

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 07.01.2020

Date of Verdict : 23.01.2020

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

S.A.No.914 of 2005
and C.M.P.No.12686 of 2005

1. R.Radhakrishna Naidu (Died)
2. Munirathinamal
3. Purushothaman
4. Ravi
5. Bharathi
6. Shanthi

(Appellants 2 to 6 are brought on record as LR's of the deceased sole appellant vide order of the Court dated 13.12.2019 made in C.M.P.Nos. 26871, 26873 and 26875 of 2019 in S.A.No. 914 of 2005 by GKIJ)

...Appellants/1st Respondent/Plaintiff

Vs.

1. Sasikala
2. Ganapathi Naidu
3. Pachaiaammal
4. Vittal

...1st Respondent/Appellant/4th Defendant
...Respondents
2 to 4/Respondents 2 to 4/Defendants 1 to 3

Prayer :- This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 19.01.2004 made in A.S.No.5 of 2002 on the file of the Additional District Court, Fast Track Court No.V, Chengalpattu, reversing the judgment and decree dated 30.08.2001 made in O.S.No.76 of 1986 on the file of the Subordinate Court, Tiruvallur.

For Appellants : M/s.V.Srimathi

For Respondents

For R1 : Mr.S.Balasubramanian

For R2 to R4: Notice served

JUDGMENT

This second appeal is directed as against the judgment and decree dated 19.01.2004 passed in A.S.No.5 of 2002 on the file of the Additional District Court, Fast Track Court No.V, Chengalpattu, reversing the judgment and decree dated 30.08.2001 made in O.S.No.76 of 1986 on the file of the Subordinate Court, Tiruvallur.

2. For the sake of convenience, the parties are referred to as per their ranking in the trial Court.

3. The case of the plaintiff in brief is as follows :-

3.1. The suit is filed for specific performance and permanent injunction. The first defendant is the brother of the plaintiff. The plaintiff and the first defendant were the members of a joint Hindu family and the suit properties were also their joint family properties. They divided their shares in the joint family properties by a partition deed dated 10.03.1983. Accordingly, the suit properties were allotted to the first defendant. The third defendant is the minor and he represented by the second defendant. The defendants 1 to 3 were decided to sell the property to the plaintiff for the sale consideration of Rs.36,000/-. The first defendant received a sum of Rs.12,400/- as advance from the plaintiff, at the time of executing the agreement. It was also agreed that the plaintiff should discharge the loan due to Tiruvallur Land Development Bank amounting to Rs.3,600/-.

3.2. Further the first defendant had also executed an equitable mortgage deed dated 28.01.1986, in favour of one Saroja ammal, W/o. Nandagopal Naidu for Rs.20,000/-. On 28.01.1986, the first defendant for himself and also for the minor son third defendant executed a letter whereby, the suit property was delivered to the mortgagee to be enjoyed in lieu of interest. Therefore, the possession of the suit property was delivered to the said mortgagee. Thereafter, the mortgagee cultivated the suit property and also raised paddy and harvested the same in the month of April 1986. It was agreed by the terms of agreement that the plaintiff should discharge the above said mortgage. Accordingly, the plaintiff discharged the said sum of Rs.20,000/- on 09.08.1986 and also made endorsement on the mortgage deed. Accordingly, the mortgage deed duly discharged and handed over to the plaintiff.

3.3. In fact, the crops situated in the suit property valued at Rs.6,000/- and the mortgagee received the said sum and also delivered the possession of the suit property to the plaintiff. Hence from 09.08.1986, the plaintiff alone is in possession and enjoyment of the suit property. Thereafter, the plaintiff cultivated the suit property by

drawing water from the well belonging to the plaintiff. Therefore, the defendants received major portion of the sale consideration out of Rs.36,000/- such as, the plaintiff had paid a sum of Rs.12,400/- as advance and Rs.20,000/- paid to the mortgagee to discharge the mortgage. The balance sale consideration payable by the plaintiff is only Rs.3,600/- that too towards loan due to the Tiruvallur Land Development Bank. In fact, the plaintiff has paid Rs.6,000/- to the mortgagee for crops and it was excess to the sale consideration.

3.4. One Renganatha Naidu and his family members are the owners of the land adjacent to the suit property. The fourth defendant is the daughter-in-law of the said Renganatha Naidu. They had full knowledge about the enjoyment of the suit property by the mortgagee viz., Saroja ammal in lieu of interest and also aware of the agreement for sale in favour of the plaintiff by discharging the mortgage and subsequent possession and enjoyment of the suit property by the plaintiff. While being so, with the view to take away the suit property, the fourth defendant colluded with her father-in-law purchased the suit property from the defendants 1 to 3. Due to some family dispute, the first defendant colluded with the fourth defendant and executed the sale deed in favour of the fourth defendant. The sale deed is not a true and genuine one as such she is not a bonafide purchaser for the valid sale consideration, without notice of earlier agreement for sale. Thereafter, on 28.08.1986 the fourth defendant along with other her assistants attempted to trespass into the suit property. Hence the suit.

4. Though notice served to the defendants 1 to 3, they did not appear before the trial Court and they were set exparte. Resisting the case of the plaintiff, the fourth defendant alone filed written statement and stated that the defendants 1 to 3 never agreed to sell the suit property to the plaintiff for the sale consideration of Rs.36,000/-. The very sale agreement itself concocted one for the purpose of maintaining this false and frivolous suit. The plaintiff filed the present suit with collusion of his father and the first defendant herein. In fact, the defendants 1 to 3 conveniently remained absent and set exparte explains their collusion. There was no mortgage deed between the defendants 1 to 3 and one Saroja and she was never put in possession and enjoyment of the suit property.

4.1. The fourth defendant completely denied the usufructual mortgage and no point of time the mortgagee was in possession of the suit property and also denied the execution of mortgage deed dated 28.01.1986. In fact, the plaintiff and the said Saroja ammal are very close relatives and the plaintiff secured the mortgage deed from the said Saroja ammal in collusion and to make use the same for the purpose of filing this false and frivolous suit.

The fourth defendant is the bonafide purchaser of the suit property for the valuable sale consideration under the registered sale deed dated 21.08.1986. On the date of sale itself, she was put in possession and enjoyment of the suit property. Thereafter, she has paid kist to the suit property. From the date of purchase, the fourth defendant only raised crops in the suit property and in fact she discharged loan due to the Tiruvallur Land Development Bank. Therefore, she prayed for dismissal of the suit

5. On the side of the plaintiff, they examined P.W.1 to P.W.3 and were marked Ex.A.1 to Ex.A.7. On the side of the defendants examined D.W.1 to D.W.3 and were marked Ex.B.1 to Ex.B.4. The Advocate Commissioner's report and rough sketch marked as Ex.C.1 to Ex.C.3. Based on the material produced on record and considering both the oral and documentary evidence adduced by the respective parties and also the submissions made, the trial Court decreed the suit filed in favour of the plaintiff. Aggrieved by the same, the fourth defendant preferred an appeal suit in A.S.No.5 of 2002 and the first appellate Court allowed the appeal and dismissed the suit filed by the plaintiff. Aggrieved by the same, the plaintiff preferred this present second appeal.

6. At the time of admission of this second appeal on 10.09.2005, the following substantial questions of law were formulated for consideration:-

"1. In order to prove readiness and willingness in a suit for specific performance, whether a pre suit notice is mandatorily required?

2. Whether the appellate Courts finding that the Ex.A.5 is not enforceable is contrary to its own findings?"

7. The learned counsel appearing for the appellant/plaintiff submitted that the fourth defendant was examined as D.W.1 and she categorically admitted the execution of agreement for sale and therefore the admitted fact need not be proved. Further the evidence of D.W.1 contrary to the written statement filed by her. Considering the above facts and circumstances, the trial Court rightly decreed the suit in favour of the plaintiff. Unfortunately, the first appellate Court only on presumption, reversed the findings given by the trial Court and dismissed the suit without any discussion and without stating any reasons. Further the first appellate Court did not believe the case of the plaintiff for no reason.

8. The learned counsel appearing for the first respondent/fourth defendant submitted that the alleged agreement for sale is not a registered one. Further the

person who seeks the relief of specific performance, he has to prove the readiness and willingness to perform his part of the contract. Since the defendants 1 to 3 conveniently absent and they were set ex-parte, the readiness and willingness does not arise. But the fourth defendant denied the execution of the very sale agreement dated 09.08.1986 itself and the mortgage deed dated 28.01.1986 executed in favour of one Saroja ammal. The duty of the plaintiff is that he has to prove that the above documents, which were executed in the above said transaction. The sale deed executed in favour of the fourth defendant is a genuine one and the fourth defendant purchased the suit property for the valid sale consideration and she is a bonafide purchaser. He relied upon the following judgments of this Court :-

1. 1977 (2) MLJ 431 - Arunachala Thevar and ors
Vs.

Govindarajan Chettiar and ors.

2. 2008 (4) MLJ 878 - M.C.Manickam Chettiar Vs.
Indrani Karmegam and 4 ors.

3. 2014 (4) LW 686 - K.Rajendran Vs. K. Chinnappa
Gounder & anr

9. Heard Mr.V.Srimathi, learned counsel appearing for the appellant/plaintiff and Mr.S.Balasubramanian, learned counsel appearing for the first respondent/fourth defendant. Though notices served to the respondent 2 to 4, no one has appeared on behalf of them.

10. The suit is for specific performance and permanent injunction. According to the plaintiff, he entered into sale agreement with the defendants 1 to 3 on 09.08.1986 and paid a sum of Rs.12,400/- as advance and part of the sale consideration. The total sale consideration was fixed as Rs.36,000/-. It was also agreed by the plaintiff to discharge the loan due to the Tiruvallur Land Development Bank amounting to Rs.3,600/-. The plaintiff also discharged the mortgage by payment of sum of Rs.20,000/- on 09.08.1986 to one Saroja ammal the mortgagee. On the date of discharge of the said mortgage an endorsement was also made to that effect and the possession of the suit property was handed over to the plaintiff. In fact the plaintiff also paid a sum of Rs.6,000/- to the mortgagee for the crops raised by her. She was put in possession of the suit property for enjoyment in lieu of interest.

11. The suit property originally belonged to the defendants 1 to 3 and it was partitioned by them by partition deed dated 10.03.1983 which was marked as Ex.A.1. The agreement for sale dated 09.08.1986 was marked as Ex.A.2. The fourth defendant denied the very execution of sale agreement Ex.A.2. Therefore, the plaintiff has to

prove his case that the sale agreement as a genuine and valid one. The plaintiff was examined as P.W.1 and P.W.2 and P.W.3 are the attestors of Ex.A.2 the sale agreement. The sale agreement was executed in favour of the plaintiff on 09.08.1986. Whereas Ex.A.3 is the receipt dated 07.11.1986 for payment of Rs.3,649.40 in favour of the Tiruvallur Land Development Bank by the plaintiff. The mortgage deed marked as Ex.A.4 and the receipt dated 09.08.1986 was marked as Ex.A.5. All these documents were subsequent to the sale agreement. The plaintiff also failed to examine the executant of the sale agreement Ex.A.2 viz., the defendants 1 to 3, to prove its genuineness.

12. In fact, the mortgage deed dated 28.01.1986 executed by the first defendant in favour of one Saroja ammal was registered one. But the Ex.A.6, the possession letter executed by the first defendant was not registered one and as such the possession and enjoyment of the suit property by the mortgagee is doubtful. Further according to the plaintiff, he had paid a sum of Rs.6,000/- to mortgagee for the crops raised by her, at the time of redemption of mortgage. The said endorsement was marked as Ex.A.7. Though the said Saroja ammal was very much alive, the plaintiff did not chose to examine her to prove the mortgage, redemption of mortgage and also payment of Rs.6,000/- to her.

13. In fact the said mortgagee viz., Saroja ammal is not the resident of the place in which, the suit property is situated. She is an outsider. In fact, the plaintiff did not produce any document to show that the mortgagee was in possession and enjoyment of the suit property from the date of mortgage. More over, the plaintiff failed to examine the said Saroja ammal the mortgagee as such, he miserably failed to prove his case. Hence, on the date of executing the mortgage deed, the possession was not handed over to the mortgagee and after discharge of the mortgage deed, she was not handed over the possession to the plaintiff. Further the sale agreement was executed by the first defendant on 09.08.1986 in favour of the plaintiff. Within the period of 20 days, ie., on 29.08.1986, the plaintiff filed the suit for specific performance.

14. Ex.A.4 the mortgage was executed on 28.01.1986 and a sum of Rs.6,000/- was paid on 09.08.1986. Whereas the fourth defendant purchased the suit property from the defendants 1 to 3 on 21.08.1986. Thereafter, the fourth defendant also paid kist for the suit property before the revenue authorities, which was marked as Ex.B.2. Thereafter, the fourth defendant also paid a sum of Rs.3,685.85 to the Land Development Bank, Tiruvallur, which was marked as Ex.B.4. The sale deed Ex.B.1 is a registered one and to prove the same, the attestors of the said sale deed were examined as D.W.2 and D.W.3.

15. It is also seen from the records, the Advocate Commissioner was appointed and the Advocate Commissioner harvested the crops raised in the suit property and deposited the sale proceeds into the Court. Therefore, the plaintiff did not prove his possession and enjoyment of the suit property on the date of filing of the suit. The sale agreement was executed in favour of the plaintiff on 09.08.1986 and the suit came to be filed within 20 days viz., on 29.08.1986. Therefore, there is collusion between the plaintiff and the defendants 1 to 3 and created the sale agreement and subsequent documents to file the false and frivolous suit.

16. The allegations as against the fourth defendant is that she along with her relatives attempted to trespass into the suit property. Whereas the prayer sought for in the plaint is against all defendants. That apart, the fourth defendant filed written statement and categorically denied the very execution of the sale agreement itself. Further stated that for the valid sale consideration, the suit property was purchased by her by a registered sale deed dated 21.08.1986. Even then, the plaintiff did not even chose to challenge the sale deed executed in favour of the fourth defendant. Therefore, the fourth defendant is the genuine and bonafide purchaser and the plaintiff is not at all entitled for the relief of specific performance.

17. In this regard, the learned counsel appearing for the first respondent/fourth defendant cited the judgment of this Court reported in 1977 (2) MLJ 431 in the case of Arunachala Thevar and ors Vs. Govindarajan Chettiar and ors., and the head notes are extracted as follows :-

"..... 4th Defendant could not be said to have willfully abstained himself from making any enquiry or to have been grossly negligent in any manner while purchasing the property, nor was there any evidence to show that property was in possession of any other person than vendors themselves so as to put 4th Defendant on notice as provided under Section 3 of Act. The 4th Defendant had established all four elements enumerated in Section 19(b) of Specific Relief Act, 1963, so as to enable him to claim protection under said Clause (b), and to retain benefit of transfer in his favour. Plaintiffs had not only failed to shatter evidence of 4th Defendant, but had also miserably failed to establish their case by placing convincing and satisfactory materials to satisfaction of this Court.

Judgment and decree of trial Court were confirmed. Appeal dismissed"

18. In another judgment reported in 2008 (4) MLJ 878 in the case of M.C.Manickam Chettiar Vs. Indrani Karmegam and 4 ors., the Madurai Bench of this Court held as follows :-

"37. The learned Counsel for the second defendant would cite the following decisions:

(i) Arunachala Thevar and others v. Govindarajan Chettiar and others reported in 1977 (2) M.L.J 431 which would highlight as to who could be termed as bona fide purchaser for value without notice of prior agreement to sell. An excerpt from it, would run thus:

"7. Now we shall find out the legal position with reference to the burden of proof that is expected from either of the parties. Section 19, clauses (a) and (b) of the Specific Relief Act, 1963, reads as follows:- "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....."

These clauses of Section 19 of the New Act corresponded to clauses (a) and (b) of Section 27 of the old Specific Relief Act. On a plain reading of the above clauses, it appears that clause (a) only lays down the general principle that it is only a party to the contract who can be sued. In other words, this clause recognises and follows the general rule that a stranger to the contract is not a proper or necessary party to a suit to enforce it; but clause (b) provides exceptions to the general rule, according to which a subsequent purchaser, in order to successfully resist a suit for specific performance of a prior agreement for sale, must establish that he is a purchaser for value without notice of the general agreement of sale and he paid the consideration money for the

sale before he had notice of the prior agreement. Clause (b) of Section 19 requires four elements to be proved to successfully claim the benefit of the exception, viz.,

1. that the transfer is for value;
2. that the consideration has been paid;
3. that the subsequent transferee has taken the transfer in good faith; and
4. that both the purchase and the payment of the consideration had been made without notice of the prior contract.

The first two elements are positive and the rest are negative in character. Clause (b) lays stress upon the payment of money by the transferee in good faith and without notice of the original contract, and does not go further. It contemplates a transferee who has got a document executed, who had paid the money in good faith and without notice and who gets the document registered in accordance with law, giving retrospective effect to the transaction from the date of execution. Thus, where a buyer paid full money before the date of the execution of the deed in good faith and before the receipt of the notice of the contract of sale from a buyer, he is a transferee in law from the date of execution of the conveyance within the meaning of Section 19 (b) of the Act and the transferee is protected." सत्यमेव जयते

In this case, my discussion supra would show that the second defendant is also a bona fide purchaser for value without notice.

(ii) Sahadeva Gramani v. Perumal Gramani reported in (2005) 11 Supreme Court Cases 454 which would posit the proposition that after agreement to sell concerned in the lis, the bona fide purchaser without notice of it, should be protected."

19. The learned counsel appearing for the first respondent/fourth defendant also relied upon the judgment of the Madurai Bench of this Court reported in 2014 (4) LW 686 In the case of K.Rajendran Vs. K. Chinnappa Gounder &

anr, which reads as follows :-

"29. In paragraph - 16 of the plaint, as adverted to earlier, no averment is found place to the effect that the second defendant has purchased the suit property after knowing existence of Ex.A1. In a case like this, the concerned plaintiff has to plead and prove that a subsequent purchaser has purchased the property involved in prior contract after knowing the same. But in the instant case, no specific averment is found place in the amended plaint to the effect that the second defendant has purchased the suit property after knowing Ex.A1. Therefore, in the amended plaint filed on the side of the plaintiff, necessary averments are completely lacking."

20. In the above judgments, this Court held that the plaintiff failed to plead in the plaint that after knowing the sale agreement the purchaser purchased the suit property. In the case on hand, the plaintiff failed to establish his case by placing convincing and satisfactory material to satisfy the Court. In view of the above discussion, this Court does not find any valid reason to interfere with the reasonings and findings rendered by the first appellate Court. Therefore, this Court is of the considered opinion that no substantial question of law involved in this appeal. Be that as it may, all the substantial questions of law formulated by this Court are answered in favour of the fourth defendant and as against the plaintiff.

21. In fine, the second appeal stands dismissed with costs by confirming the judgment and decree dated 19.01.2004 made in A.S.No.5 of 2002 on the file of the Additional District Court, Fast Track Court No.V, Chengalpattu. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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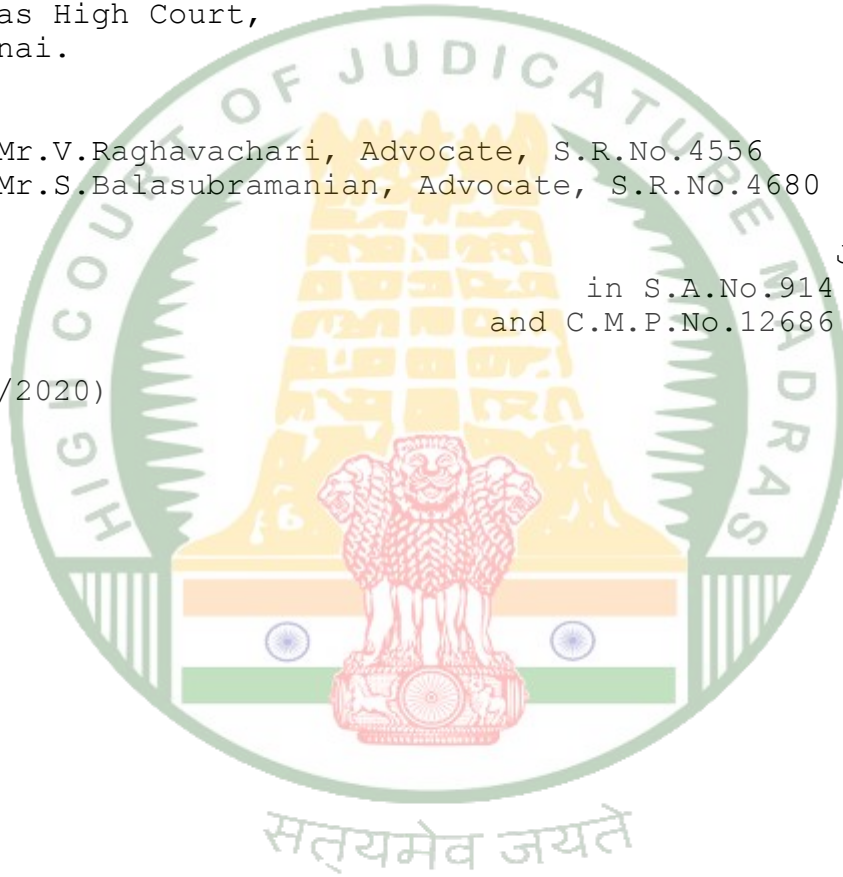
To

1. The Additional District Judge,
Fast Track Court No.V,
Chengalpattu.
2. The Subordinate Judge,
Tiruvallur.
3. The Section Officer,
V.R.Section,
Madras High Court,
Chennai.

+lcc to Mr.V.Raghavachari, Advocate, S.R.No.4556
+lcc to Mr.S.Balasubramanian, Advocate, S.R.No.4680

PM(CO)
CB(01/09/2020)

Judgment
in S.A.No.914 of 2005
and C.M.P.No.12686 of 2005



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