



SA.No.1528 of 2007

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.11.2023

CORAM

THE HON'BLE Mr.JUSTICE **C.KUMARAPPAN**

S.A.No.1528 of 2007

and

MP.No.1 of 2007

Milapchand

... Appellant

- Vs -

1. R.Kannan

2. Thazudeen

... Respondents

Second Appeal is filed under Section 100 of the Civil Procedure Code prayed to set aside the decree and judgment passed in A.S.No.82 of 2006 dated 24.07.2007 on the file of the Subordinate Judge, Udagamandalam confirming the decree and judgment passed in O.S.No.190 of 2004 dated 30.11.2005 on the file of the District Munsif Court, Udagamandalam and consequentially decree the suit together with cost.

For Appellant : Mr.M.L.Ramesh

For Respondents : No Appearance

JUDGMENT

For the sake of convenience, the parties will be referred according to their litigative status before the Trial Court.



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2. At the instance of the appellant/plaintiff, the instant Second Appeal has been filed. The respondents are the defendants before the Trial Court.

The brief facts, which give rise to the instant second appeal is as follows:-

3. The first defendant entered into a Sale Agreement with one Mrs.Sundhari Muthukrishnan. Based upon such agreement, the 1st defendant has executed a Sale Agreement dated 03.02.1997 in favour of the plaintiff, promising either to nominate the plaintiff as a purchaser or in the alternative get the Sale Deed executed and registered in the name of the 1st defendant. In pursuance of the agreement, the plaintiff has paid a sum of Rs.70,000/- [Rupees Seventy Thousand only] towards advance. A further sum of Rs.25,000/- [Rupees Twenty Five Thousand only] was paid by the plaintiff to Mrs.Sundhari Muthukrishnan on behalf of the 1st defendant. According to the Sale Agreement, the 1st defendant will execute the sale deed in favour of the plaintiff after receiving the balance sale consideration of Rs.5,000/- [Rupees Five Thousand only] from the plaintiff. However, the 1st defendant, without fulfilling his obligation of the agreement dated 03.02.1997, has executed the Sale Deed in favour of the 2nd defendant. Hence, the plaintiff issued legal notice on 20.11.1998 directing both the defendants to execute the



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Sale Deed in his name. Since the defendants failed to execute the same, the plaintiff has approached the Trial Court for the relief of specific performance.

4. The above suit was resisted by the 2nd defendant on the contention that the plaintiff was a money lender and that the 2nd defendant was the *bona fide* purchaser for the valuable consideration. The 2nd defendant has also pleaded that there was no collusion between the 1st and 2nd defendants. The 2nd defendant would further submit that at the time of execution of the sale agreement, the 1st defendant is not the owner of the property and he was only an agreement holder. Therefore, would contend that the suit for specific performance is liable to dismissed.

5. In the said suit, the 1st defendant did not file any written statement and he was set ex-parte.

Evidence, Documents and Finding of the both the Court below:-

6. Before the Trial Court, on behalf the plaintiff, the plaintiff himself was examined as PW1 and 4 documents have been marked as Exs.A1 to A4. On behalf of the defendants, 3 witnesses were examined as DW1 to DW3 and 4 documents have been marked as Exs.B1 to B4.



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7. The Trial Court, after considering both oral and documentary evidence and having considered the submissions made by either side, dismissed the suit on the finding that the agreement dated 03.02.1997 was not really intended for a sale and that the plaintiff, being the money lender, is only entitled for a decree for a sum of Rs.70,000/- with interest at the rate of 6% per annum. Aggrieved with the said finding, when the plaintiff approached the Appellate Court, the Appellate Court has confirmed the finding of the Trial Court and dismissed the appeal. Aggrieved with the said finding, the plaintiff is before this Court by way of this Second Appeal.

Submission of the counsel:-

8. The learned counsel for the appellant would vehemently submit that the findings recorded by both the Courts below that the Sale Agreement dated 03.02.1997 is only a security for a loan transaction is contrary to the admission made by DW1. The learned counsel would also submit that the intention for executing the sale agreement-Ex.A1 has been established through the evidence of PW1. It is also the submission of the learned counsel for the appellant that the finding of fact recorded by the Trial Court as well as the First Appellate Court that Ex.A1-Sale Agreement was not really intended to execute the Sale Deed is without any basis as the 1st defendant



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was set ex-parte. The learned counsel for the appellant/plaintiff would rely upon the judgment of this Court made in S.A.No.2183 of 2002 dated 23.08.2002, wherein the Hon'ble Single Judge of this Court, after referring the judgment of Hon'ble Division Bench of this Court in ***M.M.S.Investments through its Managing Director Vs. V.Veerappan*** reported in (2000) 1 CTC 538 held as follows:-

“48.The Division Bench, on consideration of the judgment of the Hon-ble Supreme Court reported in Jugraj Singh and another V. Labh Singh and another reported in (1995) 2 SCC 31 : AIR 1995 SC 945, held that a purchaser lis pendens would be of two categories. The first category would be a purchaser prior to the filing of the suit. The second category is a purchaser pending the suit. The first category would be bound by the decree and would suffer the decree which is enforceable against his vendor. With respect to the second category, it was held whether he had prior notice of agreement or not, he can plead that the prior sale agreement is illegal and unenforceable. He had taken the risk of purchasing the property. To justify his purchase, he can take up any defence he wants. It was therefore held that a subsequent purchaser for valuable consideration with or without knowledge of prior agreement can raise grounds other than the issue whether he was a bona fide purchaser



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with notice or not.

49. In the instant case, the 2nd defendant / appellant before this Court had purchased the property prior to the institution of the suit and did not purchase it pending the suit. That was why she was impleaded as the 2nd defendant and the fact that it had been pleaded in the plaint that the sale deed in favour of the appellant herein / 2nd defendant would not bind the plaintiff itself shows that the purchase was prior to the institution of the suit. If that be the case, then the 2nd defendant falls under the 1st category and cannot take up any other defense except to hold that she was a purchaser ignorant of the agreement in favour of the plaintiff and was a bonafide purchaser. Both the Courts below had held against the appellant on that ground.”

9. At this juncture, this Court would like to refer the judgment of the Hon'ble Supreme Court in ***Jugraj Singh and another Vs. Labh Singh and another*** reported in (1995) 2 SCC 31 was subsequently found to be *per incuriam* in a larger Bench judgment of the Hon'ble Supreme Court in ***Ram Awadh (Dead) by LRs and others Vs. Achhaibar Dubey and another*** reported in (2000) 2 SCC 428. The relevant portion of the said judgment is paragraph 6 and the same reads as follows:-



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“6. The obligation imposed by Section 16 is upon the court not to grant specific performance to a plaintiff who has not met the requirements of clauses (a), (b) and (c) thereof. A court may not, therefore, grant to a plaintiff who has failed to aver and to prove that he has performed or has always been ready and willing to perform his part of the agreement the specific performance whereof he seeks. There is, therefore, no question of the plea being available to one defendant and not to another. It is open to any defendant to contend and establish that he mandatory requirement of Section 16(c) has not been complied with and it is for the court to determine whether it has or has not been complied with and, depending upon its conclusion, decree or decline to decree the suit. We are of the view that the decision in Jugraj Singh case [(1995) 2 SCC 31] is erroneous.”

10. The above judgment followed by a latest Full-Bench judgment of the Hon'ble Supreme Court in ***Kadupugotla Varalakshmi Vs. Vudagiri Venkata Rao and others*** reported in **2021 SCC OnLine SC 365**.

11. By relying the above proposition, the learned counsel for the appellant would submit that the findings recorded by both the Courts below



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in respect of the executability of the agreement is not legal as the executant of the agreement was set ex-parte. The 2nd defendant is being the subsequent purchaser, his only defence could be the *bona fide* purchaser for valuable consideration. Therefore, the learned counsel prayed to allow the Second Appeal.

12. Despite the name printed, no one is appeared on behalf of the respondents on 16.11.2023. Even today also, there is no representation.

13. I have given my anxious consideration to the submission made by the learned counsel for the appellant.

Analysis of the submission:-

14. First of all, the main contention put forth by the learned counsel for the appellant/plaintiff is that the 2nd respondent/2nd defendant cannot have any defence beyond the defence of *bona fide* purchaser for valuable consideration. Therefore, this Court would like to commence the discussion from the above point before delve into the other aspects discussed by both the Courts below.

15. Coming to the *bona fide* purchase of the 2nd defendant, the Trial Court as well as the First Appellate Court relied upon Ex.B4-Encumbrance



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Certificate for the relevant period in respect of the suit property. Admittedly, the Sale Agreement is unregistered one and that at the time of the Sale Agreement, the 1st defendant was not at all the owner of the property. Therefore, based upon the absence of entry in respect of the impugned Sale Agreement in Ex.B4-Encumbrance Certificate, both the Courts below have found that the 2nd defendant was the *bona fide* purchaser for the valuable consideration. This Court absolutely has no iota of doubt over the finding.

16. It is pertinent to mention here that it is not even the pleading of the plaintiff that the 2nd defendant has acted *mala fidely* so as to deny the right of the plaintiff. Therefore, this Court could not find any ground to deviate from the said finding. As rightly contended by the learned counsel for the appellant, once the 2nd defendant established that he is the *bona fide* purchaser for valuable consideration, his sale must be protected. Therefore, this Court is of the view that the finding of fact recorded by both the Courts below that the 2nd defendant is the *bona fide* purchaser for the valuable consideration is liable to be confirmed.

17. Along with the above finding, both the Courts below have recorded that on the date of Ex.A1-Sale Agreement, the plaintiff was the money lender based upon his admission. Such finding further vindicated through the



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pronote obtained by the plaintiff under Ex.A2. According to the plaintiff, an additional sum of Rs.25,000/- was paid in pursuance of Ex.A1-Sale Agreement. If really the additional sum of Rs.25,000/- is paid towards sale assent, there would have been some endorsement obtained in Ex.A1-Sale Agreement or there would have been some receipt received from the 1st defendant. Therefore, the reasoning recorded by both the Courts below that the receiving Ex.A2-pronote from the 1st defendant is strengthening the finding that the plaintiff is the financier and that Ex.A1-Sale Agreement was entered into by way of a security for the loan transaction. It was also the finding of both the Courts below that Ex.B1-Sale Deed, which stands in the name of the 1st defendant dated 10.07.1998 is for Rs.41,650/- and also Ex.B2, which stands in the name of the 2nd defendant dated 26.10.1998 is for Rs.67,300/-. Therefore, the Trial Court disbelieved the contention of the plaintiff that there would not have been an occasion arising for him to obtain the sale deed at a higher price of Rs.1,00,000/-. Therefore, this Court is of the firm view that there is no ground to deviate from the finding of the both the Court below.

18. From the submissions of the learned counsel for the Appellant,



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this Court could not find any substantial question of law. Therefore, this Court is inclined to confirm the finding of both the Courts below upon all the grounds namely the 2nd defendant is the *bona fide* purchaser for valuable consideration, and the plaintiff was not ready and willing and the finding regarding validity of the Sale agreement cannot be found faulted with.

19. In the result, this Second Appeal is dismissed by confirming the judgment and decree of both the Courts below. There shall be no order as to costs. Consequently, connected MP is also closed.

20.11.2023

kmi

Index : Yes/No

Speaking Order : Yes/No

NCC : Yes/ No

To

1. The Subordinate Court,
Udhagamandalam.

2. The District Munsif,
Udagamandalam.



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C.KUMARAPPAN, J

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