. It is the case of the plaintiff that the first defendant has already received Rs.6.00 lakhs on pronotes and on the date of agreement he has agreed to complete the sale by receiving another sum Rs.1.00 lakh on or before 6.2.2003. However, he failed to execute the sale deed and absconded. The defendants 2 to 3 are friends and the fourth defendant is a relative of the first defendant have created the document as if the properties have been conveyed to them and such documents are not supported by consideration. They are not bona fide purchasers.

12. In the light of the above pleadings when careful perusal of Ex.A2 the so called agreement dated 7.8.2002, it can be seen that the same was written in a 10/- Rupee stamp paper. It is the evidence of P.W.3 said to be the document writer, he has written Ex.A2 agreement. P.W.2 said to be one of the witnesses testified before the Court to prove that the agreement was signed by the first defendant on 7.8.2002. A perusal of Ex.A2 document, the stamp paper has been purchased on 13.4.2002, whereas the agreement came into existence only on 7.8.2002. It is the evidence of the plaintiff that the first defendant himself had purchased the stamp paper in which the agreement came to be executed. It is to be noted that the subject matter of the agreement itself was allotted to the first defendant in the month of July 2002 under Ex.A1 partition deed. Therefore, before the property came into his possession, the person purchasing the stamp paper for such of

the property is highly improbable.

13. Be that as it may, it is the case of the plaintiff that the agreement was written by the document writer-P.W.3. P.W.3 in his evidence also stated that he only written the document and P.W.1 and P.W.2 also stated that the document was written in the house of P.W.1/Plaintiff. It is to be noted that P.W.3 is not an illiterate. He is the license holder of document writing. He knew about value of the stamp paper on which the agreement has to be typed. Whereas the agreement has been written only on 10/- Rupee stamp paper. In the year 2002 as per the Stamp Act, any agreement for sale to be drafted only on 20/- Rupee stamp paper. This aspect also create serious doubt about the manner in which the agreement came to be executed. This doubt is further fortified by the fact that the recitals in the agreement in fact is overlapping on the signature of the first defendant. If really this agreement was executed by the first defendant on 7.8.2002, there was no necessity whatsoever for him to put his signature over the recitals. This fact also create some serious doubt about the agreement.

14. Further perusal of the entire agreement the recitals show that as if the first defendant has already received Rs.6.00 lakhs on pronote and only to clear the above pronote amount sale agreement was executed for total consideration of Rs.7.00 lakhs. To pay the remaining balance consideration time was extended up to 6.2.2003. But the fate of the alleged pronotes is not forthcoming before this Court. Whereas in evidence of P.W.1 in the cross-examination stated that while writing document namely Ex.A2 the pronotes were returned to the defendant. Whereas the evidence of P.W.2 and P.W.3 is silent about the so called handing over of the pronotes by the first defendant. The recitals in the agreement itself clearly show that the first defendant was adversity at the relevant time, he borrowed the alleged loan on pronotes from the plaintiff. Only on that circumstance this agreement came into existence. If really the first defendant was present and executed the document there was no necessity for him to put his signature overlapping the recitals. This in fact create some serious doubt about the execution of the agreement.

15. The cross-examination of the P.W.1 and D.W.1 in entirety when read the same would clearly show that the first defendant who was running some financial transaction was booked by the police and he was in fact arrested in a criminal case and was custody for some period. Only in that circumstance this agreement came to be existence. These facts coupled with the very recitals in the agreement with regard to the money transaction will lead to the inference that only when the first defendant has suffered loss in his financial

transaction and criminal cases also lodged against him, these documents came into existence. This inference cannot be ignored altogether. It is further to be noted that it is the evidence of P.W.1 that schedule of properties mentioned in the sale agreement were noted on the basis of the partition deed in which the property was allotted to the first defendant. P.W.1 in his cross examination categorically admitted that the boundaries and identity of the properties were written in the agreement only on seeing the Ex.A1 partition deed. If this evidence is taken into consideration this Court has no other option except to hold that Ex.A2 document has been created subsequently by anti dating the same. It is to be noted that Ex.A1 is the certified copy of partition deed. Certified copy was applied only on 24.10.2002 much after the alleged agreement dated 7.8.2002 and copy was obtained only on 28.2.2002. Therefore, inclusion of details of the properties in the agreement based on the alleged partition deed is highly improbable and in fact the same itself clinchingly establish the fact that Ex.A2 is nothing but created and anti dated taking advantage of the blank signature of the first defendant. This is further fortified by the manner in which the recitals of the agreement were accommodated above the signature. These facts clearly show that Ex.A2 cannot be true and created subsequently by anti dated.

16. The evidence of P.W.1 and D.W.1 together taken into consideration the same clearly prove the fact that the documents on both sides viz., plaintiff and defendants came into existence only when the first defendant was in financial adversity. Though the defendants projected power of attorney and subsequent sale, those documents also registered immediately within a span of six months, for the same value. All these facts clearly lead to the fact that taking advantage of the position of first defendant in financial adversity and he was in fact arrested in a criminal case for some period, the parties have knocked away his properties. Therefore, this Court is of the view that Ex.A2 cannot be enforceable in the Court of law for specific performance. Of course, the defendants also placed a registered power of attorney under Ex.B1 dated 8.10.2002 to show that power has been given to the second defendant. The second defendant within two days executed a registered agreement in favour of the third defendant on 10.10.2002. Thereafter, immediately within one and half month he has executed a sale deed in favour of the third defendant for a sum of Rs.5.00 lakhs on 18.11.2002. The third defendant in turn on 8.1.2003 sold the same property to the fourth defendant for a sum of Rs.5.00 lakhs. The manner in which the documents were executed within a span of six months clearly show that the defendants also taking advantage of the financial adversity of the first defendant got the property registered in their name. Of course those documents are voidable in nature it is for the first defendant to avoid those documents. But the defendant remained exparte and he has

not taken any steps to avoid those documents within a period of three years from the date of execution of the documents.

17. Therefore, this Court is of the view that once the title passed on the basis of the registered document, now the plaintiff cannot question the same. The plaintiff is now sought to enforce the agreement dated 7.8.2002. From the above discussions it is proved that agreement dated 7.8.2002 is fabricated and anti-dated. Hence, this Court hold that Ex.A2 cannot be enforceable in the Court of law. If any agreement which is sought to be enforced in the Court of law is attached with even slights stout with regard to its genuineness, such agreement cannot be enforceable in the Court of law for granting equitable relief for specific performance. Once the subject matter of the suit agreement Ex.A2 throws serious doubt about the genuineness as discussed above, the same cannot be given any importance in the eye of law. Therefore, merely because P.W.2 has supported the case of the plaintiff that alone is not sufficient. The Court has to consider the matter before it, as per Section 3 of the Indian Evidence Act. The word "matters" stated in Section 3 of the Indian Evidence Act is a wide connotation. It is not only include the evidence but also surrounding circumstances. The manner in which the recitals are accommodated in Ex.A2 above the signature of the first defendant and no advance whatsoever was paid on the particular date and the documents have been written in a stamp paper which was insufficient in value, purchased long back even before the property was allotted to the first defendant. That apart the nature of the properties said to have been incorporated in the agreement on the basis of the partition deed is also found to be false. All these facts clearly establish that Ex.A2 is nothing but created. The learned trial Judge has not appreciated the above aspects properly and has mechanically relied on the evidence of P.W.2 and P.W.3 and believed Ex.A2.

18. In this regard the learned Senior Counsel for the Respondent has relied upon the judgment reported in Veeramalai Vanniar v. Thadikara Vanniar [AIR 1968 Mad. 383], wherein a Division Bench of this Court has held as follows:-

"No person can convey a better title than what he has, except where the statute provides exceptions to the rule like Sec. 27(b). If a person, as the owner of the property, has entered into an agreement to sell the property, he cannot thereafter convey the same property to any other persons, as after the prior agreement of sale, he cannot be said to be a free owner of the property. If he subsequently alienates the property he can alienate it only subject to the rights created under the prior agreement of sale.

The plain language of the Sub-Section (b) shows

that the subsequent transferee can retain the benefit of his transfer by purchase which, prima facie, he had no right to get, only after satisfying the two conditions concurrently viz., (1) he must have paid the full value for which he purchased the property and (2) he must have paid it in good faith and without notice of the prior contract. Further, the burden of proof is upon the subsequent purchaser to establish these conditions in order that his rights may prevail over the prior agreement of sale. It is the actual payment of the money and not a mere agreement to pay the money which alone confers the right so as to prevail over a prior agreement of sale."

19. In *R.K. Mohammed Ubaidullah v. Hajee C. Abdul Wahab* [AIR 2001 SC 1658], the Hon'ble Supreme Court has held as follows:-

"With reference to subsequent purchaser it is essential that he should make an inquiry as to title or interest of the person in actual possession as on the date when sale transaction was made in his favour. The actual possession of a person itself is deemed or constructive notice of the title if any, of a person who is for the time being in actual possession thereof. A subsequent purchaser has to make inquiry as to further interest, nature of possession and title under which the person was continuing in possession on the date of purchase of the property. In the case on hand defendants subsequent purchasers contended that they were already aware of the nature of possession of the plaintiff over the suit property as a tenant and as such there was no need to make any inquiry. In view of S. 19(b) of the Specific Relief Act and definition of 'notice' given in S.3 of the Transfer of Property Act read along with explanation II, the defendants subsequent purchasers are not bona fide purchasers in good faith for value without notice of the original contract. And, that they were required to make inquiry as to the nature of possession or title or further interest if any of the plaintiff over the suit property at the time when they entered into sale transaction notwithstanding they were already aware that the plaintiff was in possession of the property as the tenant. What is material is the inquiry at the time when subsequent transaction was entered into."

20.Absolutely there is no dispute with regard to the above propositions laid down by the Hon'ble Supreme Court and by our High Court. But the fact remains that Ex.A2 sought to be enforced in the Court of law itself is found fabricated, therefore, the Judgments cited by the learned Senior Counsel for the Respondents is not applicable to the facts of this case.

21.Accordingly, this Court holds that the trial Court decreeing the suit for specific performance is liable to be interfered. Accordingly, these points are answered.

22.In the result, this appeal is allowed and the decree and judgment of the learned trial Court is hereby set aside with costs. Consequently, M.P.No.2 of 2006 is closed.

s/d-
Assistant Registrar(CS VI)

True Copy

Sub-Assistant Registrar

gr.

To

The Additional District Sessions Judge
Fast Track Court, Kallakurichi

+1 CC to M/s. R. Meenal, Advocate sr 26167

+1 CC to Mr. V. Ravi, Advocate sr 25726

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IN A.S.No.569 of 2006

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