IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 11.10.2018

Judgment Pronounced on : 30.11.2018

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

A.S.No.426 of 2012

S.Pachaimmal ... Appellant/6th Respondent

Vs

1.B.Suriya Prakasam .1st Respondent /Plaintiff
2.G.Mani
3.G.Sethuraman
4.K.Shanthi
5.G.Vijayakumar
6.R.Shanmugam

7.The Sub Registrar
Kundrathur
Kundrathur Village
Sriperumbudur Taluk
Kancheepuram District.
... Respondents 2 to 7/ Respondents 1 to 5 &7

Prayer :- First Appeal filed under Section 96 of C.P.C., to set aside the judgment and decree passed in O.S.No.133 of 2006 dated 27.09.2011 on the file of the learned District Judge (Fast Track Court-II), Poonamallee and allow the first appeal.

For Appellant : Mr.P.Dinesh Kumar
for Mr.S.Ramesh Kumar

For Respondent : Mr.T.Karunakaran [R1]
R2 to R7 - No appearance

JUDGMENT

The sixth defendant in a suit for specific performance has come forward with this appeal challenging the decree passed therein. She has purchased the suit property after the agreement for sale that the plaintiff had entered into with defendants 1 to 4. The parties would be referred to by their rank before the trial court for narrative convenience.

2. A summary of the material facts on which the cause of action for the suit is found is provided below:

- The suit property, a plot measuring 8,602 sq.ft. and comprised in S.F. No.158/3 of Sennierkuppam Village, originally belonged to a certain Gopal Naicker. He had four sons, of who defendants 1,2 and 4 are the three. The fourth son of Gopal Naicker was Kesava Naicker, and his widow is the third defendant. On the demise of Gopal Naicker, the suit property devolved on these defendants.

- On 23.09.2003, the plaintiff and defendants 1 to 4 entered into a sale agreement, for the sale of the suit property for a total consideration of Rs.13.90 lakhs. On the date of the agreement, plaintiff had paid Rs.1.60 lakhs as advance. In terms of the agreement and in part performance thereof, plaintiff was given possession of the property. The agreement stipulated:

    - That electricity service connection for the suit property was to be changed in the name of the first defendant.

    - That the defendants should provide the death certificate and legal heir certificate of Gopal Naicker, besides encumbrance certificate for 31 years.

    - The second defendant was also required to correct his name as Sethuraman in the Government records. Since the patta stood in the names of the defendants 1 to 4 showed a lesser extent they also required to correct the same.

- While so, additional payments were made towards sale consideration to the second defendant, and on each occasion the latter had made necessary endorsements for the receipt of the sum in the very agreement itself. The details are:

Date on which payments made	Amount (Rs.)
27.01.2004	20,000.00
04.01.2004	20,000.00
18.04.2004	5,000.00
17.05.2004	10,000.00

In all, the plaintiff has paid Rs.2,15,000/- leaving a balance of Rs.11.75 lakhs to be paid toward performance of his part of the contract. The plaintiff has always been ready and willing to perform his part of the contract. However, the defendants 1 to 4 have been evading to perform the stipulations that they are required to comply with as per the contract.

2.2. Be that as it may, the plaintiff came to know that the defendants 1 to 4 have executed a Power of Attorney (PoA) in the name of the fifth defendant, who on the strength of the said PoA, had executed a sale deed dated 31.1.2005 in favour of his wife, the sixth defendant. It is in this circumstance, the suit is laid, directing the defendants to execute and register the sale deed and for a decree of injunction seeking to restrain the defendants from disturbing the plaintiff's possession.

3. Defendants 1 to 4 remained exparte and the fifth and sixth defendant have filed separate written statements. In his written statement, the fifth defendant has pleaded that the General Power of Attorney deed dated 24.1.2005 that the defendants 1 to 4 have executed along with other owners of the property was true and valid, and acting on the powers so granted, he had executed the sale deed dated 31.1.2005 for valuable consideration. The alienee under the sale deed has been put in possession of the property. The sale agreement in favour of the plaintiff is a concoction and that the defendants 1 to 4 have not executed any such sale agreement. It is a product of collusion between the plaintiff and defendants 1 to 4 aiming to defraud the 6^{th} defendant of her valuable right. The possession of the property is not with the plaintiff. He had neither demolished the existing building in the suit property nor had he handed over the materials to them. He had not made any improvements. The suit is bad for non-joinder of the widow and the daughters of Gopal Naicker who are all necessary parties to the present suit.

4.The sixth defendant has asserted that she was a bonafide purchaser for value without any notice of agreement under which the plaintiff claims right. This defendant has been in possession of the property since the date of sale. The suit against this defendant is barred by limitation and the plaintiff at any rate has not been ready and willing to perform his part of the contract.

5.1 Before the trial Court, plaintiff has examined himself as P.W.1 whereas the 5th defendant, has examined himself both for himself and for his wife, the 6th defendant as D.W.1. The plaintiff's agreement of sale is marked Ext.A-4, whereas defendant's sale deed was marked as Ext.D-1 = Ext.A-3. The Power of attorney deed in favour of the 5th defendant is Ext.B-2.

5.2 Relying on the testimony of D.W.1, wherein he had admitted that he knew about Ext.A-4 agreement beforehand, the trial Court has declared that the sale deed obtained by the 6th defendant/appellant herein is invalid, and proceeded to decree the suit. On the relief of injunction, the trial Court had found that Ext.A.4, agreement dated 23.9.2003, was not registered in terms of Sec.17-A introduced Vide Tamil Nadu Amendment Act to the Indian Registration Act, 1908, and declined the said relief. So far as decree for specific performance is concerned it has directed the defendant 1 to 4 to execute the sale deed.

5.3 Challenging the said decree, the sixth defendant has come forward with this appeal.

6. Points for consideration

1. Whether the appeal is maintainable?

2.Whether the appellant is a bonafide purchaser for value?

3. Whether the decree passed by the trial Court is effective and valid ?

4. The relief to which the appellant is entitled to?

7. The issue on maintainability is raised by the counsel for first respondent/plaintiff. According to the learned counsel appearing for the first respondent, since no decree was passed against the sixth defendant, she is only appealing against a finding that the sale deed in her favour was invalid. Since this is only a finding, an appeal is not maintainable against a mere finding in a judgment. Reliance was placed on the authorities in Banarsi & others Vs Ramphal [(2003) 9 SCC 606] and Nawab Shaqafath Ali Khan & Others Vs Nawab Imdad Jha Bahadur & Others [(2009)5 SCC 162].

8.1 It may be stated that the point on the maintainability of the appeal is intertwined with the 3rd point raised herein, which touches upon the effectiveness of the decree passed. Here this Court finds that the trial court has missed a few fundamental aspects in law.

8.2 A sale agreement does not confer any title or right over the property and it only creates a personal obligation on the seller of the property to complete the sale. This is a statutory statement as could be found in Sec.54 of the Transfer of Property Act, 1908. Secondly, there is no statutory bar for sale of the property subsequent to the agreement either, though an attempt to enforce the agreement has the potential to affect the title of the subsequent purchaser. Since a sale agreement does not create any interest in the property, in a sale that takes place subsequently, the right over the property conveyed thereunder vest in the purchaser thereof. Accordingly, by virtue of Ext.B-1 sale deed in her favour, the title to the suit property has vested in the appellant. And, since the right to enforce an agreement specifically against the promissor thereof is an equitable remedy, the right vested in a bonafide purchaser for value without notice of the earlier agreement is saved under Sec19(b) of the Specific Relief Act. If however, such purchaser is not a bonafide purchaser, then he has to join his vendor in executing the sale deed for transferring the title to the plaintiff. See Lala Durga Prasad & another Vs Lala Deep Chand & others [AIR 1954 SC 75]. If this is the principle of law that governs the topic,

- Then the trial court holding that Ext.B-1 sale deed in favour of the appellant as invalid since her husband has admitted that he knew about Ext.A-4 agreement is an invalid statement in law.

- Secondly, when it has decided to decree the suit, it should have passed the decree also against the 6th defendant (the present appellant), and now without a decree against her, the title to the property cannot be conveyed to the plaintiff. The consequence which the decree of the trial court as it now stands is that the plaintiff may not be able to execute the decree even if he intends to, since there is no decree against the one in who the title to the property now remains.

8.3 The consequence is an absolute chaos: One who has obtained the decree cannot execute it in terms of it; and one who has not suffered the decree, has her title-deed declared invalid. And, the decree-holder has not filed any cross objection either. This Court therefore steps in to invoke its powers under Article 227 of the Constitution, to correct the mess. Accordingly, the decree is amended as one including the appellant in order it obtains a meaning and purpose. The appeal now would be maintainable.

8.4 Moving to the core issue involved, it must be said that it is not a plain case of the appellant purchasing the suit property without any bonafide. Ext.B-2, power of attorney in favour of the 5th defendant shows that it was executed by defendants 1 to 4 herein plus their mother and sisters. Gopal Naicker, the original owner of the suit property in fact had four sons and four daughters. Those who have executed the Ext.A-4 agreement constitute three of his sons and his widowed daughter-in-law (the wife of the fourth son Kesava Naicker). They jointly have only 4/9 shares in the suit property, but have contracted for the sale of the entire property. Now, even if the 6th defendant were to suffer a decree, then she can be directed to transfer only 4/9 share in the suit property. In a scenario such as this, this Court encouraged the parties to explore the possibilities of resolving the dispute amicably, but it ended in futility.

9. Did the plaintiff know about the other heirs - the daughters and widow of Gopal Naicker, when he entered into Ext.A-4 agreement to sell? In his (affidavit of) chief examination, he indicates that he knew about their existence when he has averred that the defendants 1 to 4 had informed him about their sisters (daughters of Gopal Naicker) and proceeded to state that they did not have right in the property. The just question that reasonably now arises is, has the plaintiff been prudent in ascertaining if the daughters did not have any right in the suit property? In his cross examination, he reiterates his knowledge about the existence of Gopal Naicker's widow and daughters, and adds that he did not choose to obtain legal opinion on the title of his vendors, the defendants 1 to 4. He would then testify that they had promised that they would obtain the signatures of the other heirs. Has the plaintiff then gambled in entering into an agreement, without taking the least precaution that any prudent man in similar circumstances would ordinarily take? It needs to be stated that an action for specific performance does not operate like laws of physics to produce a result in a predictable equation. There is a variable factor in judicial discretion, which scans and evaluates the conduct of the plaintiff for ascertaining if it is equitable to grant him a decree. The plaintiff's imprudence, or negligence, or just the chance he has taken in proceeding with Ext.A-4 agreement without all those in who the title vests, gets noticed here.

10. The next aspect is that when admittedly the defendants 1 to 4 have only 4/9 share in the suit property, plaintiff cannot seek specific performance for the entire property. The authority of the Supreme Court in Shanmughasubdaram Vs

Diravia Nadar by Lrs [(2005)10 SCC 728] declares it pointedly. The next option open to the plaintiff is to settle for a lesser share, 4/9 share to be precise, to which he is entitled to under Sec.12 of the specific Relief Act. However, sec.12(3) provides a rider and its significance is dealt with in P.C.Varghese Vs Devaki Amma Balambika Devi (2005) 8 SCC 486]. The relevant passages in the said authority reads:

> "22. Sub-Section (3) of Section 12 of the Specific Relief Ac, 1963 (for short "the Act") was enacted with a view to meet such eventualities when the whole of the contract cannot be performed by the vendor. It reads as under :
>
> > "12. (3) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either -
> >
> > (a) forms a considerable part of the whole, though admitting of compensation in money; or
> >
> > (b) does not admit of compensation in money;
>
> he is not entitled to obtain a decree for specific performance; but the court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the other party-
>
> (i) in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and in a case falling under clause (b), pays or had paid the consideration for the whole of the contract without any abatement; and
>
> (ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all rights to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.
>
> The said provision has been enacted for the benefit of the purchaser and, thus, cannot operate to his detriment. We may notice that under the old

Specific Relief Act, the plaintiff was not only required to relinquish his claim of specific contract as regards that part of the contract which cannot be performed but also was required to pay the entire amount of consideration; whereas in terms of Section 12(3) of the new Specific Relief Act, 1963 he is now required to pay the amount of consideration proportionately.

23. In Sardar Singh v. Krishna Devi it was held: (SCC p.28, para 17)

"The house being divisible and the appellant being not a consenting party to the contract, equity and justice demand partial enforcement of the contract, instead of refusing specific performance in its entirety, which would meet the ends of justice."

The statutory precondition for availing the benefit under Sec.12 is that the plaintiff must relinquish that portion over which his vendors do not have any title. Here however, the plaintiff has not showed any intent to relinquish his claim as to 5/9 share belonging to the other heirs of Gopal Naicker, till this moment. He is seen harping on the testimony of the D.W.1 and his prior knowledge about Ext.A-4 before he sold he property to the appellant.

11. It may have to be stated that Sec.19 of the Specific Relief Act only lists all those against whom a relief for specific performance can be granted. It reads:

> Sec.19. Relief against parties and persons claim under them by subsequent title – Except as otherwise provided by this chapter, specific performance of a contract may be enforced against -
>
> (a) either party thereto
>
> (b) any other person claiming under him by a title arising subsequently to the contract, except a trasnferee, for value who has piad his money in good faith and without noitce of the original contract.
>
> (c) to (e) ………. "

Sec.19 (b) while saves a bonafide subsequent purchaser of the property for value without notice of the original contract in an action for specific performance, it does not dispense the plaintiff in performing his obligations while seeking it. Nor does it affect the discretion that Sec.20 of the Act has vested in the Court. This is not to mean that a defendant's conduct is immaterial in an action for specific performance, but only means that the conduct of the defendant cannot be the sole criterion for granting a decree to the plaintiff. The conduct of the plaintiff still matters, and his willingness to comply with statutory prescription is still essential. It's plaintiff, his conduct first, and if the same falls short of the required standards, he would not be entitled to specific performance of a contract merely because the defendant's conduct is blameworthy.

12. As indicated earlier, the plaintiff to start with has risked himself in entering into a contract for the entire property, knowing full well that Gopal Naicker had other heirs, other than defendants 1 to 4, and showed no intent at any time to relinquish his claim proportionately to invoke Sec.12.

13. Caution is the soul of judicial discretion, and Courts shall not ignore it in exercising it while considering if the plaintiff is entitled to have the contract specifically enforced. The caution in the instant case, does not guide this Court to exercise its discretion in favour of the plaintiff. Necessarily the suit shall fail. However, the equity that has denied the plaintiff his right to have Ext.A4 specifically enforced, requires that defendants 1 to 4 are not doubly benefited. They having received this entire sale consideration from the appellant herein are not entitled to retain the advance money that they have received from the plaintiff under Ext.A4. Necessarily, they have to refund the plaintiff a sum of Rs.2,15,000/- that the plaintiff had paid under Ext.A4 with interest at 6% per annum from the date of the suit.

14. In the result, this appeal is allowed and the judgment and decree passed in O.S.No.133 of 2006 dated 27.09.2011 on the file of the learned District Judge (Fast Track Court-II), Poonamallee is hereby set aside. The defendants 1 to 4/2 to 5 respondents are directed to refund the plaintiff / first respondent a sum of Rs.2,15,000/- with interest at 6% per annum from the date of the suit till realisation. The plaintiff is also entitled to have the amount in Court deposit with accrued interest, if any, within two months from today. No costs.

Sd/-

Assistant Registrar(CS iii)

//True Copy//

Sub Assistant Registrar

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To:

1.The District Judge (Fast Track Court-II)
Poonamallee.

Copy to

The Section Officer
VR Section, High Court, Madras.

+2ccs to Mr.S.Ramesh, Advocate SR.No. 82388
+2ccs to Mr.T.Karunakaran , Advocate SR.No. 83005

A.S.No.426 of 2012

A.SK(24/05/2019)