

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 03.01.2019

DATED: 21.01.2019

CORAM :

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

S.A. No. 823 of 1999

Gowrammal .. Plaintiff/1st respondent/Appellant

Vs.

1. Kasthuri
2. Rajeswari .. Respondents / Defendants

PRAYER: This Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and Decree of the First Additional District Judge cum Chief Judicial Magistrate, Krishnagiri made in A.S.No.8 of 1997 dated 05.03.1998, reversing the Judgment and Decree of the learned District Munsif of Uthangarai dated 23.12.1996 made in O.S.No. 10 of 1995.

For Appellant : Mr. N.E.A.Dinesh
for Mr.V.Nicholas

For 1st Respondent : Mr. K.Koteswara Rao

JUDGMENT

The plaintiff in O.S.No. 10 of 1995 on the file of the District Munsif Court, Uthangarai, is the appellant herein.

2. O.S.No. 10 of 1995 had been filed by the plaintiff Gowrammal against two defendants Kasthuri and Rajeswari seeking a Judgment and Decree for a direction against the defendants to execute a sale deed in favour of the plaintiff and in default, for execution of the sale deed through Court and for a permanent injunction restraining the defendants from trespassing into the suit schedule property and if the Court finds that possession is with the defendants, for recovery of possession, and also for payment of costs of the suit.

3. This suit came up for consideration on 23.12.1996 and by Judgment and Decree of even date, the learned District Munsif, Uthangarai, decreed the suit. Challenging that Decree

and Judgment, the second defendant Kasthuri filed A.S.No. 8 of 1997 before the First Additional District Court / Chief Judicial Magistrate, Krishnagiri. By Judgment and Decree dated 05.03.1998, A.S.No. 8 of 1997 was allowed and the Judgment and Decree in O.S.No. 10 of 1995 was set aside. The plaintiff then filed the present Second Appeal challenging the said Judgment.

4. The Second Appeal had been admitted on the following substantial question of law:-

"Whether the Judgments of the Courts below in non-suiting the plaintiff in the suit for specific performance filed by him solely on the ground that on the principle of equity he is not entitled to the relief, are sustainable in law?".

O.S.No. 10 of 1995 - District Munsif Court, Uthangarai:

5. The plaintiff Gowrammal had filed the said suit seeking a Judgment and Decree directing the defendants to execute sale deed in her favour and in the event of their default, for execution of sale deed through Court and also for permanent injunction to protect possession and in case the Court finds that the defendants are in possession for recovery of possession and for costs.

6. It was the case of the plaintiff that the first defendant was the owner of suit property, land in S.No. 21/23 in Mundrapatti Village, Uthangarai, Krishnagiri District. The first defendant had offered to sell the said land for consideration of Rs.5,000/-. In this connection, an agreement of sale dated 14.11.1983 was entered into between the plaintiff and the first defendant and an advance of Rs.4,000/- was paid. The first defendant agreed to execute the sale deed on or before 13.11.1984 on receipt of balance sale consideration of Rs.1,000/-. It had been further stated that on 12.11.1984, the first defendant sought extension of time till 11.02.1985. Accordingly, an endorsement was made in the agreement of sale itself and the plaintiff claims to have paid the balance sale consideration of Rs.1,000/- in the presence of witnesses. The plaintiff claimed that she was always ready and willing to perform her part of the agreement and even if the Court were to direct her to deposit the said additional amount of Rs.1,000/- in Court, she was ready and willing to do so. The plaintiff further claimed that she was put in possession of the suit property and was paying kist and was cultivating the land. It was stated that the first defendant avoided performing her part of the agreement, namely, to execute the sale deed. The

plaintiff therefore issued a notice dated 09.11.1987. This notice was received from the first defendant on 12.11.1987. On the very next day 13.11.1987, without complying with the demand of the plaintiff, the first defendant sold the property by a nominal document to the second defendant. The plaintiff claimed that she is entitled for specific performance of her agreement of sale and she further stated that she is also entitled for permanent injunction since the defendants threatened to disturb her possession.

7. The plaint was amended by order dated 04.11.1996 and the plaintiff also included alternative relief of recovery of possession, if possession was found to be with the defendants. The plaintiff therefore sought the reliefs as stated above in the plaint.

8. The second defendant, the purchaser, filed written statement. She denied that there was an existing agreement of sale between the plaintiff and the first defendant and also denied the averments regarding payment of advance consideration in the said agreement. The first defendant was the step daughter of the plaintiff. It was claimed that her father Krishnaswami Naidu was managing the suit properties on behalf of the plaintiff and had leased the same. The plaintiff also claimed that the suit is barred by limitation since the endorsement dated 12.11.1984 was a fraudulent one. It was stated that the plaintiff and the first defendant colluded against her since she had purchased the said property for adequate consideration of Rs.25,000/- on 13.11.1987. It was also pointed out that the agreement between the plaintiff and the first defendant was for a total consideration of Rs.5,000/- alone, whereas the second defendant had purchased the very same property for Rs.25,000/-. It was urged that the Court should dismissed the suit.

9. After the plaintiff was permitted to amend the relief by including the alternative relief of recovery of possession, the second defendant filed an additional written statement claiming that she had been in possession from 1987 and was paying kist. It was stated that the husband of the plaintiff and the husband of the second defendant were brothers. Consequently, the plaintiff knew that the second defendant was in possession of the property.

10. On the basis of the above pleadings, the learned District Munsif, Uthagarai, framed necessary issues for trial. The substantial issue surrounding the case was whether the second defendant was a bona fide purchaser for adequate consideration and in good faith and without notice of the earlier agreement between the plaintiff and the first defendant.

The further issue was whether the earlier agreement of sale dated 14.11.1983 was a validly executed document. During trial, the plaintiff Gowrammal examined herself as PW-1 and other witnesses, Venkatasamy as PW-2, Govindasamy as PW-3, Venkatesa Naidu @ Govindasamy as PW-4 and Sriramulu as PW-5. The plaintiff marked Exs. A-1 to A-7. Ex.A-1 was the agreement dated 12.11.1984; Ex.A-2 was the endorsement made in Ex.A-1; Ex.A-3 was the sale deed in favour of the second defendant executed by the first defendant dated 14.11.1986; Ex.A-5 was the notice dated 09.11.1987 and Ex.A-6 was the acknowledgment card.

11. On the side of the defendants, the second defendant Kasthuri examined herself as DW-1 and further examined Rathina Naidu as DW-2 and Moula Bucksha as DW-3. She also marked Exs. B-1 to B-7. Ex.B-1 was the sale deed dated 13.11.1987 executed in her favour by the first defendant; Ex.B-3 was the patta passbook; and Ex.B-4 to Ex.B-7 were tax receipts.

12. On analysis of the oral and documentary evidence, by the Judgment dated 05.03.1998, the learned District Munsif found that Ex.A-1 had been proved in the manner known to law by examining the attesting witness and that Ex.A-2 endorsement for payment of the final amount of Rs.1,000/- was also proved in manner known to law. The learned District Munsif further found that the second defendant was not a bona fide purchaser and she had not proved that she had purchased the property without knowledge of the agreement existing in favour of the plaintiff. The learned District Munsif therefore decreed the suit. The learned District Munsif also granted the relief of recovery of possession.

A.S.No. 8 of 1997 - First Additional District Court / Chief Judicial Magistrate, Krishnagiri:

13. Challenging the Judgment and Decree of the District Munsif, Uthangarai, the second defendant Kasthuri filed A.S.No. 8 of 1997. By Judgement dated 05.03.1998, the learned First Additional District Judge / Chief Judicial Magistrate, Krishnagiri, reappraised the evidence and framed points for consideration. The learned Additional District Judge found that the possession was with the appellant before him and further found that the endorsement, Ex.A-2 could not be believed and further found that in the endorsement, the date had been over written and there was no mention about payment of Rs.1,000/-. The learned Additional District therefore found that the agreement between the plaintiff and the first defendant gave a specific time limit between 4.11.1983 and 13.11.1984 for execution and found that the appellant had purchased the property only on 13.11.1987 after considerable period of time from the date of the agreement. It was also found that the

appellant had purchased the property for adequate consideration of Rs.25,000/-; whereas the agreement of sale was for Rs.5,000/-.

14. Holding as above, the Appeal was allowed and the Judgment and decree of the trial Court was reversed.

S.A.No. 823 of 1999:

15. Challenging the Judgment of the First Appellate Court, the plaintiff had filed the present Second Appeal.

16. As stated above, the Second Appeal had been admitted on the following substantial question of law:-

"Whether the Judgments of the Courts below in non-suiting the plaintiff in the suit for specific performance filed by him solely on the ground that on the principle of equity he is not entitled to the relief, are sustainable in law?".

17. The plaintiff in O.S.No. 10 of 1995 is the appellant herein. The second defendant in the suit is the first respondent herein. The first defendant in the suit remained ex-parte both during the trial Court proceedings and in the first appeal proceedings. She is the second respondent herein.

18. For sake of convenience, the parties will be referred as plaintiff, first and second defendants.

19. The plaintiff had filed the suit on 25.11.1987 seeking a Judgment and Decree directing the defendants to execute a sale deed in her favour with respect to the suit schedule property and on failure, for the Court to execute sale deed. Originally the relief of permanent injunction protecting possession was sought. Subsequently, by amendment, the relief of recovery of possession was sought. सत्यमेव जयते

20. It was the case of the plaintiff that she and the first defendant had entered into an agreement of sale on 14.11.1983 agreeing to purchase/sell the suit schedule property for a total consideration of Rs.5,000/-. The agreement of sale was written in a stamp paper. An advance of Rs.4,000/- was paid. The balance sale consideration was to be paid within a period of one year from 14.11.1983, ie., by 13.11.1984.

21. Before going any further, it must also be mentioned that the plaintiff Gowrammal and the first defendant Rajeswari were closely related. Rajeswari was the step daughter of Gowrammal. This agreement had been registered as Document No.

1479 of 1983 in the Office of the Sub Registrar, Uthangarai. There are two witnesses to the document, namely, R.Venkatasamy Naidu and Govindasamy. The plaintiff claimed that the first defendant sought extension of time and accordingly in the reverse page of the second sheet of the agreement, an endorsement was made on 12.11.1984 seeking extension of time for execution of sale deed by the first defendant for a further period of three months.

22. According to the plaintiff, she was also put in possession of the suit property. It must be mentioned that the suit property was vacant land in Mundrampatti Village in Re.S.No. 21/23 Uthangarai Taluk, Krishnagiri District.

23. It was the case of the plaintiff that having paid the entire sale consideration she had called upon the first defendant to execute the sale deed. Notice was issued to the first defendant. The agreement of sale had been marked as Ex.A-1 and the endorsement seeking extension of time was marked as Ex.A-2. The notice dated 09.11.1987 was marked as Ex.A-5. This notice was received by the first defendant on 12.11.1987. During trial, the plaintiff examined as PW-4 Venkatasamy Naidu @ Govindasamy, who was one of the attesting witness to the agreement of sale. She also examined as PW-3 Govindasamy, another attesting witness. She also examined as PW-5, Sriramulu, who wrote the endorsement in Ex.A-2. On 13.11.1984 the very next day, after receipt of notice from the plaintiff, the first defendant sold the property to the second defendant for consideration of Rs.25,000/-.

24. The primary point to be examined is whether the second defendant was a bona fide purchaser without notice and without knowledge of the earlier agreement of sale. The relationship among the parties assumes significance. As stated, the first defendant was the step daughter of the plaintiff. The husband of the second defendant and the husband of the plaintiff were brothers. Even in the written statement, it had been stated that the husband of the plaintiff was in possession of the suit property in his capacity as Manager of the property on behalf of the plaintiff.

25. The learned District Munsif had framed an issue relating to whether the second defendant was a bona fide purchaser without notice of the earlier agreement of sale. In her evidence, DW-1, namely, the second defendant deposed that she verified whether there were any encumbrances over the property from the Sub Registrar Office. Further, in her evidence DW-1 stated that she enquired with the husband of the plaintiff whether the property can be purchased and only

thereafter had purchased the property. The husband was her own father. The learned District Munsif had given a specific finding that there was an encumbrance of the property and the fact that there was an agreement of sale was to the knowledge of the second defendant. It was specifically found that Ex. B-1 sale deed in favour of the second defendant was executed though Ex.A-1 agreement was in force. It was specifically found that the second defendant was not a bona fide purchaser.

26. On the other hand, the learned Additional District Judge/ Chief Judicial Magistrate observed that Ex.A-1 was entered into for a consideration of Rs.5,000/-; whereas Ex.B-1 sale deed was executed for a consideration Rs.25,000/- and consequently, stated that the Court should do equity and consequently exercised jurisdiction under Section 20 of the Specific Relief Act. It was also held by the learned Additional District Judge that the plaintiff had not expressed readiness and willingness to purchase the property. The learned Additional District Judge also expressed doubt over the endorsement in Ex.A-2 holding that the payment of additional advance of Rs.1,000/- was not mentioned in it. Section 19 of the Specific Relief Act has been interpreted by the Honourable Supreme Court in the judgment reported in R.K.MOHAMMED UBAIDULLAH v. HAJEE C.ABDUL WAHAB ((2000) 6 SCC 402), wherein the Honourable Supreme Court held as follows:-

"14. Section 19 of the Specific Relief Act, 1963, to the extent it is relevant, reads:

"19. Relief against parties and persons claiming 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 transferee for value who has paid his money in good faith and without notice of the original contract;

(c) (e) ***** As can be seen from Sections 19(a) and (b) extracted above specific performance of a contract can be enforced against (a) either party thereto; and (b) any person claiming under him by a title arising subsequent to the contract, except a transferee for value who has paid his money in good faith and without notice

of the original contract. Section 19(b) protects the bona fide purchaser in good faith for value without notice of the original contract. This protection is in the nature of exception to the general rule. Hence, the onus of proof of good faith is on the purchaser who takes the plea that he is an innocent purchaser. Good faith is a question of fact to be considered and decided on the facts of each case. Section 52 of the Penal Code emphasises due care and attention in relation to good faith. In the General Clauses Act emphasis is laid on honesty.

15. Notice is defined in Section 3 of the Transfer of Property Act. It may be actual where the party has actual knowledge of the fact or constructive. "A person is said not have notice" of a fact when he actually knows that fact, or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it. Explanation II of said Section 3 reads:

"Explanation II-- Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title if any, of any person who is for the time being in actual possession thereof."

Section 3 was amended by the Amendment Act of 1929 in relation to the definition of "notice". The definition has been amended and supplemented by three explanations, which settle the law in several matters of great importance. For the immediate purpose Explanation II is relevant. It states that actual possession is notice of the title of the person in possession. Prior to the amendment there had been some uncertainty because of divergent views expressed by various High Courts in relation to the actual possession as notice of title. A person may enter the property in one capacity and having a kind of interest. But subsequently while continuing in possession of the property his capacity or interest may change. A person entering the property as tenant later may become usufructuary mortgagee or may be agreement holder to purchase the same property or may be some other interest is created in his favour subsequently. Hence with reference to subsequent purchaser it is essential that he should make an inquiry as to the title or interest of the person in actual possession as on

the date when the 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."

27. From the above passage, it clear that Section 19(b) of the Specific Relief Act is an exception to the general rule and the onus is on the subsequent purchaser to prove that she purchased the property in good faith and was also a bona fide purchaser for value.

28. In (1995) 2 SCC 31, Jugraj Singh and another Vs. Labh Singh and Others, the Hon'ble Supreme Court held as follows:-

"5. This Court in Gomathinayagam Pillai v. Palaniswami Nadar quoting with approval Ardeshir case 1 had held as follows:

"But the respondent has claimed a decree for specific performance and it is for him to establish that he was, since the date of the contract, continuously ready and willing to perform his part of the contract. If he fails to do so, his claim for specific performance must fail."

That plea is specifically available to the vendor/defendant. It is personal to him. The subsequent purchasers have got only the right to defend their purchase on the premise that they have no prior knowledge of the agreement of sale with the plaintiff. They are bona fide purchasers for valuable consideration. Though they are necessary parties to the suit, since any decree obtained by the plaintiff would be binding on the subsequent purchasers, the plea that the plaintiff must always be ready and willing to perform his part of the contract must be available only to the vendor or his legal representatives, but not to the subsequent purchasers. The High Court, therefore, was right in rejecting the petitioners' contention

and rightly did not accept the plea. We do not find any ground warranting interference."

29. In Kamal Kumar vs Premlata Joshi and others reported in CDJ 2019 SC 015 (Civil Appeal No. 4453 of 2009, dated 07.01.2019), the Hon'ble Supreme Court had given the material questions to be examined for grant of relief of specific performance. Paragraph No. 10 of the said Judgment reads as follows:-

"10. It is a settled principle of law that the grant of relief of specific performance is a discretionary and equitable relief. The material questions, which are required to be gone into for grant of the relief of specific performance, are First, whether there exists a valid and concluded contract between the parties for sale/purchase of the suit property; Second, whether the plaintiff has been ready and willing to perform his part of contract and whether he is still ready and willing to perform his part as mentioned in the contract; Third, whether the plaintiff has, in fact, performed his part of the contract and, if so, how and to what extent and in what manner he has performed and whether such performance was in conformity with the terms of the contract; Fourth, whether it will be equitable to grant the relief of specific performance to the plaintiff against the defendant in relation to suit property or it will cause any kind of hardship to the defendant and, if so, how and in what manner and the extent if such relief is eventually granted to the plaintiff; and lastly, whether the plaintiff is entitled for grant of any other alternative relief, namely, refund of earnest money etc. and, if so, on what grounds."

30. It is seen that in this case Ex.A-1 is a valid and concluded contract between the plaintiff and the first defendant. According to the plaintiff, she had paid an advance of Rs.4,000/- towards the total sale consideration of Rs.5,000/-. Ex.A-1 was dated 14.11.1983. It was submitted that the balance of Rs.1,000/- should be paid within a period of one year from 14.11.1983, ie., on or before 13.11.1984. It is the contention of the plaintiff that the first defendant sought extension of time and consequently, endorsement was made in Ex.A-1 on 12.11.1984 extending the period for performance for a further period of three months. However, in the endorsement, there is no evidence that a final balance of Rs.1,000/- had

actually been paid. There was an averment in the plaint that it was paid. But the endorsement in Ex.A-2 does not reflect such payment.

31. However, since the property had been purchased by the second defendant, this issue of readiness and willingness cannot be agitated by the second defendant. The second defendant would only have to show that she was a bona fide purchaser without notice or knowledge of the earlier agreement and for adequate consideration. The second defendant had purchased the property by Ex.B-1 which is dated 13.11.1987 nearly four years after the agreement of sale in Ex.A-1. Having had an agreement in her favour, the plaintiff cannot hold the first defendant to ransom and the first defendant also cannot be expected not to take advantage of any increase in the market value of the property. It is seen that the consideration fixed under Ex.A-1 was Rs.5,000/-. The consideration fixed within a period of four years under Ex.B-1 was Rs.25,000/-. As a matter of fact, in the Annexure of Ex.B-1, the following under Rule 3(1) of the Tamil Nady Stamp Act had also been given.

32. The value had been mentioned as Rs.27,500/- which included the value of the stamp papers and the registration charges. This naturally meant that the value of the property was Rs.27,000/- and consequently adequate consideration had been paid by the second defendant.

33. The plaint had proceeded on the basis that the plaintiff was in possession pursuant to the agreement. However, it actually transpired that she was not in possession and consequently, an amendment had been sought to seek the relief of recovery of possession. This naturally meant that the second defendant was in possession of the suit property pursuant to Ex.B-1 sale deed in her favour. All these aspects have to be considered while negating the claim of the plaintiff seeking specific performance, since, all right, title and interest had flowed to the second defendant by purchase of the property. When the issue of equity is examined, most certainly the second defendant would be subjected to more hardship and loss by grant of a decree for specific performance since she had been in possession for the past 30 years and the consideration paid by her was also nearly five times more than the consideration offered by the plaintiff. I hold that the Judgment of the First Appellate Court does not warrant any interference though for the grounds stated above.

34. The plaintiff is not entitled for specific performance. At the most the plaintiff can only seek refund of earnest money. However, I hold that the plaintiff is also not entitled for such relief since she had come to Court after considerable period of time. The date of agreement in her favour was 14.11.1983. She instituted the suit on 25.11.1987, after more than four years. She had issued the notice seeking specific performance on 09.11.1987 after nearly four years. No relief can be granted to the plaintiff who sleeps over holding the first defendant to ransom in view of Ex.A-1. Further the close relationship among the parties must also be taken into account. The plaintiff is the second wife of the father of the first defendant. The husband of the second defendant is the brother of the father of the first defendant /husband of the plaintiff. In view of all these facts, it would be highly inappropriate to upset a settled situation.

35. The substantial question of law which had been framed related to the principle of equity which is a fundamental principle in deciding grant or otherwise of the relief for specific performance. In the present case, equity swings in favour of the second defendant, who had purchased the property in the year 1987 for grant adequate consideration and has also be in possession from that. The second defendant had let in positive evidence that she had made necessary enquires from the Sub Registrar Office and from the husband of the plaintiff before purchasing the suit property. Consequently, the substantial question of law is answered that the First Appellate Court is correct in non suiting the plaintiff on the ground of principal of equity.

36. In all the reasons stated above, the Second Appeal is dismissed, however without costs having into considereartion the relationship among the parties. The Judgment and Decree of the First Appellate Court in A.S.No. 8 of 1997 dated 05.03.1998 is confirmed. The Judgment and Decree of the Trial Court in O.S.No. 10 of 1995 dated 23.12.1996 is set aside. The Second Appeal is dismissed. No costs.

Sd/-
Assistant Registrar(CS-VI)

//True Copy//

Sub Assistant Registrar

vsg

To

1. The First Additional District Judge cum
Chief Judicial Magistrate,
Dharmapuri at Krishnagiri.
2. The District Munsif,
Uthangarai.
3. The Section Officer,
VR Section, High Court, Madras

+1 cc to Mr.V.Nicholas, Advocate, S.R.No.4209

+1 cc to Mr.H.Mohammed Farook, Advocate, S.R.No.4344

Judgement made in
S.A. No. 823 of 1999

CNR(CO)
SSM(14/03/2019).



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