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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :24.03.2021

PRONOUNCED ON :31.03.2021

CORAM:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

A.S.NO.865 OF 2008

1.Jagavirshingh D.Chudasama
2.Vasanth J.Chudasama
3.Khodubha D.Chudasama

.. Appellants/
Respondents 5 to 7

/versus/

1.S.Rangasamy
2.K.Thambana Gounder
3.V.Paramasivam (died)
4.S.Komarasamy

... Respondents 1 to 4/
Appellants 1 to 4

5.K.Dhandapani
6.N.Thangavel
7.K.Chandrasekaran
8.P.Rajendran
9.Palaniammal
10.Natarajan

(R9 and R10 brought on record as LRS of
the deceased R3 vide order of Court dated
21.01.2020 made in C.M.P.Nos.643 to 648
of 2020 in A.S.No.865 of 2008 (SMSJ))

.. Respondents 5 to 8/
Respondents 1 to 4

Prayer:- Appeal Suit has been filed under Section 96 of the Civil Procedure Code, 1908, against the judgment and decree dated 24.02.2006 made in O.S.No.11 of 2004 on the file of the Additional District Court/Fast Track Court No.1, Erode.

For Appellants :Mr.N.Manokaran

For Respondents :Mr.P.Valliappan
for R1, R2,R4, R9 to R10

R5 to R8- No appearance

R3-died



J U D G M E N T

(The case has been heard through Video Conferencing)

The suit under appeal was filed before the Principal Sub-Court, Erode and numbered as O.S.No.679/1998. Later transferred to Fast Track Court, Erode and renumbered as O.S.No.11/2004.

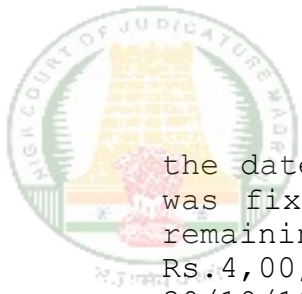
2.The suit initially filed against the sole defendant Dhandapani for specific performance of the agreement to sell the immovable property morefully described in the plaint schedule or in alternate to repay the advance amount of Rs.6,00,000/- with interest and for creation of charge over the suit property till its realisation. Later, the plaint was amended and defendants 2 to 7 were impleaded. After trial, the Court below, granted the alternate relief viz, refund of advance money of Rs.6,00,000/- with 6% interest payable from 30/10/1997 till the date of realisation. It directed the first defendant to pay the suit claim to the plaintiffs and created charge over the suit property to the extent of the plaintiffs' share in it. The defendants 5 to 7 in the suit are the appellants herein. They are the purchasers of the suit property from the first defendant under two sale deeds subsequent to the suit sale agreement.

3.The trial Court judgment creating charge over the property is assailed by the appellants on the ground that, the trial Court erred in creating charge over the property which was sold to the appellants prior to the suit. The appellants are the bonafide purchasers and had no knowledge about the transactions between the first defendant and the plaintiffs. The trial Court ought not to have created charge over the property, since on the date of decree, the first defendant had no right in the suit property. The trial Court, after dismissing the suit against the appellants, ought not to have created charge over the property of the appellants for realisation of money payable by the first defendant.

4.The point for determination in this appeal is whether the trial Court can create a charge over the suit property for realisation of the advance money after holding that the plaintiffs not proved their readiness and willingness to complete the contract and when the appellants had proved that they had purchased the said property prior to the institution of suit for specific performance ?

5.The brief facts of the case as found in the amended plaint:

The suit sale agreement dated 08/11/1996 was entered between the first defendant Dhandapani and plaintiffs for a consideration of Rs.7,00,000/-. Advance of Rs.4,00,000/- paid on



the date of agreement and time to pay the balance Rs.2,00,000/- was fixed as one year. Thereafter, another one year to pay the remaining Rs.1,00,000/- was fixed. Accordingly, a sum of Rs.4,00,000/- on 08/11/1996 and a sum of Rs.2,00,000/- on 30/10/1997 were paid towards part sale consideration. After gathering the balance sale consideration of Rs.1,00,000/- when the plaintiffs demanded the first defendant to execute the sale deed, he evaded the due execution of the deed. Hence, pre suit notice dated 30/10/1998 was issued and suit for specific performance with alternate relief of refund of advance money was filed on 06/11/1998. After filing the suit, the first defendant issued reply notice with false averments denying the execution of the suit sale agreement. Further, he had stated that the suit property comprised in the agreement was partitioned on 27/04/1996 among himself and defendants 2 to 4. Thereafter, he sold his share to the defendants 5 to 7 on 05/11/1998.

6. On getting the encumbrance certificate, the plaintiffs came to know that the defendants 1 to 4 had entered into two partition deeds in respect of suit schedule property and got it registered on 05/11/1998. Thereafter, on the same date, the first defendant sold his share in the property to defendants 5 to 7. These transfers are done to defeat the lawful right of the plaintiffs. Hence, the plaint was amended alleging these records are created subsequent to the sale agreement and will not bind the plaintiffs.

7. The first defendant in his written statement denying the plaint averments, alleged that the suit sale agreement produced along with the plaint is falsely fabricated to attain wrongful gain. The alleged receipt of part sale consideration denied. According to the first defendant, the plaintiffs were running a spinning mill by name M/s Sri Karvembu Textiles (P) Ltd. at Muthur. They purchased a carding machine from this defendant and obtained signatures in blank stamp paper value Rs.10/- and blank paper and blank stamp receipts under the pretext of preparing documents required for sale tax and Income tax department. Due to difference of opinion which arose later, the plaintiffs had fabricated those signed papers and filed this vexatious suit. Absolutely there is no agreement between them with intention to sell the suit property. On 27/04/1996, the first defendant along with his co-sharers divided the property and got allotted share according to the terms of agreement and took possession of the respective share. Subsequently, the first defendant entered into the sale agreement with defendants 5 to 7 on 08/10/1996 for sale consideration of Rs.4,27,700/- and executed two sale deeds in favour of them on 05/11/1998 and delivered possession to them on the same date.



8. The second defendant in his written statement denying the averments set out in the plaint, stated that the suit properties were jointly purchased by defendants 1 to 4 on 10/07/1995 and enjoying the same in common. They got divided the property among themselves through an oral agreement on 27/04/1996 and put in separate possession of their respective portion. Confirming this oral partition agreement, they entered into a registered partition deed on 05/11/1998. Prior to the suit sale agreement, the partition agreement was effected and defendants 1 to 4 took possession of their respective share and enjoying it. The plaintiff in collusion with the first defendant had filed the vexatious suit. The defendants 2 to 4 are not necessary parties. It is open to the plaintiffs to proceed against the property of the first defendant. The partition agreement is prior to the alleged suit sale agreement, therefore there is no valid cause of action as against this defendant.

9. The 5th defendant in his written statement had denied the plaint averments as false, frivolous, vexation and not maintainable. According to the 5th defendant, the defendants 1 to 4 entered into un registered partition agreement with regard to the suit property which they held in common. The first defendant offered to sell his share in the suit properties to this defendant and on 08/10/1996 entered into a written agreement with this defendant (D-5) his wife (D-6) and brother (D-7) to sell the suit property for Rs.4,27,700/- and received advance of Rs 4,00,000/-. First defendant agreed to execute the sale deed within 30 months from the date of the sale agreement. He put the purchasers in possession of the property. After receiving the balance sale consideration, the first defendant executed two sale deeds on 05/11/1998. The defendants are bonafide purchasers for value without notice of any such agreement of sale between the plaintiffs and the first defendant. The plaintiffs and the first defendant have several transactions inter-se and had colluded to file this suit. The suit agreement is later to the agreement of the defendants 5 to 7 with the first defendant. Therefore, the suit agreement cannot be enforced. In his additional written statement the 5th defendant apart from the plea of collusion between the plaintiffs and the first defendant, had pleaded the suit is barred by limitation and to be dismissed for non deposit of balance sale consideration to prove readiness.

10. Reply statement filed by the plaintiffs, refuting the allegations made in the written statements and pleaded that the partition deeds among the sharers and the sale agreements in favour of the defendants 5 to 7 are documents created subsequent to the pre suit notice anticipating the suit for specific



performance. The non disclosure of these facts in the reply telegram of the defendant prove those documents are fabricated documents creates subsequently.

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11. Based on the pleadings, the trial court framed the following issues:-

- 1) Whether the plaintiffs are entitled for the relief of specific performance as prayed?
- 2) Whether the plaintiffs are entitled for the alternate relief of refund of advance money?
- 3) Whether the defendants 1 to 4 divided the suit property under the unregistered partition agreement is true?
- 4) What other relief the plaintiffs are entitled to?

12. On behalf of the plaintiffs, 3 witnesses were examined. 10 documents were exhibited. On behalf of the defendants, 7 witnesses were examined. 13 documents were exhibited.

13. The trial Court granted the alternate relief (i.e.) refund of advance money and created charge over the suit property limited to the extent of the first defendant share. Assailing the trial Court judgment, the learned counsel for the appellants submitted that, the charge over the property can be created only if the subsequent purchaser of the property had knowledge about the prior agreement. Section 100 of the Transfer of Property Act read with Section 55 (6) (b) and Section 3, the interpretation to the term "a person who said to have notice" does not permit creating charge over the property purchased by bonafide purchaser without knowledge of the pre-existing agreement. Further when the trial Court has held that the plaintiffs failed to prove their readiness and willingness, there cannot be charge over the property sold prior to institution of the suit.

14. Per contra, the learned counsel for respondents 1 to 4, 9 and 10 submitted that the appellants are subsequent purchasers with knowledge of the prior agreement in force. To defeat the lawful claim of the plaintiffs, documents were created with anti-dates and sale deed in favour of the appellants was registered after receipt of the pre-suit notice. Pointing out the dates and events, the learned counsel for the respondents submitted that, the suit agreement is dated 08/11/1996. Pre-suit notice was issued on 30/10/1998. The reply notice by the first defendant is dated 07/11/1998. In the said reply, the first defendant had denied the execution of the suit sale agreement and also lied he does not know the plaintiffs. However in the



written statement and in the deposition, he admits that he know the plaintiffs and had transaction with them in respect of sale of his carding machine. The documents with dates prior to the pre-suit notices are all prepared subsequently. The sale deeds in favour of the appellants was registered on 05/11/1998 much after the receipt of the pre suit notice. Therefore, the trial Court judgment creating charge over the suit property to the extent of the first defendant share in the suit property is fair and equitable.

15.Ex.A-1 is the suit sale agreement. Ex.A-2 is the receipt for payment of Rs.2,00,000/ on 30/10/1997. The due execution of the sale agreement and the receipts is spoken by PW-1 the second plaintiff, PW-2 witness to the receipt Ex.A2 and PW-3 the scribe of Ex.A-1. The first defendant examined as DW-1 had reiterated his plea that he never entered into agreement to sell the suit property to the plaintiffs and not received any money from them. Trusting the plaintiffs, he signed on blank stamp papers for transporting the machineries which he sold to the plaintiffs. The trial Court after considering these evidence and taking note of the fact that the first defendant admits the signatures in Ex.A-1 and Ex.A-2, held that the execution of sale agreement and receipt of money proved through PW-2 and PW-3, whereas the first defendant had not produced any contra evidence to prove the Ex.A-1 and Ex.A-2 were signed by him, while selling his machineries to the plaintiffs. Therefore, it disbelieved the plea of the first defendant that Ex.A-1 and Ex.A-2 are fabricated document.

16.Regarding the plea of oral partition among the defendants 1 to 4 on 27/04/1996, the trial Court observed that if the oral partition was true and acted upon, the defendants 1 to 4 would have immediately mutated the revenue records. At least when the pre-suit notice[Ex.A-3] dated 30/10/1998 received by him, he would have immediately replied to the plaintiffs about the oral partition and other facts regarding prior agreement with defendants 5 to 7. Defendant had sent a telegram without any detail and later the reply notice dated 07/11/1998 sent after creating Exs.B1 and B 2 partition deeds among Defendants 1 to 4 and Ex.B4 and Ex.B-5 the sale deeds in favour of the defendants 5 to 7. Therefore the trial Court held that Ex.B-1, Ex.B-2, Ex.B-4 and Ex.B-5 are the documents created with ill motive to defeat the interest of the plaintiffs.

17.One of the reason stated by the trial Court to disbelieve the bonafide of the defendants regarding the subsequent sale in favour of the defendants 5 to 7 is that, the sale agreement



Ex.B-3 dated 08/10/1996 specifies the possession was handed over to the purchasers after receiving Rs.4,00,000/- as advance, out of total sale consideration of Rs.4,27,000/- The time to pay the balance sale consideration of Rs.27,000/- fixed as 30 months. Whereas, in the sale deed, there is no whisper about the sale agreement or payment of advance of Rs.4,00,000/- or delivery of possession on 08/10/1996. In fact, in Ex.B-4 and Ex.B-5 sale deeds, it is mentioned that the possession is handed over only on the date of these deeds ie 05/11/1998. Highlighting these contradictions, the trial Court, while declining to grant the relief of specific performance, since the plaintiffs failed to prove their readiness and willingness, granted the alternate relief of refunding the advance amount and created charge over the share of the first defendant in the suit property.

18.The learned counsel for the appellants contended that, while the Court below has arrived at the clear conclusion that there is no evidence to show that the defendants 2 to 7 are liable to pay the suit claim and the sale in favour of the defendants 5 to 7 was prior to the institution of the suit, it ought not to have created charge over the property already sold. Further, submitted that the trial Court erred in suspecting the sale deeds Ex.B-4 and Ex.B-5 for omission to refer about the agreement of sale Ex.B-3 in the sale deeds. Such omission will not vitiate the sale deed executed for value. In support of this submission the learned counsel refer the Division Bench judgment of this Court rendered in Joseph Antoine Marie Michel and another -vs- Selin Mary reported in 2018 (2) MLJ 482.

19.In the above cited judgment, dispute regarding the validity of the suit sale deed arose, when the defendant pleaded fraud and misrepresentation. The defendants pleaded absences of consensus ad idem. In the said context, the Court held that the doctrine of non est factum will not apply to the facts of the case. While holding so, the Bench expressed its opinion that mere non-mentioning of sale agreement entered into between the parties in the recitals in the sale deed, will not vitiate the transaction.

20.The facts of the instant case is entirely different. First of all, the trial Court has not said the sale deeds in favour of the appellants vitiated because of the omission to refer the sale agreement. It has pointed out that the omission to refer the sale agreement Ex.B-3 in a sale deeds Ex.B-4 and Ex.B-5 is one of the reasons to hold that it is a document created subsequent to the receipt of the pre-suit notice, in order to give an impression that the appellants are prior



agreement holders and defendants 5 to 7 are bonafide purchasers without knowledge. On reading the proviso to Explanation III to the interpretation of the term "a person is said to have notice", under Section 2 of the Transfer of Property Act, we find it says, "if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud." The appellants in this case, while purchasing the share of the first respondent under Ex.B-4 and Ex.B-5 were fully aware of the sale agreement Ex.A-1. Therefore, the fabrication of the sale agreement Ex.B-3 done in collusion with the first defendant to defraud the plaintiffs. Having privy to the fabricated document and cognizant of the fraud, they are to be termed as person said to have notice.

21.The active participation of the appellants in creating Ex.B-3 sale agreement with anti-date exposes the fact that they had knowledge of the agreement with the plaintiffs and to circumvent the statutory charge attached to the property, the Ex.B-3 agreement for sale with date 08/10/1996 created. The reading of Section 100 of Transfer of Property Act, 1882 and the Rulings cited, makes clear that the appellants shall have a case to canvass only if (a) the property against which the charge is to be enforced must have been transferred for consideration (b) the transferee had no notice of the charge (c) the property which is the subject matter of the charge is in the hands of the person to whom such property has been transferred (refer Dattatreya Shankaer Mote -Vs- Anand Chintaman Datar: 1974 (2) SCC 799 @ 811 para 18).

22.A conjoint reading of Section 54 and Section 55 (6) (b) of Transfer of Property Act, 1882 make it clear that a contract for sale of immovable property does not of itself, create any interest or charge on the property. The buyer is entitled for a charge on the property, as against the seller and all person 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 delivery of the property. Provided, the buyer should not improperly decline to accept delivery of property.

23.It is appropriate in this context to refer the judgment of Hon'ble Supreme Court rendered in Videocon Properties Ltd - vs- Bhalchandra Laboratories and others: 2016(5) LW 820, where the Hon'ble Apex Court has observed :



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"13. The buyer's charge engrafted in clause (b) of paragraph 6 of Section 55 of the Transfer of Property Act would extend and enure 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



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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 got 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."

24. In the instant case, it is not the case of the seller that he offered delivery of property but the buyer improperly declined to accept delivery. It is a case where the payment of part sale consideration proved and the appellants are claiming right under the first defendant/seller. As observed by the Hon'ble Supreme Court in the Videocon case cited supra, the buyer is entitled to enforce the statutory charge against the property and for that purpose, trace the property even in the hands of the third parties. The appellants having failed to prove that they are subsequent purchasers without knowledge, they are bound to suffer the decree of charge over the property purchased with the knowledge of the prior agreement.

25. For the reasons stated above, this Court finds that the appeal does not carry any merit to interfere the trial Court judgment and decree.

26. As a result, the Appeal Suit is dismissed. The judgment and decree dated 24.02.2006 made in O.S.No.11 of 2004 on the file of the Additional District Court/Fast Track Court No.1, Erode is confirmed. No order as to costs.

Sd/-

Assistant Registrar

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Sub Assistant Registrar



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To:

1. The Additional District Court,
Fast Track Court No.1, Erode.

2. The Section Officer,
VR Section, High Court,
Madras-104.

+lcc to Mr.P.Valliappan, Advocate, S.R.No.21192

+lcc to Mr.N.Manokaran, Advocate, S.R.No.21075

A.S.No.865 of 2008

SR(CO)
CS/19/11/2021