

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 22.10.2019	Delivered on .11.2019
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THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

S.A.No.1030 of 2019

and CMP No.22375 of 2019

1. A.Maheswari

2. C.Arumugham ..Appellants/ Defendants 2&3

vs.

1. R.Balasubramaniam

A. Shankaran (died)

2. S.Parvatham

3.Sivasubramaniam

... Respondents/Plaintiff& LRS of 1st defendant

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code against the Judgment and Decree dated 31.01.2019 made in A.S.No.44 of 2015 on the file of the learned V Additional District and Sessions Court, Coimbatore confirming the judgment and decree dated 18.03.2015 made in O.S.No.984 of 2010 on the file of the learned Principal Sub Court, Coimbatore.

For Appellants : Mr.N.Manoharan

J U D G E M E N T

The defendants in OS No.984 of 2010, having suffered a decree for specific performance at the hands of the Trial Court and confirmed by the Lower Appellate Court, have come up with this Second Appeal.

2. It is the case of the plaintiff that the defendants agreed to sell the suit property for a total consideration of Rs.9,00,000/- on 16.02.2010. An advance of Rs.3,00,000/- was paid by the plaintiff on the very same day and a time of 9 months was fixed for payment of the balance of sale consideration and execution of Sale Deed. Even within a period of 9 months, since the first defendant did not come forward to execute the Sale Deed, the plaintiff issued a notice on 05.10.2010 requiring the first defendant to execute the Sale Deed on receipt of the balance of sale consideration.

3. The first defendant sent a reply claiming that the second defendant, who is his daughter, had obtained a Settlement Deed from him on 26.04.2010 and she had in turn settled the property on her husband/the third defendant on 18.05.2010. It was also claimed by the first defendant that he had filed a suit in OS No.522 of 2010 against defendants 2 and 3 seeking cancellation of the Settlement Deed. Since the said process will take a longer time, the first defendant offered to return the advance money and cancel the Sale Agreement. Unwilling to accept the demands made in the reply notice, the plaintiff had filed the suit on 22.10.2010.

4. The first defendant while admitting the agreement contended that the plaintiff was not ready and willing to perform his part of the contract. He would also plead that the Settlement dated 26.04.2010, said to have been executed by him in favour of his daughter, who obtained by fraud and he had taken steps to have the settlement annulled by filing a suit in OS No.522 of 2010.

5. The defendants 2 and 3 filed a separate written statement contending that the agreement has been created by the son of the first defendant in collusion with the plaintiff. Therefore, according to the defendants 2 and 3, the agreement is not true and valid and the plaintiff is not entitled to the relief of specific performance.

6. The Trial Court on a consideration of the evidence on record concluded that the agreement is true and valid. The Trial Court also found that the second defendant as D.W.1 has specifically admitted the knowledge of the agreement entered into by the first defendant with the plaintiff. Since the first defendant who was the executant of the agreement and had admitted the agreement and the receipt of advance of Rs.3,00,000/- on the date of the agreement, the Trial Court concluded that the agreement is true and valid. The Trial Court also found that the plaintiff has always been ready and willing to perform his part of the contract. The Trial Court also took note of the conduct of the plaintiff in suing for specific performance immediately upon the first defendant having sent a reply notice offering to return the advance money on 05.10.2010.

7. On the above findings, the learned Trial Judge granted a decree for specific performance. Aggrieved the defendants 2 and 3, preferred an appeal in AS No.44 of 2015 and the plaintiff preferred a Cross Appeal challenging the non-awarding of cost by the Trial Court.

8. The Lower Appellate Court also concurred with the findings of the Trial Court on the merits of the claim relating to the validity of the agreement dated 16.02.2010 and the readiness and willingness on the part of the plaintiff to have the contract performed. On issue of cost, the Appellate Judge allowed the Cross Appeal and concluded that the plaintiff would be entitled to costs both before the Trial Court as well as the Lower Appellate Court. Aggrieved, defendants 2 and 3 have come by way of this Second Appeal.

9. I have heard Mr.N.Manoharan, learned counsel appearing for the appellant.

10. Mr.Manoharan, learned counsel appearing for the appellant would submit that the plaintiff has not averred that he has always been ready and willing to perform his part of the contract and therefore, the Courts below were not right in granting Specific Performance. The Courts below have considered the question of readiness and willingness and they have on the evidence available come to the factual conclusion that the plaintiff has always been ready and willing to perform his part of the contract. After all readiness and willingness is a state of mind. The plaintiff has in the plaint averred as follows:

"The plaintiff has always been and is ready and willing to perform his part of the agreement by paying the balance of sale price and to get the sale deed executed."

11. It is also seen from the evidence that the plaintiff had issued a notice demanding Specific Performance within the time stipulated under the agreement on 22.09.2010 and upon the receipt of reply notice dated 05.10.2010 issued by the first defendant, the plaintiff has almost immediately on 22.10.2010, filed the suit. Therefore, it cannot be said that the plaintiff was not ready and willing to perform his part of the contract. The conclusions of the Courts below on the question of readiness and willingness cannot be termed as perverse and as such, I do not think that I can interfere with the said findings even assuming that another view is possible.

12. Mr.Manoharan, would next contend that the plaintiff being aware of the alienation made by the first defendant in the form of Settlement Deed dated 26.04.2010, ought to have sued for cancellation of the said instrument, before seeking specific performance of the agreement. This contention of Mr.Manoharan, is based on recent judgment of the Hon'ble Supreme Court in B.Vijaya Bharathi v. P.Savitri and Others, reported in 2018

(11) SCC 761, wherein, a Two Judge Bench of the Hon'ble Supreme Court had made a passing observation which reads as follows:

"17. It must also be noted that though aware of two conveyances of the same property, the plaintiff did not ask for their cancellation. This again, would stand in the way of a decree of specific performance for unless the sale made by Defendant 1 to Defendant 2, and thereafter by Defendant 2 to Defendant 3 are set aside, no decree for specific performance could possibly follow."

13. The law relating to grant of a decree for specific performance where the vendor alienates the property after having entered into an agreement has been subject matter of several decisions of the Hon'ble Supreme Court and High Courts in the past. There were conflicting decisions of various High Courts regarding the manner in which, a suit for specific performance could be dealt with once it is found that the vendor had alienated the property after the agreement. The said question was dealt with by the Three Judge Bench of the Hon'ble Supreme Court in *Lala Durga Prasad and another v. Lala Deep Chand and Others*, reported in AIR 1954 SC 75. After having taken note of the conflict of opinion between various High Courts on the form of the decree that could be granted in a suit for specific performance, wherein, the vendor had sold the property after the agreement but prior to the filing of the suit, the Hon'ble Supreme Court held as follows:

"36. ... But before we decide that, we will consider another question which is bound up with it, namely, the proper form of decree in such cases.

37. The practice of the courts in India has not been uniform and three distinct lines of thought emerge. (We are of course confining our attention to a Purchaser's suit for specific performance). According to one point of view, the proper form of decree is to declare the subsequent purchase void as against the plaintiff and direct conveyance by the vendor alone. A second considers that both vendor and vendee should join, while a third would limit execution of the conveyance to the subsequent purchaser alone.

38. The only statutory provisions which bear on this point are Section 91 of the Indian Trusts Act, 1882, Section 3 of the Specific Relief Act, 1877, illustration (g), and Section 27 of that

Act, and Section 40 of the Transfer of Property Act.

39. Section 91 of the Trusts Act, does not make the subsequent purchaser with notice a trustee properly so called but saddles him with an obligation in the nature of a trust (because of Section 80) and directs that he must hold the property for the benefit of the prior "contractor", if we may so describe the plaintiff,

"to the extent necessary to give effect to the contract."

Section 3 illustration (g) of the Specific Relief Act makes him a trustee for the plaintiff but only for the purposes of that Act. Section 40 of the Transfer of Property Act enacts that this obligation can be enforced against a subsequent transferee with notice but not against one who holds for consideration and without notice. Section 27 of the Specific Relief Act does not carry the matter any further. All it says is that specific performance 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".

None of this helps because none of these provisions directly relate to the form of the decree. It will therefore be necessary to analyse each form in the light of other provisions of law.

40. First, we reach the position that the title to the property has validly passed from the vendor and resides in the subsequent transferee. The sale to him is not void but only voidable at the option of the earlier "contractor". As the title no longer rests in the vendor it would be illogical from a conveyancing point of view to compel him to convey to the plaintiff unless steps are taken to re-vest the title in him either by cancellation of the subsequent sale or by reconveyance from the subsequent purchaser to him. We do not know of any case in which a reconveyance to the vendor was ordered but Sulaiman, C.J. adopted the other course in Kali Charan v. Janak Deo. He directed cancellation of the subsequent sale and conveyance to the

plaintiff by the vendor in accordance with the contract of sale of which the plaintiff sought specific performance. But though this sounds logical the objection to it is that it might bring in its train complications between the vendor and the subsequent purchaser. There may be covenants in the deed between them which it would be inequitable to disturb by cancellation of their deed. Accordingly, we do not think that is a desirable solution.

41. We are not enamoured of the next alternative either, namely, conveyance by the subsequent purchaser alone to the plaintiff. It is true that would have the effect of vesting the title to the property in the plaintiff but it might be inequitable to compel the subsequent transferee to enter into terms and covenants in the vendor's agreement with the plaintiff to which he would never have agreed had he been a free agent; and if the original contract is varied by altering or omitting such terms the court will be remaking the contract, a thing it has no power to do; and in any case it will no longer be specifically enforcing the original contract but another and different one.

42. In our opinion, the proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff. This was the course followed by the Calcutta High Court in Kafiladdin v, Samiraddin, and appears to be the English practice. See Fry on Specific Performance, 6th edition, page 90, Para 207; also Potter v. Sanders. We direct accordingly."

14. Unfortunately, the decision of a Larger Bench of the Hon'ble Supreme Court rendered as early as in 1954, was not brought to the notice of the Bench which decided B.Vijaya Bharathi's case, referred to supra. In Vijay A. Mittal and others v. Kulwant Rai (dead) through Legal Representatives and another, reported in 2019 (3) SCC 520, another Two Judge Bench of the Hon'ble Supreme Court had an occasion to consider the same question and after referring to judgment in Lala Durga

Prasad's case, referred to supra, the Hon'ble Supreme Court had this to say:

"35. This takes us to examine another question which arises in this case but was not taken note of by the Courts below while decreeing the suit. It relates to the nature of decree to be passed in this case.

36. The question arises in this way. The effect of the decree passed in this case is that the original Defendant 1, now represented by his legal representatives (Appellant Nos.1- 4 and 7) along with legal representatives of original defendant No. 2, i.e., (i) Rita Mittal, (ii) Akanksha and (iii) Akshay Mittal, and defendant No. 3 (Appellant No.6 herein) are required to execute the sale deed in favour of legal representatives of original plaintiff No.1, i.e., respondent No.1(i) Sudesh Goel, (ii) Ajay Goel and (iii) Sanjay K. Goel and Atul Kumar, plaintiff No.2 (respondent No.2 herein) jointly.

37. Yet another effect of the decree is that the transaction of sale of suit property between original defendant No.1, now represented by his legal representatives (Appellant Nos.1 - 4 and 7) and defendant No.2 (Appellant No.5 herein), now represented by his legal representatives and defendant Nos.3 (Appellant No.6 herein) is declared bad in law and stands nullified. As a consequence thereof, legal representatives of defendant No.1 (Appellant Nos.1 - 4 and 7) are required to return Rs.48,000/- to original defendant No.2 (appellant No.5 herein), now represented by his legal representatives and defendant No.3 (appellant No.6 herein) in the absence of any contract to the contrary in this behalf between the parties. The reason being that once the sale is declared bad, the transaction of sale fails and, therefore, the seller (defendant No.1) has no right to retain the sale consideration with himself and has to refund the sale consideration to the buyers (defendant Nos.2 & 3) [See Section 65 of the Indian Contract Act].

38. The question arose before this Court in Durga Prasad V. Deep Chand, as to what form of decree should be passed in the case of specific performance of contract where the suit property is sold by the defendant, i.e., the owner of the suit property to another person and later he suffers a

decree for specific performance of contract directing him to transfer the suit property to the plaintiff in term of contract.

39. The learned Judge, Vivian Bose, J. examined this issue and speaking for the Bench in his inimitable style of writing, held as under:

"Where there is a sale of the same property in favour of a prior and subsequent transferee and the subsequent transferee has, under the conveyance outstanding in his favour, paid the purchase-money to the vendor, then in a suit for specific performance brought by the prior transferee, in case he succeeds, the question arises as to the proper form of decree in such a case. The practice of the Courts in India has not been uniform and three distinct lines of thought emerge. According to one point of view, the proper form of decree is to declare the subsequent purchase void as against the prior transferee and direct conveyance by the vendor alone. A second considers that both vendor and vendee should join, while a third would limit execution of the conveyance to the subsequent purchaser alone. According to the Supreme Court, the proper form of decree is to direct specific performance of the contract between the vendor and the prior transferee and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the prior transferee. He does not join in any special covenants made between the prior transferee and his vendor; all he does is to pass on his title to the prior transferee."

40. We, therefore, consider it just and proper and with a view to end this litigation between the parties, which is pending since 1982 and also to balance the equities amongst the parties that defendant No.1 through his legal representatives (Appellant Nos. 1 - 4 and 7 herein) would return a sum of Rs.48,000/- to the legal representatives of defendant No.2 (Appellant No.5 herein) and defendant No. 3 (Appellant No.6 herein). This direction we give by taking recourse to our powers under Article 142 of the Constitution of India to do complete justice between the parties to the lis because we do not want another round of litigation to go on for

years in future between the defendants inter se for recovery of this amount.

41. In the light of the foregoing discussion, the appeal is disposed of by modifying the judgment and decree as under:

41.1. The legal representatives of defendant No.1 (Appellant Nos.1 - 4 and 7) shall deposit a sum of Rs. 48,000/- in the executing Court for being paid to the legal representatives of defendant No.2, i.e., (i) Rita Mittal, (ii) Akanksha and (iii) Akshay Mittal and Defendant No.3 (Appellant No.6 herein) within three months as an outer limit.

41.2. The legal representatives of original Plaintiff No.1, (respondent No.1 herein) i.e., (i) Sudesh Goel, (ii) Ajay Goel, and (iii) Sanjay K. Goel and Atul Kumar, plaintiff No.2 (respondent No.2 herein) shall deposit in the executing Court a sum of Rs.41,000/- for being paid to the legal representatives of original Defendant No.1 (Appellant Nos.1 to 4 and 7 herein) within three months as an outer limit.

41.3. The original defendant No.1, now represented by his legal representatives (Appellant Nos.1 - 4 & 7) along with legal representatives of original defendant No. 2 and defendant No. 3 (Appellant No.6 herein) will jointly execute the sale deed in favour of legal representatives of original plaintiff No.1, i.e., respondent No.1 herein (i) Sudesh Goel, (ii) Ajay Goel and (iii) Sanjay K. Goel and Atul Kumar, plaintiff No.2 (respondent No.2 herein) and hand over the possession of the suit property to them simultaneously and then will withdraw the money deposited for them in Court.

15. In view of the above, I find that the observation of the Two Judge Bench in B.Vijaya Bharathi's case, relied upon by the learned counsel for the appellant could only be treated as an obiter since it runs counter to the conclusion of the Larger Bench of the Hon'ble Supreme Court in Lala Durga Prasad's case, referred to supra.

16. I am therefore not inclined to accept the contentions of Mr.Manoharan, to the effect that the plaintiff in a suit for specific performance where there is an alienation of the

property, after the agreement but prior to the suit, should seek to set aside such alienation, before he could be favoured with the decree for specific performance, as the said contention of the learned counsel runs counter to a Larger Bench decision of the Hon'ble Supreme Court in Lala Durga Prasad's case, referred to supra. I therefore find no question of law much less substantial question of law enabling me to entertain the Second Appeal. Hence the Second Appeal is dismissed without being admitted. There will be no order as to costs. Consequently, the connected miscellaneous petition is closed.

jv

Sd/-

Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

To

1. The Judge, V Additional District and Sessions Court,
Coimbatore.

2. The Judge, Principal Sub Court,
Coimbatore.

+1cc to Mr.N.Manoharan , Advocate SR.No. 90896

+1cc to Mr.V.Anandamoorthy , Advocate SR.No. 90633

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and CMP No.22375 of 2019

pa

A.SK(03/03/2020)

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