

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 08.11.2019
CORAM:

THE HON'BLE MR.JUSTICE R.SUBRAMANIAN

S.A.No.220 of 2014 &
M.P.No.1 of 2014

Mahalingam

..Appellant/3rd Defendant

Vs.

Gurusamy

..Respondent/Plaintiff

PRAYER: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 04.08.2011 in A.S.No.8 of 2008 on the file of the Additional District Court/Fast Track Court No.III, Kallakurichi, against the judgment and decree dated 02.12.2004 in O.S.No.145 of 2004 on the file of the learned Principal District Munsif, Kallakurichi.

For Appellant : Mr.K.Selvaraj

For Respondent : Mr.S.Sounthar

J U D G M E N T

The 3rd defendant in O.S.No.145 of 2004 aggrieved by the decree for specific performance granted against him and defendants 1 and 2 by the Courts below, has come up with the second appeal.

2. According to the respondent/plaintiff, the suit properties belonged to defendants 1 and 2. They agreed to sell the suit property to the plaintiff for a sum of Rs.1,00,000/- (One lakhs only) and had received an advance of Rs.75,000/- on 12.06.1999. The terms of the said agreement were reduced into writing on the said date and a period of four months was fixed for payment of balance sale consideration and execution of the sale deed. Claiming that the defendants 1 and 2 had not come forward to execute the sale deed, despite demands and the defendants 1 and 2 had sold the properties in favour of the 3rd defendant under a Sale Deed dated 21.09.1999, the plaintiff sued for specific performance, impleading the 3rd defendant, who was a subsequent purchaser of the suit properties. It was also pleaded that the 3rd defendant is not a bonafide purchaser for value without notice of the agreement.

3. Expectedly, the defendants 1 and 2, the agreement vendors remained exparte. It is also in evidence that the 1st defendant cancelled the sale deed executed by him in favour of the 3rd defendant a day after the presentation of the above suit for specific performance on 13.10.1999.

4. The 3rd defendant, subsequent purchaser resisted the suit contending that the said agreement created only to defeat his rights under the sale deed 21.09.1999. He would also claim that he is a bonafide purchaser for value without notice, apart from taking the other defences open to him in a suit for specific performance.

5. The trial Court upon consideration of the evidence on record concluded that the suit agreement is true and valid. The trial Court also rejected the claim of the 3rd defendant that he is a bonafide purchaser for value without notice of the agreement on the ground that he had not obtained the encumbrance certificate to verify the encumbrance before he purchased the property on 21.09.1999. The trial Court imputed the knowledge of the agreement of the 3rd defendant because of his failure to obtain encumbrance certificate prior to the sale deed. On the said finding, the trial Court decreed the suit for specific performance.

6. Aggrieved, the 3rd defendant preferred an appeal in A.S.No.8 of 2008. The lower appellate Court also concurred with the finding of the trial Court. Though an issue was framed by the lower appellate Court regarding the claim of the 3rd defendant that he is a bonafide purchaser for value without notice, the lower appellate Court did not render any specific finding on that issue. The lower appellate Court only pointed out that once the agreement is held to be true, the 3rd defendant cannot be termed as a bonafide purchaser without notice to the prior agreement. On the validity of the sale agreement dated 12.06.1999, the lower appellate Court concurred with the finding of the trial Court. The lower appellate Court also faulted that the 3rd defendant for not examining the attestors to the sale deed dated 21.09.1999. On the aforesaid conclusions, the lower appellate Court dismissed the appeal confirming the decree and judgment of the trial Court. Aggrieved, the 3rd defendant has come up with this second appeal.

7. The following questions of law were framed by this Court at the time of admission:

- i. Whether the Courts below have grossly erred in decreeing the suit against the mandatory provisions of Section 16 (c) of the Specific Relief Act, 1963 since the plaintiff (respondent

herein) has not pleaded and established that he was always ready and willing to perform his part of the contract as per the terms and conditions of the agreement for sale?

ii. Whether the Courts below are justified in accepting the case of the plaintiff for granting the relief of specific performance based on unilateral cancellation deed of sale marked as Ex.A2 canceling the sale deed already executed in favour of the 3rd defendant/appellant under Ex.B1?

8. Upon hearing the counsels, I had framed another question of law regarding the finding of the trial Court on the question as to whether the 3rd defendant is a bonafide purchaser for value without notice only prior to agreement or not. The said question of law is as follows:

"Whether the Courts below were right in concluding that the defendant is not a bonafide purchaser for value without notice of the agreement."

9. I have heard Mr.K.Selvaraj, learned counsel appearing for the appellant and Mr.S.Sounthar, learned counsel for the respondent on the above questions of law framed.

10. Elaborating on the questions of law, Mr.K.Selvaraj, learned counsel appearing for the appellant would vehemently contend that the trial Court erred in concluding that the 3rd defendant is not a bonafide purchaser for value without notice of the prior agreement. According to him, the agreement being an unregistered document, even if the 3rd defendant had applied for and obtained an Encumbrance certificate, the suit agreement would not have been reflected therein. He would also point out the evidence of P.W.1, particularly, in the cross examination where P.W.1 has deposed as follows:

"fpiua xg;ge;jg;jj;jpuk; gw;wp 3k; gpujpthjpf;F bjupahJ vd;why; mJ gw;wp vdf;Fj; bjupahJ/"

11. Therefore, according to the learned counsel, there is no positive evidence imputing knowledge of the agreement on the 3rd defendant. In the absence of the positive evidence, the trial Court was wrong in concluding that the 3rd defendant had notice of the agreement prior to the sale in his favour. As already pointed out that the lower appellate Court has not rendered any specific finding on this issue. The lower appellate Court has considered the validity of the agreement and has concluded that once the agreement is found to be valid, the 3rd defendant cannot be considered to be a bonafide purchaser for value without notice.

12. Mr.K.Selvaraj, learned counsel would also submit that the plaintiff has not specifically pleaded that he has always been ready and willing to perform the part of the contract. The pleadings are not in conformity with Section 16 (c) of the Specific Relief Act, 1963. He would also contend that the Courts below erred in accepting the unilateral cancellation of the sale in his favour. The certified copy of the cancellation deed was marked as Ex.A2.

13. Pointing out the fact that the plaintiff himself has marked the certified copy of the cancellation deed which came to be executed after the suit, Mr.K.Selvaraj, learned counsel would contend that it is a case of collusion between the plaintiff and the defendants 1 and 2. He would also draw the Court's attention to the fact that the defendants 1 and 2 had remained exparte before the trial Court.

14. Contending contra, Mr.S.Sounthar, learned counsel appearing for the respondent would contend that the conclusion of the trial Court that the 3rd defendant was aware of the agreement is based on the evidence and as such the same cannot be interfered with in the second appeal. He would also point out that the plaintiff has categorically pleaded that he has been ready and willing to perform his contract. According to him, the fact that the suit was filed on the last date fixed for performance of the contract itself would show that the plaintiff is always been ready and willing to perform the contract.

15. Mr.S.Sounthar, learned counsel would further contend that the validity of Ex.A2, the unilateral cancellation, need not be gone into the present suit. If the agreement is found to be true and valid and the 3rd defendant is found to have knowledge of the agreement prior to the sale deed in his favour. The suit for specific performance can be decreed by directing the 3rd defendant to join execution of the sale deed to transfer the title that resides in him as pointed out by the Hon'ble Supreme Court in Durga Prasad Vs. Deep Chand reported in AIR 1954 SC 75.

16. Mr.S.Sounthar, learned counsel would also point out that the defendants 1 and 2 who had suffered a decree before the trial Court were not made parties to the appeal and consequently, they have also not been made parties to the second appeal. Mr.S.Sounthar would further submit that whether the decree for specific performance granted against the defendants 1 and 2 can be reversed in this second appeal in their absence, even if I agree with the learned counsel for the appellant.

17. I have considered the rival submissions.

18. I do not think that the legal issue raised by the learned counsel for the respondent regarding non impleading of the defendants 1 and 2 would apply to a decree for specific performance. Needless to say that the decree proceeding on common ground to all the defendants, including the subsequent purchaser. The subsequent purchaser can raise all the pleadings and defences open to the agreement vendors in a suit for specific performance. Therefore, it is possible for one of the defendants namely the subsequent purchaser in this case to successfully challenge the decree even in the absence of the agreement vendors who, according to the appellant are colluding with the respondent. Order 41 Rule 4 of Civil Procedure Code reads as follows:

"4. One of Several plaintiffs or defendants may obtain reversal of whole decree where it proceeds on ground common to all

- Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceed on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiff or defendants, as the case may be."

19. The question as to whether the appellate Court could reverse the judgment of the trial Court or the second appellate Court could reverse the judgment of the first appellate Court, in the absence of some of the parties to the suit is no longer res integra. The Hon'ble Division Bench of this Court in S.Ismail and another Vrs. I.Rajkumar Bhagwat Saran reported in 1996-1-L.W.776 had gone into the specific question and had held that even in the absence of some of the defendants as parties to an appeal, the appellate Court or the second appellate Court as the case may be, can reverse the judgment of the trial Court or the lower appellate Court, in view of Order 41 Rule 4 of C.P.C.,. After comparing the provisions of Order 41 Rule 4 of C.P.C., with that of Order 41 Rule 33 of C.P.C., the Division Bench had observed as follows:

"24. No doubt, in order that a Court may exercise its power under Order 41, Rule 33 and grant relief to a person, one of the requirements is that such person should be a party to the appeal. But such a requirement is not found in Order 41, Rule 4, C.P.C. When a court wants to grant a positive relief, it has to act under Order 41, Rule 33, CPC. But, where the Court finds it necessary to set aside a decree obtained by the plaintiff on any ground common to all the defendants,

the Court may reverse or vary the decree in favour of all the defendants under Order 41, Rule 4, CPC. The constraint in Rule 33 of Order 41 is absent in Rule 4. Under the said rule, the only requirement is that the decree passed by the trial Court is on a ground common to all the defendants. If there is an appeal by some of the defendants only and other defendants are not made parties to the appeal, the court while allowing the appeal can set aside the entire decree and give the benefit also to persons who are not parties to the appeal. This position is well settled and has been accepted by all the High Courts. In *Dhu Tlaloor Subbayya v. Paidigantam Subbayya* (I.L.R.30 Mad.470), a Full Bench of this Court held that when the decree of the lower court proceeds on a ground common to all the defendants, the appellate court may, on appeal by one of the defendants against the whole decree, reverse the decree in so far as it affects other defendants though they have not joined in the appeal. The Full Bench has also pointed out that it is enough if any one ground on which the decree appealed against is found common to all the defendants.

25. In *Gurunath v. Venkatesh* (AIR 1937 Bom. 101), a decree was passed against three persons with costs. It was executed against one of them. The other two filed an appeal against the decree. When the decree was reversed, the person against whom the decree was executed earlier and costs had been recovered, was held entitled to restitution under Section 144 of the Code of Civil Procedure, though he was not a party to the appeal. The same principle has been laid down in *Chacko Joseph v. Varghese Markose* (AIR 1957 Ker. 181), *Brij Mohanlal Murli Dharv. Raj Kishore* (AIR 1959 P&H 555), *Chandadevi v. GM., Eastern Rly.* (AIR 1961 Pat 301), *Thakur Ram Janki v. Jago Singh* (AIR 1962 Pat 131) and *Hanuman v. Shakru* (AIR 1972 Raj 176). In *Thakur Ram Janki v. Jago Singh* (AIR 1962 Pat 131) referred to above, an appeal was filed by some of the defendants against the decree. Two of the defendants, who did not file such appeal, died during the pendency of the said appeal. A Division Bench of the Patna High Court considered the question and held that whether they died before the filing of the appeal or after the filing of the appeal, it did not matter and the benefit of the decree which might be passed by the appellate court was available to the legal representatives of the deceased non-appealing defendants. In *Lal Chand v. Radhakishan* (AIR 1977 SC. 789), a joint eviction decree was passed against several defendants. Two of them surrendered possession and three filed an appeal. During the

pendency of the appeal, one of them died. His widow and son applied for being brought on record as legal representatives. The application was dismissed on the ground that the right to sue did not survive. The Supreme Court held that it was erroneous to treat the appeal as abated on the death of one of the appellants and the appellate court ought to have applied the provisions of Order 41, Rule 4, C.P.C. and heard the appeal on merits. The Court held that in view of the provisions of the Slum Clearance Act, the decree for eviction was a nullity and set aside the judgement of the High Court in entirety, dismissing the suit for eviction.

26. In the present case, the decree against defendants 1 to 4 is on the only ground that they all trespassed together and removed the movables of the plaintiffs. No distinction has been made as between any of the defendants 1 to 4. Hence, when the decree is set aside as against the appellants, who are defendants 3 and 4, necessarily it has to be set aside in entirety even as against defendants 1 and 2."

In view of the categorical pronouncement of the Division Bench of this Court, I do not think that the absence of the defendants 1 and 2 as parties to this appeal would be a deterrent to consider the appeal on merits.

20. On the questions of law as to whether the appellant can be termed as a bonafide purchaser for value without notice, Mr.K.Selvaraj, would point out that the plaintiff in the plaint has not specifically pleaded that the 3rd defendant was aware of the said agreement in favour of the plaintiff and he ventured the purchase of the suit property despite such knowledge. In the written statement filed by the 3rd defendant, it is very clearly pleaded that he is a bonafide purchaser for value without notice of the prior agreement. I have already extracted the evidence of the plaintiff/ P.W.1 wherein, he has not positively stated that the 3rd defendant is aware of the said agreement. His evidence, particularly in cross examination neither here nor there. He has not attributed knowledge of the agreement on the 3rd defendant. The trial Court faulted the 3rd defendant for not producing the encumbrance certificate which he claimed to have obtained before entering into the sale deed. I find that the trial Court has overlooked the evidence while deciding the issue only on the ground that suit agreement is found to be true and valid. Admittedly, it is an unregistered agreement. The same will not be reflected in the encumbrance certificate even assuming that the 3rd defendant had obtained one. Except the uncertain evidence of P.W.1, there is nothing on record imputing knowledge of the suit agreement on the 3rd defendant.

21. The 3rd defendant has been examined as D.W.1. He has specifically stated that he was not aware of the suit agreement. In his chief examination he has clearly stated as follows:

jhth fpiua mf;upbkd;l; tpt&ak; vdf;F bjupahJ. ehd; gzk; bfhLj;J ek;gp fpiuak; th';fpatd; (Bonafide purchaser for value without notice)

22. Surprisingly, I find that, there is no cross examination imputing the knowledge on the 3rd defendant. Undoubtedly, the plaintiff has to prove that the 3rd defendant had knowledge of the agreement. In the absence of such proof, I do not think that the trial Court was right in concluding that the 3rd defendant had knowledge of the agreement. I have already pointed out that the lower appellate Court has not gone into the aspect of knowledge of the agreement on the part of the 3rd defendant. The lower appellate Court had failed to consider the evidence on record. I find the evidence available on record is wholly insufficient to impute the knowledge of the agreement on the 3rd defendant. I therefore conclude that the plaintiff has not established that the 3rd defendant had knowledge of the agreement when he purchased the property under the sale deed dated 21.09.1999.

23. As far as the 1st question of law framed, I find that the plaintiff had stated in the plaint that he has always ready and willing to perform the part of the contract and he had filed the suit on the last date fixed for performance. Therefore, it cannot be said that the plaintiff was not ready and willing to perform his part of the contract or he has not pleaded that he was ready and willing to perform the contract as required under Section 16 (c) of the Specific Relief Act.

24. As regards the 2nd question of law, the question whether the cancellation of the sale deed in favour of the 3rd defendant under Ex.A2 is valid or not, does not really loom large in the present suit for specific performance. Therefore, the result of the appeal will not depend on the answer to the 2nd question of law. In view of the answer to the additional question of law framed to the effect that the 3rd defendant is a bonafide purchaser for value without notice, this appeal has to be necessarily allowed, setting aside the judgment and decree of the Courts below. I do not find any alternative prayer for refund of advance in the plaint. In view of Section 22 of the Specific Relief Act in the absence of the prayer, I do not think I can grant alternative prayer also.

25. In view of the above, the second appeal is allowed. The judgment and decree of the Courts below are set aside. The suit in O.S.No.188 of 1999 renumbered as O.S.No.145 of 2004 will stand dismissed. However, there will be no order as to costs in

this appeal. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS IV)

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Sub Assistant Registrar

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To

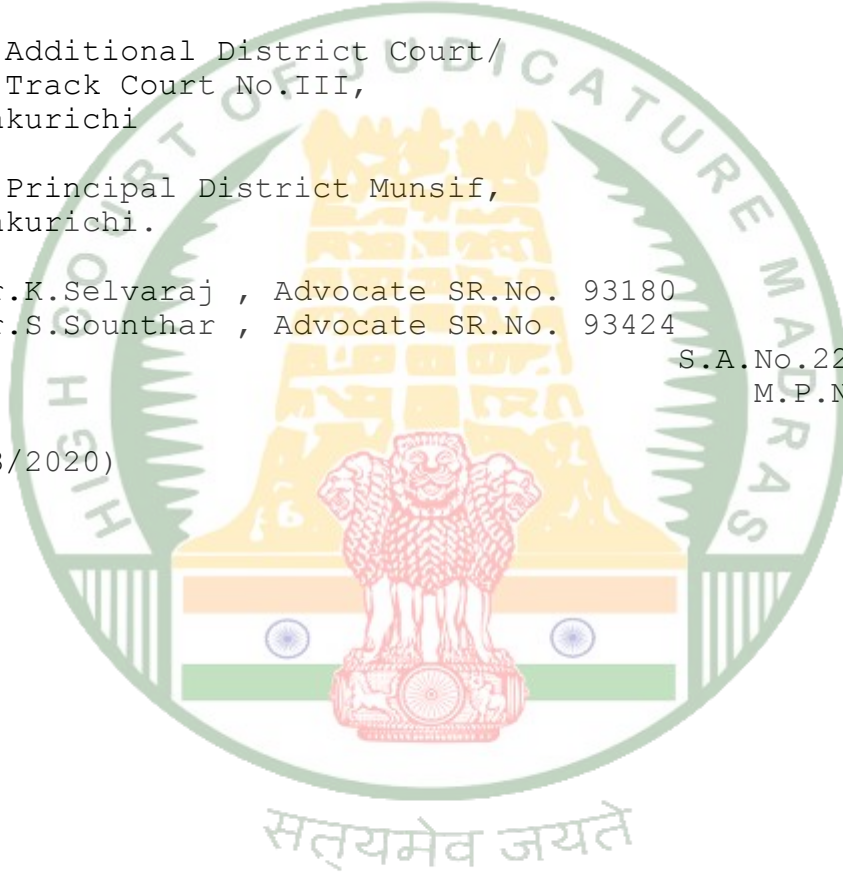
1. The Additional District Court/
Fast Track Court No.III,
Kallakurichi
2. The Principal District Munsif,
Kallakurichi.

+1cc to Mr.K.Selvaraj , Advocate SR.No. 93180

+1cc to Mr.S.Sounthar , Advocate SR.No. 93424

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A.SK(18/03/2020)



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