IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 16.07.2019

C O R A M

THE HONOURABLE MRS.JUSTICE **R.HEMALATHA**

CRP (NPD) No.2903 of 2009 and
M.P.No.1 of 2009

T.Vinayaga Mudaliar ... Petitioner

Vs.

Delhi Bai (died)
Saroja Ammal (died)

D.Sambasivam ... Respondents

PRAYER: Civil Revision Petition filed under Section 115 of the Code of Civil Procedure against the orders dated 16.07.2009 passed in EP -/2009 in O.S.No.659 of 1999 by the District Magistrate, Gudiyattam, Vellore.

For Petitioners : Mr.K.A.Ravindran

For Respondent : No appearance

ORDER

The Civil Revision petitioner is the decree holder in O.S.No.659 of 1999 on the file of the Subordinate Judge, Gudiyatham against the respondents for specific performance of the contract executed between him and the respondents 1 and 2. Though the said suit was dismissed with regard to the specific performance of the contract, the defendants 1 and 2 were directed to refund the advance amount of Rs.70,000/- received by them to the plaintiff/ revision petitioner together with interest at the rate of 9% p.a. from the date of plaint till the date of decree and thereafter at 6% p.a. till the date of realization. The revision petitioner filed an execution petition under Order XXI Rule 11(2) of the Code of Civil Procedure in O.S.No.659 of 1999 against the 3rd respondent before the District Munsif, Gudiyatham, The District Munsif, Gudiyatham, vide his orders dated 16.07.2009, rejected the petition on the ground that since no decree was passed against the 3rd respondent, the decree holder cannot file an execution petition against him. Aggrieved over the same, the present revision petition is filed.

2. The learned counsel appearing for the revision petitioner contended that the property was sold in favour of the 3rd respondent and though the plaintiff was not granted a decree for specific performance of the contract, was nevertheless granted a decree to get back the advance amount from the defendants 1 & 2. His specific contention is that since the 3rd respondent is the purchaser of the suit property, he is also liable to pay the suit amount to the plaintiff.

3. No appearance on behalf of the respondent.

4. The executing court mainly rejected the execution petition filed by the decree holder on the following two grounds.

(i) There is no specific decree against the 3rd respondent.

(ii) The executing court cannot go beyond the decree.

5. At this Juncture, it is relevant to extract Section 55 (6)(b) of the Transfer of Property Act, which reads thus.

> ***55. Rights and Liabilities of buyer and seller.*** *- In the absence of a contract to the contrary, the buyer and seller of immovable property respectively are subject to the liabilities and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold.*
>
> *(6) The buyer is entitled--*
>
> *(a) ....*
>
> *(b) Unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, to the extent of the seller's interest in the property, for*

the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission.

Therefore, it is clear from the above provision of law that, in the absence of a contract to the contrary, the buyer will have a charge on the seller's interest in the property, which is a subject matter of the sale agreement. The charge is available against the seller and all persons claiming under him. The charge in favour of the buyer is converse to the seller's charge under Section 55(4)(b) of the Transfer of Property Act. The buyers charge under Section 55(6)(b) is a statutory charge and different from a contractual charge, to which the buyer may be entitled to claim under a separate contract.

6. In the decision in ***Videocon Properties Ltd. Vs. Dr Bhalchandra Laboratories reported in 2004 (SCC) 711,*** while considering the scope of Section 55(6)(b) of the Transfer of Property Act, the Apex court has observed at paragraph No.13 as follows.

" The buyer's charge engrafted in clause (b) of paragraph 6 of Section 55 of the Transfer of Property Act would extend and ensure to the purchase-money or earnest money paid before the title passes and property has been delivered by the purchaser to the seller, on the seller's interest in the property unless the purchaser has improperly declined to accept delivery of property or when he properly declines to accept delivery including for the interest on purchase money and costs awarded to the purchaser of a suit to compel specific performance of the contract or to obtain a decree for its rescission. The principle underlying the above provision is a trite principle of justice, equity and good conscience. The charge would last until the conveyance is executed by the seller and possession is also given to the purchaser and ceases only thereafter. The charge will not be lost by merely accepting delivery of possession alone. This charge is a statutory charge in favour of a buyer and is different from contractual charge to which the buyer may become entitled to under the terms of the contract, and in substance a converse

to the charge created in favour of the seller under Section 55(4)(b). Consequently, the buyer is entitled to enforce the said charge against the property and for that purpose trace the property even in the hands of third parties and even when the property is converted into another form by proceeding against the substituted security, since none claiming under the seller including a third party purchaser can take advantage of any plea based even on want of notice of the charge. The said statutory charge gets attracted and attaches to the property for the benefit of the buyer the moment he pays any part of the purchase money and is only lost in case of purchaser's own default or his improper refusal to accept delivery. So far as payment of interest is concerned, the section specifically envisages payment of interest upon the purchase-money/price prepaid, though not so specifically on the earnest money deposit, apparently for the reason that an amount paid as earnest money simplicitor, as mere security for due performance does not become repayable till the contract or agreement

gets terminated and it is shown that the purchaser has not failed to carry out his part of the contract, and the termination was brought about not due to his fault, the claim of the purchaser for refund of earnest money deposit will not arise for being asserted."

7. A Single Judge of this court in the decision ***K.Shanmugam vs C.Samiappan*** reported in ***2013(6) CTC 28***, has observed at paragraph No.23 as

" 23. The ratio laid down by the Supreme Court is that the the buyer shall have a statutory charge over the immovable property under Section 55 (6)(b) of the Transfer of Property Act, 1882. The said view has been followed by various High Courts including the Division benches of this Court. Citing all those decisions shall not be necessary. Suffice to state that now it is a settled position of law that limitation for refund of advance money with interest under an agreement for sale of immovable property is governed by Article 62 of the Limitation Act as the buyer has got a statutory charge over the property to the extent of interest of

the seller and that hence the period of limitation shall be 12 years from the date on which the right to sue for the refund of advance amount accrues. Therefore, the lower appellate Court is definitely wrong in holding that the limitation for filing a suit for refund of advance amount shall be governed by Article 54 of the Limitation Act and hence, the period shall be three years from the date of accrual of the right to sue. Consequently, the lower appellate Court has committed an error in holding that the suit filed by the appellants/plaintiffs for refund of the advance amount is barred by limitation. The said finding of the lower appellate Court is erroneous and the same deserves interference and reversal. "

8. As per the statutory charge created under Section 55(6)(b) of the Transfer of Property Act, the civil revision petitioner can file an execution petition for refund of the amount of Rs.70,000/- from the 3rd respondent, who is the purchaser of the property. He can proceed against the 3rd respondent only in respect of the suit property and the decree holder cannot proceed against the other properties of the 3rd respondent.

9. Article 62 of the Limitation Act, 1963, which corresponds to Article 132 of the Limitation Act, 1908 provides a period of 12 years "to enforce payment of money secured by a mortgatgee or otherwise charged upn immovable property". Time runs from the date "when money becomes due".

10. From the above Article, it is clear that the period of limitation for enforcement of the statutory charge created under Section 55(6)(b) is 12 years from the date when money becomes due. The period remains the same even for enforcement of the charge on the substituted security. The executing court without adverting its attention to the provisions contained in 55(6)(b) of the Transfer of Property, had rejected the execution petition. Therefore, the orders passed by the execution court is liable to be set aside.

11. In the result, the civil revision petition is allowed. No costs. The connected miscellaneous petition is closed. The orders passed by the execution court is set aside.

16.07.2019

Index : Yes/No
Internet : Yes/No
Speaking/non-speaking order
mst

To

The District Munsif, Gudiyatham, Vellore District.

R.HEMALATHA,J.
mst

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