

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 26.07.2019

Judgment Pronounced on : 01.11.2019

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.1620 of 2004

Thamizhselvi ... Appellant/1st Respondent/ Plaintiff

Vs

1.Gurunathan ... Respondent-1 /Appellant / 2nd defendant

2.Manicka Naicker

3.Rajendran

4.Gunasekaran

5.Murugan

... Respondents -2 to 5 /
Respondents 3 to 6 (L.Rs of 1st
defendant)

Prayer :- Second Appeal filed under Section 100 of CPC, against the judgment and decree of the Court of the Additional District and Sessions Judge cum Fast Track Judge No.II, Tindivanam in A.S.No.71 of 2002 dated 26.09.2003 in reversing the well considered judgment and decree of the District Munsif Court, Vanur in O.S.No.782 of 1995 dated 27.09.2000.

For Appellant : Tmt.V.Srimathi

For Respondents : Mr.P.B.Ramanujam

Mr.P.B.Balaji

JUDGMENT

The plaintiff in a suit for specific performance, having obtained a decree before the trial Court but, suffered a reversal before the first Appellate Court, has approached this Court in the second appeal. Parties would be referred to by their rank before the trial Court.

2.The case of the plaintiff:

- On 27.12.1994, Vide Ext.A.1, the plaintiff entered into a written, unregistered, sale agreement with the first defendant to whom the suit property originally belonged, for a total consideration of Rs.28,400/-. The entire sale consideration was paid, and she was put in possession of the property as well. Since the sale deed was not executed, the plaintiff had laid the suit for specific performance.
- The first defendant is the original owner of the suit property, and she had filed her written statement, disputing the execution of Ext.A.1. The second defendant claimed that

he purchased the suit property based on Ext.B.2, sale deed, dated 17.04.1995, executed in his favour by the first defendant, and that he was a bonafide purchaser for the value - without notice of the sale agreement.

3.1 The dispute went to trial, and before the trial Court, the plaintiff was examined as P.W.1, and so was the second defendant as D.W1. The first defendant in her written statement, though supported the case of the second defendant, opted not to participate in the trial of the suit. Both sides have produced documentary evidence as well. The critical documents are: Ext.A.1, sale agreement in favour of the plaintiff and Ext.A.2 and Ext.A.3, both produced to support plaintiff's claim of possession of the suit property pursuant to the sale agreement. On the defendant's side, the second defendant had produced Ext.B.1, the title deed executed in favour of the first defendant by her vendor and Ext.B.2, sale deed in her favour.

3.2 On appreciating the evidence before it, the trial Court decreed the suit. It first found that Ext.A.1 was genuine, then it proceeded to hold that inasmuch as the second defendant has pleaded that he was not aware of Ext.A.1 when he purchased the suit property, he has no locus standi to challenge Ext.A.1. Then it proceeded to rely on the testimony of D.W.1 (that of the second defendant) wherein he has deposed that when he approached the first defendant with a request to tender evidence before the Court, the latter had told him that loss or gain was his (second defendant's) problem. The trial Court harped on this statement, and has held that since the vendor of the second defendant had told that the fate of the case was his problem, he had to resign to his fate. It also then proceeded to discuss that the sale consideration under Ext.B.2 was not seemed to have been fully paid, and taking a cumulative view of its reasoning, it decreed the suit.

3.3. In an appeal preferred by the second defendant before the first Appellate Court, it has held that inasmuch as the second defendant has taken up a plea that he is a bonafide purchaser without notice of Ext.A.1, the burden is on the plaintiff to prove that the second defendant indeed had received notice of agreement. Holding that this burden was not discharged by the plaintiff, it proceeded to allow the appeal. Challenging the same, the plaintiff is back again before this Court in this appeal.

4. The appeal is admitted on the following substantial questions of law;

1. When the recitals of the document under Ex.B.2 are artificial and suspicious, whether the same would not discredit the document in favour of the second defendant as a bonafide purchaser for value?

2. Whether the lower appellate Court is right in dismissing the Suit for specific performance, when the sale deed in favour of the second defendant is concocted for the purpose of the case?

3. When the plaintiff had established her possession in respect of the suit properties, whether the lower appellate Court is right in holding that the second defendant is a bonafide purchaser for value contrary to the judgment of the Supreme Court?

5. The learned counsel for the appellant submitted:

- That under Ext.A-1, the appellant/ plaintiff was put in possession of the suit property, and on the date when the second defendant purchased the property under Ext.B-2, the plaintiff was already in possession. This is borne out by the fact, that Ext.A.4, land tax receipt dated 18.05.1995, was issued before institution of the suit, and it evidences that possession was with the plaintiff. If the second defendant was a bonafide purchaser for a value without notice of Ext.A.1, then the minimum that law expects him was to enquire the plaintiff about her right to be in possession. In particular, he ought to have at least enquired the first defendant, his vendor about possession. In his testimony, the second defendant as D.W.1 has deposed that he had made no such enquiries. Exts.B5 to B7 are the sale deeds which the second defendant had obtained from the other family members of the first defendant herein, and they relate to properties adjacent to the suit property. Therefore, it is inconceivable that he could not have known about first defendant's possession of the suit property even before he purchased it. As the second defendant had made no such enquiries, he cannot be termed as a bonafide purchaser. A combined reading of Ext.A.4 alongside the testimony of D.W.1 would go to indicate that the second defendant is not a bonafide purchaser. The authorities in Ram Niwas Vs. Bano [(2000) 6 SCC 685]; R.K.Mohammed Ubaidullah and Others Vs. Hajee C.Abdul Wahab [(2000) 6 SCC 402], are relied on to fortify the arguments.
- Secondly, while under Ext.A.1, the consideration is fixed at Rs.28,400/-, in Ext.B.2 sale deed, the same property is seen valued at Rs.14,800/-. The suit property therefore, is deliberately undervalued in Ext.B.2, whereas, Ext.A.1 stipulates the consideration is at Rs.28,400/-. This under valuation is an index for ascertaining if adequate consideration has passed under the document. And, in the context of the suit, it is a factor that goes to prove that Ext.B-2 sale deed was executed only to defeat the right of the first defendant. It is here that the perversity in appreciation of evidence by the first Appellate Court is evident, and warrants interference by this Court.

6. Per contra, the learned counsel for the respondent/second defendant argued: The second defendant's core pleading has been that Ext.A.1 was created to defeat the rights of the second defendant, and along side he had pleaded that he was not aware of the execution of Ext.A-1 when he obtained Ext.B-2 sale deed. The trial Court lifted one sentence out of the entire pleading of the second defendant, and fitted it rather tangentially when it appreciated the evidence. The critical fact to be taken note of is, if Ext.A-1 is believable? That it is not is probablised by the following set of facts:

- The stamp paper used for making Ext.A-1 agreement was dated 05.08.1994, but according to the plaintiff, the entire sale consideration was only in December, 1994. Why was this time difference?
- Secondly, pursuant to Ext.A-1, no sale deed was executed, even though the entire sale consideration, according to the plaintiff, was paid. P.W.1 attempts to explain it when he deposes that the sale deed could not be executed immediately because the first defendant expressed some inconvenience then, still if only Ext.A-1 was genuine, a sale deed should have been executed within a reasonable time. This was not done for several months. And, in between there is no evidence, not even a notice to the first defendant requiring the latter to execute the sale deed. Cumulatively, the conduct of the plaintiff does not reconcile with the conduct which a reasonable man of law might expect him to display.
- If according to the plaintiff that in Ext.B-2 sale, the suit property was seen undervalued almost by half when compared to the consideration in Ext.A-1, there is no evidence on record to show the market price of the property at that relevant point of time. And, it is immaterial, if only Ext.A-1 was manufactured to defeat the right of the second defendant that he derived under Ext.B-2 sale deed.
- Thirdly, turning to the land tax receipts, even though they are generally considered as documents evidencing possession, yet they cannot be excluded from contextual scrutiny in a particular case. Ext.A-4, is dated 18.05.1995, is barely one month after Ext.B.2 sale deed, and therefore, notwithstanding the fact that it is prior to the suit, it may not impact the title or possession of the second defendant, since in our system even patta would not have been transferred in the name of the second defendant by then. And, this tax receipt was issued in favour of Seethalakshmi/first defendant. If Ext.A.4 is kept aside, there is no other evidence except the self serving evidence of P.W.1 to indicate that the second defendant knew about Ext.A.1, agreement.

7. The efforts of the appellant in effect, requires this Court to re-appreciate the evidence in the second appellate stage. It is not forbidden in law, but it is circumscribed by a condition that the reasoning of the first appellate Court in arriving at its conclusion is perverse, and one which no reasonable man would ever arrive. Here, the first appellate Court's view was fundamentally founded on its finding that the plaintiff had not proved that the second defendant had notice of Ext.A-1 before he obtained Ext.B-2 sale deed.

8. To prove that this foundation of the first appellate court's reasoning borders on perversity, the only fact relied on by the plaintiff/appellant was based on plaintiff's claim of possession over the suit property when Ext.B-2 was executed. And, the only document relied on was Ext.A-4. This was amply, explained by the second defendant: First, this tax receipt was issued only in the name of the first defendant, the original owner of the property. Secondly, it was dated about a month after Ext.B-2, and not at anytime before it.

9. This fact is now required to be assessed in the context of the pleading of the second defendant that Ext.A-1 was made to defeat his right. The suit is founded on an agreement, written and executed on 27-12-1994 upon payment of the entire sale consideration on a stamp paper that was purchased some four months before, on 05.08.1994. And there is no demand to execute the sale deed for several months. A conjoined reading of this set of facts does not appeal to the conscience of this Court that Ext.A-1 could be believed. When once the evidence passes the test of relevancy and admissibility, and are ready for the consideration of the Court, the only friend who the court trusts is the invisible, yet omnipresent reasonable man of law, to guide it to its conclusion. Given the ordinary course of human conduct, no man will demonstrate his excellence in patience especially when he had paid the entire consideration for obtaining a sale deed. Ext.A-1 sale agreement, the manner of its alleged execution, does not inspire confidence. Therefore, even dehors the plea of the second defendant that he is a bonafide purchaser for value without notice of Ext.A-1, the plaintiff still does not qualify for this Court to consider the exercise of its discretion in her favour. And, if in this backdrop, the plea of possession founded solely on Ext.A-4 tax receipt, it has to be held that Ext.A-4 lacks the efficacy to sustain a suit for specific performance, or to tilt the equity in favour of the plaintiff for, what Ext.A-1 sale agreement cannot achieve on its inherent strength, a tax receipt in the name of the vendor under Ext.A-1 cannot. This apart, this Court is also not impressed with the argument for the appellant/plaintiff that merely because the second defendant has properties adjacent to the suit properties that would ipso facto imply that he knew about the plaintiff's possession of the suit property. This argument is faulty since it is built on a premise that the plaintiff was in possession when Ext.B-2 was executed. But this court has

indicated its reason to suspect the believability of Ext. A-1 itself. Here, the learned counsel for the plaintiff has summoned the ratio of the authorities in Ram Niwas Vs. Bano case and R.K.Mohammed Ubaidullah and Others Vs. Hajee C.Abdul Wahab case to lend strength to her arguments, but those are cases where the property involved were buildings, and are capable of ascertaining physical possession, and not open-fields as in the present case, where physical possession, when asserted, has to be proved positively. In other words, Court cannot presume possession of the plaintiff under a suspect agreement, and here the plaintiff finds herself on the back foot, as she has not produced any positive evidence other than Ext.A-4 for substantiating it.

10. The conclusion is to state the most obvious: That the plaintiff/appellant has not established that the reasoning of the first appellate Court was perverse, and consequently the appeal fails. In the result, this appeal is dismissed and the judgment and decree of the Additional District and Sessions Judge cum Fast Track Judge No.II, Tindivanam in A.S.No.71 of 2002 dated 26.09.2003, is hereby confirmed. No costs.

Sd/-
Assistant Registrar

//True copy//

Sub Assistant Registrar

To:

1. The Additional District and Sessions Judge
cum Fast Track Judge No.II,
Tindivanam.
2. The District Munsif
Vanur.
3. The Section Officer
VR Section, High Court, Madras.

+1 cc to Mr.V.Raghavachari, Advocate,sr.90812

+1 cc to Mr.P.B.Ramanujam, Advocate,sr.90623.

Vgii(co)
krd 4/1

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