BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 30.03.2023

DELIVERED ON : 18.04.2023

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

A.S.No.78 of 2004

1.Balaraj (Died)

2.Dhanalakshmi

3.R.Kiruthika

4.B.Ayshwarya ... Appellants

(Appellants 3 and 4 are brought on record as Lrs of the deceased 1st appellant vide Court order dated 12.08.2022 made in C.M.P.(MD)No.6977 of 2022)

Vs.

1.Syed Masood Rowther (Died)

2.Ahamed Masood Rowther (Died)

3.S.Raja Mohammed

4.S.Fathima Jinna

5.S.Peer Mohammed

6.S.Jamela Beevi

7.S.Jamal Mohammed

8.S.Shafi Mohammed

9.S.Kazali Mohammed

10.S.Sulaika Beevi

11.A.Rabiya

12.Peer Mohammed

13.A.Ahmed Amis

14.A.Sheik Mujipur Rahuman ... Respondents

(R3 to R10 are brought on record as LRs of the deceased 1st respondent as per order of this Court dated 08.03.2007 made in M.P.(MD)No.1 of 2007)

(R11 to R14 are brought on record as Lrs of the deceased 2nd respondent vide Court order dated 02.03.2020 made in M.P.(MD)Nos.2 to 4 of 2007)

PRAYER: Appeal Suit is filed under Section 96 of C.P.C. against the judgment and decree dated 15.10.2003 made in O.S.No.244 of 1997 on the file of the Subordinate Court, Srivilliputtur.

For Appellants : Mr.A.R.M.Ramesh

For Respondents : Mr.S.Meenakshi Sundaram, Senior Counsel for M.N.Dilipkumar for R3 to R10

JUDGMENT

Challenging the decree and judgment passed by the learned Subordinate Judge, Srivilliputtur, in O.S.No.244 of 1997, dated 15.10.2003, decreeing the suit for specific performance, the present appeal came to be filed by the appellants.

2. For the sake of convenience, the parties are referred to herein, as per their own ranking before the Trial Court.

3. The brief facts of the plaintiff's case are as follows:-

3.1. The plaintiff and the first defendant are brothers. They have owned the property adjacently. The first defendant agreed to sell the suit property to the plaintiff for a total sale consideration of Rs.6 lakhs. The agreement was finalized in the presence of Mediators one N.P.Sahulammed and M.S.Abdulkhadar. Accordingly, the agreement dated 04.04.1996 was reduced in writing. On the date of said agreement, a sum of Rs.2,000/- was paid as advance amount. On the date of the sale agreement, the title of the suit schedule property was not with the first defendant, but with the possession of Spices Board of Cochin. Therefore, it was agreed between the parties that the first defendant ought to have obtained reconveyance of the title from the Spices Board and thereafter, a registered sale deed shall be executed in favour of the plaintiff. The plaintiff from the date of sale agreement, has paid the amount to the tune of Rs.6,83,985/- on various dates till 13.03.1997 to the first defendant and Spices Board, at the instructions of the first defendant.

3.2. The property originally was brought for public auction. The Spices Board has purchased the property and they have also agreed to reconvey the schedule mentioned property on payment to the first defendant. Hence, it is the contention of the plaintiff that to clear the amount to the Spices Board and for reconveyance, the first defendant has requested the plaintiff to tender payment on his behalf to the Spices Board. Accordingly, the plaintiff has remitted the amount to the Spices Board on several dates by way of demand draft drawn in Bank of Baroda, Rajapalayam Branch in favour of the Secretary of the Spices Board. The plaintiff, has in fact, paid a sum of Rs.6,83,985/-.

3.3. On 03.01.1997, the Spices Board has written a letter to the first defendant requesting to pay the balance amount of Rs.1 lakh for reconveyance of the schedule mentioned property. At the request of the first defendant, the plaintiff has remitted the said amount on behalf of the first defendant vide Bank of Baroda, Rajapalayam Branch, by way of demand draft, dated 22.01.1997. The first defendant has also handed over the physical possession of the said property to the plaintiff on 22.10.1996. The plaintiff has been in continuous possession and enjoyment of the suit property on and from 22.01.1996. As the Spices Board agreed to reconvey the property after clearing the amount, the plaintiff has approached the first defendant through his relatives and Panchayadars on and from 01.05.1997, on several occasions, informing about his readiness and willingness to perform his part of contract and also requested the first defendant to complete the sale on getting reconveyance from the Spices Board. However, the first defendant has replied stating that he was unwell and not in a position to attend the Jamath meeting.

3.4. On 14.06.1997, one of the Mediators viz., Abdul Khadar, Tenkasi has sent a letter to Rajapalayam Jamath President. In the said letter, he has categorically admitted the execution of sale agreement dated 04.04.1996 and advance amount of Rs.2,000/- paid on the day and subsequently received a sum of Rs.4,000/- from the plaintiff and paid the same to the first defendant. On 12.05.1997 and 16.06.1997, the Jamath Committee has also passed a resolution, directing the plaintiff to take appropriate legal action through the competent Court of law against the first defendant in order to get the sale deed registered. The first defendant, having received the entire sale consideration, has tried to avoid the contract. Therefore, the plaintiff has issued a legal notice on 30.06.1997, which was replied by the first defendant on 11.07.1997. The plaintiff also came to know that the Spices Board executed the deed of reconveyance on 22.10.1997 and on the very same day, the first defendant has pre-planned to execute a registered sale deed to the second defendant to deprive and deceive the plaintiff. Immediately, the plaintiff issued a legal notice to the defendants 1 and 2 indicating that if any such sale is created in favour the second defendant or to any third party, the same will be invalid and will not bind the plaintiff. Thereafter, having obtained the reconveyance deed from the Spices Board on 23.10.1997, the first defendant has wilfully evaded to execute a registered sale deed in favour of the plaintiff. However, a sale deed was executed in favour of the defendants 2 and 3 on 27.10.1997. Hence, the suit has been filed to enforce the contract. According to the plaintiff, the defendants 2 and 3 are not a bona fide purchasers and they are also aware of the prior agreement and a notice has also been issued in this regard. Hence, the suit.

4. The first defendant remained *ex-parte*. The second defendant has filed a written statement stating that the second defendant and his wife viz., the third defendant has purchased the property from the first defendant in pursuant to the sale agreement dated 06.01.1996. According to them, they purchased the property on 24.10.1997 from the first defendant, who was in possession of the property. Hence, they are the owners of the property. It is the further stated in the written statement that the first defendant and the plaintiff are colluded together and created a document in order to defeat their rights. The sale agreement dated 04.04.1996 is not a genuine one and the presence of alleged Mediators were also denied. Only close relatives names have been mentioned in order to support the case of the plaintiff. Further, the agreement was also not written in stamp papers and it is only a formal agreement and further agreement had to be executed within a week from 04.04.1996, whereas no agreement was said to have been executed after 04.04.1996. Therefore, the agreement dated 04.04.1996 cannot be enforced.

5. Further, it is stated in the written statement that the first defendant alone has discharged the loan payable to the Spices Board and the allegation that the possession was handed over to the plaintiff on 22.10.1996 was also denied. The property has been purchased through Court auction by the Spices Board and the plaintiff had not spent a single paise towards reclamation of the estate or for repairing the building. According to the defendants, they are *bona fide* purchasers of the suit property, they are in possession of the property and they also not aware of the notice sent by the plaintiff to the first defendant and the sale in their favour is perfectly valid and hence, prayed for dismissal of the suit.

6. In the reply statement, it is the contention of the plaintiff that only after the legal notice, the property has been sold to the second defendant by the first defendant and therefore, such sale deed is fraudulent and collusive one and doctrine of *lis Pendens* also will apply. The alleged agreement dated 06.01.1996, agreed between the first defendant and defendants 2 and 3 was created only in order to defeat the rights of the plaintiff. It is the further contention of the plaintiff that though the property was purchased in a Court auction by the Spices Board, the possession was never handed over to them and in fact they have filed an execution petition against the first defendant for recovery of possession. Hence, it is his contention that defendants 2 and 3 are not *bona fide* purchasers and they are aware of the existence of the sale agreement.

7. Based on the above pleadings, the trial Court has framed the following issues:

1.Whether the plaintiff is entitled to get the relief prayed in the plaint?

2. Whether the agreement dated 04.04.1996 is valid under law and the plaintiff is entitled to specific performance?

3. Whether the agreement dated 06.01.996 between the defendants 2 and 3 and first defendant is true and valid?

4.Whether the defendants 2 and 3 are the bona fide purchaser of the suit property?

5. To what relief, the plaintiff is entitled?

8. On 29.11.1999 and 28.07.2003, the trial Court has framed the following additional issues:

1.Whether the agreement dated 06.01.1996 is a created one?

2. Whether the sale deed dated 24.10.1997 is not valid in the eye of law?

3.Whether the agreement dated 04.04.1996 is not valid in the eye of law?

4. Whether the plaintiff is entitled to specific performance?

5. Whether the plaintiff is entitled to permanent injunction as prayed for?

9. On the side of the plaintiff, four witnesses were examined as P.W.1 to P.W.4 and 53 documents were marked as Ex.A1 to Ex.A53. On the side of the defendants, one witness was examined as D.W.1 and 51 documents were marked as Ex.B1 to B51 and the Court has marked 9 documents as Ex.C1 to C9.

10. On the basis of the evidence and materials, the trial Judge has granted a specific performance in favour of the plaintiff and decreed the suit. Challenging the same, the defendants 2 and 3 filed the present appeal.

11. The learned counsel appearing for the defendants 2 and 3 / appellants vehemently contended that Ex.A1, allegedly executed on 04.04.1996, has been created only to non-suit the registered documents viz., Exs.B50 and B51-sale deeds dated 24.10.1997, executed in favour of the defendants 2 and 3, in pursuant to the agreement dated 06.01.1996. It is his contention that the genuineness of Ex.A1 has not been established. The first defendant is the brother of the plaintiff and therefore, the possibility of collusion is apparent to non-suit the registered sale deed executed in favour of the defendants 2 and 3 / appellants. It is his further contention that Ex.A1 is not a contract for sale of property. It is only a contract entered into further agreement. Therefore, the same is not enforceable in law.

12. It is the further contention of the learned counsel appearing for the defendants 2 and 3 / appellants that even assuming it is to be true that Ex.A1 has to be treated as agreement for sale, at the time of agreement, the first defendant had no title to the property. The property has already been transferred to the name of Spices Board. Therefore, the first defendant executing such a contract for sale does not arise at all. Admittedly, the Spices Board purchased the property in a Court auction sale and also took a delivery of possession of the property. Therefore, the first defendant handing over the possession of the suit property to the plaintiff is also highly improbable. Further, in Ex.A1, there was no time stipulated in the agreement and that itself clearly shows that Ex.A1 has been created only to non-suit the registered documents executed in favour of the defendants 2 and 3.

13. It is the further contention of the learned counsel appearing for the defendants 2 and 3 / appellants that mere payment of some amount to discharge the liability of the first defendant to the Spices Board only to lead the inference that it is only a loan extended by the plaintiffs and payment has been made only by the first defendant. Therefore, the same cannot be said that there was a sale consideration. Though the sale consideration of Rs.6 lakhs was agreed in Ex.A1, the plaintiff appears to have made a payment to the tune of Rs.6,83,985/- i.e., a sum of Rs.84,000/- more than the sale consideration. That itself clearly indicates that there was a loan transaction between the plaintiff and the first defendant and not beyond that. The plaintiff has not even examined his brother and no coercive steps have been taken to examine him in the lower Court. Therefore, it clearly shows that there is a collusion between the parties. Originally Ex.A1 was objected on the ground of stamp. However, such objection is given up, since stamp duty penalty has been paid in the appeal stage. Further, it is submitted that the defendants 2 and 3 / appellants are the bona fide purchasers for the value and the document has been registered and therefore, the agreement, entered between the plaintiff and the first defendant, in respect of the property to which the first defendant did not have title, cannot be enforced in the eye of law. Further a prayer has been sought only against the first defendant to execute the sale deed and no relief whatsoever sought against the defendants 2 and 3 / appellants. Therefore, the very decree and judgment of the trial Court is not proper.

14. In support of his submissions, he has relied upon the following judgments:

1. ***A.Shanmugam & Others Vs. T.R.Kannappa Mudaliar & Others*** reported in ***CDJ 1988 MHC 438.***

2.***Pemmada Prabhakar & Ors. Vs. Youngmen's Vysya Association & Ors***. reported in ***2015 (3) CTC 229***;

3. ***M.Jayaprakash Narayanan Vs. Santhammal*** reported in ***2018 (1) CTC 701;***

4. ***S.Palanivel and another Vs. P.Natesan and Others*** reported in ***2018 (1) CTC 50;***

5. ***Jayakantham and others Vs. Aaykumar*** reported in ***2017 (2) CTC 647;***

6.***Sak Apparels Vs. Madras Management Association and others*** reported in ***2018 (2) CTC 407;*** and

7. ***Velsamy Vs. Jothi Vayola Rani & another*** reported in ***CDJ 2018 MHC 4016.***

15. The learned Senior Counsel appearing for the plaintiff / respondents 3 to 10 would submit that though the plaintiff and the first defendant are brothers, the agreement came into existence only in order to retain the property in the family. The suit property originally have been auctioned in a Court auction and the Spices Board has become a successful bidder. Though the title has been transferred to the name of Spices Board, the first defendant has retained the possession. The first defendant has agreed to sell the property for a total sale consideration of Rs.6 lakhs, since he had dues and he has received the sale consideration only for the purpose of clearing the amount to the Spices Board. Pursuant to the agreement, the plaintiff has made several payments to the Spices Board, which are evidenced under Ex.A2 to Ex.A7. Besides, P.W2 has also spoken about the execution of the document-Ex.A1. That apart P.W.3, who is the Officer of the Spices Board had also clearly spoken about the payment and reconveyance of the property in favour of the first defendant. Hence, it is his contention that when the first defendant paid the entire amount to Spices Board after receiving sale consideration from plaintiffs, a document has been registered in favour of the defendants only in order to defeat the rights of the plaintiff.

16. It is the further contention of the learned counsel appearing for the plaintiff / defendants 2 and 3 that the legal notice already issued not only to the first defendant, but also to the defendants 2 and 3. After receipt of the legal notice, the property has been transferred. Therefore, it is his contention that the defendants 2 and 3 were aware of the earlier contract. Therefore, they are not *bona fide* purchasers for value. Besides, the suit itself filed on 24.10.1997 and the sale deed was executed in favour of the defendants 2 and 3 on 27.10.1997. Therefore, this fact clearly shows that the document has been created only for the purpose of the case and the above sale deed is also hit by the Doctrine of l*is pendens*. The trial Court after analysing the entire materials has granted decree in favour of the plaintiff. Merely because, the relief has been sought as against the first defendant to execute a document that does not mean that the entire suit has to be dismissed. Hence, the appeal has to be dismissed. In support of his submissions, he has relied upon the judgment of the Hon'ble Supreme Court in ***P.Ramasubbamma Vs. V.Vijayalakshmi*** reported in ***AIR 2022 SC 179*****3.**

17. In the light of the above submissions, now the points arise for consideration in this appeal are as follows:

1. Whether Ex.A1 agreement dated 04.04.1996 is true and valid in the eye of law?

2. If execution of Ex.A1 is established, whether it is capable of enforcement for specific performance?

3. Whether the agreement dated 06.01.1996 is true and validly executed or created?

4. Whether the plaintiff is ready and willing to perform the above contract?

5. Whether the defendants 2 and 3 are the *bona fide* purchasers for value without notice?

6. Whether the sale in favour of the defendants 2 and 3 is hit by the Doctrine of *lis pendens*?

7. To what relief the plaintiff is entitled?

Point Nos.1 & 2:

18. The relationship between the parties are not disputed. The plaintiff is younger brother of the first defendant. The suit property originally owned by the first defendant and the same has been auctioned in a public auction due to the certain loan obtained by the first defendant from the Spices Board. In a public auction, Spices Board become the owner of the property and it is also not disputed by both sides that the Spices board despite the transfer of the property in a public auction sale in their favour, they are ready and willing to reconvey the property to the first defendant, provided all the dues payable by the first defendant is properly paid. These facts are not in dispute.

19. It is the case of the plaintiff that an agreement EX.A1, came to be executed for a total sale consideration of Rs.6 lakhs for sale of the suit property. On perusal of Ex.A1, it is agreed between the parties that the sale consideration of Rs.6 lakhs have been agreed between the parties and it is also agreed to execute the formal agreement later. It is the specific case of the plaintiff in his pleadings that at the time of entering into the contract, the title of the property was not with the first defendant and the property has been auctioned in a public auction and Spices Board has become a successful bidder. The first defendant also agreed orally he will retrieve the property by clearing the loan to the Spices Board and after getting reconveyance from the Spices Board, he has agreed to execute the sale agreement in favour of the plaintiff. According to the plaintiff, he has paid the substantial amount to clear the debts to the Spices Board.

20. Admittedly, the first defendant has not contested the suit and he was remained *ex-parte*. It is relevant to note that P.W.2, one of the attesting witnesses in the agreement-Ex.A1, has also spoken about the execution of the contract. He has also spoken about the various payments made from 04.04.1996 till 19.09.1996 and the endorsement made in Ex.A1. On a perusal of Ex.A1 and the evidence of

P.W.2, this Court is of the view that except the suggestions, his evidence has not been discredited. The nature of the amount received from 04.04.1994 till 19.09.1996 by the first defendant makes it clear that in fact, the parties reached into an agreement to sell the property and sale consideration was also received on 19.09.1996 by way of Demand Draft (DD). The same was also endorsed in Ex.A1.

21. P.W.2, one of the witnesses, clearly spoken about the execution of the document by the first defendant and he has also given an explanation in his evidence that the time limit has not been fixed, since the property has to be reconveyed from the Spices Board. The plaintiff also in his evidence has clearly spoken about this aspect. It is seen from Exs.A2 to A7 filed by the plaintiff that after entering into the contract, the plaintiff in fact, has paid various amounts to the Secretary to the Spices Board. In fact, he has drawn the DD and the receipt for drawing DD was also filed. This document clearly proved the oral contract to sell the suit property after clearing the entire loan to the Spices Board. Ex.A8 is the receipt issued by the first defendant on the date of Ex.A1.

22. Ex.A9 is the certified copy of the judgment in C.C.No.153 of 1995, wherein, a criminal prosecution has been launched against the first defendant and another for the alleged trespassing into the property and causing damages in the suit property. The case has been initiated by the Spices Board that after purchasing and taking delivery of the property through the Court auction, the first defendant and others trespassed into the property and damaged the crops. After analysing the entire evidence produced, the learned Judicial Magistrate, Srivilliputhur found that the alleged trespass has not been established. In fact even at the time of auction purchase, the first defendant was in enjoyment of the property and possession was never handed over to the Spices Board. Ex.P13 to Ex.P37 are filed to show that the kist have been paid in respect of the suit properties.

23. It is also relevant to note that P.W.3-Officer from the Spices Board was also examined. In his evidence, he has admitted that the property was sold in public auction and their Spices Board itself has purchased the property and again the first defendant was requested to reconvey the property. Accordingly, they agreed to reconvey the property. They also sent a legal notice in this regard. They issued a legal notice-Ex.C1 dated 01.08.1989 and he has also admitted that the amount has been paid by the first defendant and property has been reconveyed to the first defendant.

24. It is the specific case of the plaintiff that a sum of Rs.1 lakh has been paid by him and the first defendant took the DD and sent it to the Spices Board. However, as the first defendant was evading to execute the sale deed, the plaintiff also gave a complaint to the Jamath Committee. To substantiate above contention, P.W.4 was examined and P.W.4 in his evidence has clearly spoken that the plaintiff requested him. However, the first defendant was not coming to the meeting and his son viz., Peer Mohammed only came and he has also agreed the receipt of the payment and he has also signed in the Jamath Register- Ex.C.9. As the first defendant has not appeared before the Jamath, they instructed the plaintiff to approach the competent Civil Court.

25. From the nature of the documents, the conduct of the parties and several payments have been made to the Spices Board and the amount also received by the first defendant from the plaintiff, besides plaintiff has also sent the amount to the Spices Board, which were evidenced through Ex.A2 to A7, this Court is of the view that Ex.A1 came into existence only for sale of the property by clearing the loans to the Spices Board. Execution of the document by the first defendant has been clearly spoken by P.W.1. P.W.3 also clearly spoken about the reconveyance and payment made to their Spices Board. Therefore, merely because Ex.A1 referred to the further formal contract, it cannot be said that there was no *consensus ad idem* between the parties. In fact, Ex.A1 is also contained all the necessary terms and though the time stipulation was not provided, it has been clearly explained in the pleadings and evidence. The defendants 2 and 3 also not disputed that the properties had already been purchased in a public auction by the Spices Board and they also entered into agreement. Therefore, when the parties are clear about their terms, this Court is of the view that merely Ex.A1 stipulated that formal contract would be entered later, the same will not affect its enforceability.

26. It is relevant to note that P.W.2-attesting witness clearly spoken about the presence of the first defendant's son at the time of execution of Ex.A1, and further the signature of the defendant's son is also identified by P.W.1. When the execution has been clearly spoken, it is for the defendants to disprove the execution by examining the attesting witness, however, the defendants have not taken any steps in this regard. Therefore, considering over all aspects and the evidences of P.Ws.1, 2 and 4 and the further evidence of P.W.3, Officer of the Spices Board, this Court is of the view that though a formal contract has not been prepared, but parties are intended to sell the property after clearing the dues to the Spices Board and after reconveyance in the name of the first defendant. Substantial payments have also been made by the first defendant to clear the dues of the Spices Board, which has been clearly established on record.

27. Considering the overall evidence, this Court has to necessarily hold that Ex.A1 has been properly executed and valid in the eye of law. Merely because, the parties intended to enter the formal contract with clear terms, it cannot be said that there was no concluded contract between the parties. The oral evidence of the parties clearly shows that the parties have understood how to proceed the matter. The main intention was to clear the loan of the Spices Board and redeem the property by the first defendant and thereafter, execute the sale deed. This aspect clearly established on record. There was no reason to disbelieve the evidence of P.W.3, who is the Officer of the Spices Board and he has also clearly spoken about the reconveyance in favour of the first defendant.

28. Yet another aspect has to be seen. It is the case of the plaintiff that when the loan was about to be cleared and as the first defendant was evading, a complaint was given to the Jamath. P.W.4 clearly spoken about this aspect and he has also clearly spoken about the complaint given to Jamath-Ex.C.8 and resolution of the Jamath-Ex.C.9. He has also admitted that the first defendant's son was also signed in those documents, which has also not been disproved by the defendants 2 and 3 by examining the first defendant's son. Considering the overall evidence adduced to prove the execution of Ex.A1, this Court holds that Ex.A1 is validly executed and the parties are intended to sell all the properties and terms have been clearly agreed between the parties. As discussed earlier, though the property was sold in public auction, the first defendant was all along in possession and therefore, the same will probablise the plaintiff's contention that he was also given possession of the property.

29. It is to be noted that when an interlocutory application has been filed during the pendency of the suit in I.A.No.1199 of 1997, the trial Court by order dated 10.11.1997, has granted injunction in favour of the plaintiff and the certified copy of the said order has also been marked as Ex.A.48, which has been challenged before this Court in C.M.A.No.165 of 1998. This Court has also confirmed the judgment of the trial Court, by order dated 28.07.1998, and the certified copy of the said order has also been marked as Ex.A.49. As against the same, SLP has been filed before the Hon'ble Supreme Court in S.L.P.(Civil)No.2

of 1999 and the same was also dismissed by the Hon'ble Apex Court. The certified copy of the said order has also been marked as Ex.A.50. Therefore, the findings recorded in the earlier stage of the suit with regard to the possession reached the finality and the same is binding on the parties.

30. The another submissions with regard to Ex.A1 that it is an unregistered document and no stamp duty has been paid. Though such ground has been raised, the same has been given up, since this Court, by order dated 20.03.2023, has issued a direction to collect the necessary stamp duty with penalty. After verification, the lower Court has sent a letter dated 06.04.2023, wherein it is stated that a sum of Rs.110/- has been collected for necessary stamp duty with penalty. It is to be noted that pursuant to the order of this Court, once again on 24.11.1997 the stamp duty with penalty was paid before this Court also. It is relevant to note that once the document has been admitted, it cannot be questioned as per Section 36 of the Indian Stamp Act. However, any appeal arise out of the judgment, the appellate Court can go into the validity of the document and even the impound document and collect necessary stamp duty. Since proper stamp duty is already collected E.A1 cannot be non-suited.

Point Nos.3 and 5:

31. It is the case of the defendants 2 and 3 that there was a contract entered between the first defendant and defendants 2 and 3 on 06.01.1996 for sale of the suit property. The defendants 2 and 3 would submit that there was an agreement on 06.01.1996 for a total sale consideration of 4,90,100/- and a sum of Rs.25,000/- was paid as advance amount and sale shall be completed before 30.06.1997. Thereafter, three months time has been extended to 30.09.1997. It is relevant to note that the very agreement itself denied by the plaintiff and he took a stand that the same has been created for the purpose of the case with the collusion of the first defendant and it is the duty of the first defendant to prove the execution of the so called sale agreement. None of the witnesses, who signed in the agreement, were examined, though particularly 3 or 4 witnesses including the document writer have been shown in the document.

32. Further, it is to be noted that though the defendants 2 and 3 claimed to have been entered into an agreement to purchase the vast land of estate, in the cross examination of D.W.1, he has stated that he does not even entered the residential area and he do not know the door number of the building and never measured the land and he has also does not know about the age of the cardamom plant in the land. This evidence of D.W.1 creates doubt about the genuinity of the agreement dated 06.01.1996. When a person is intended to purchase the vast extent of property, his normal conduct would be at least to verify the nature of the property and buildings there on without even seeing the suit property and no idea about the plants and its age, entering into a contract to purchase the property is highly improbable. In fact, the above conduct of the first defendant, probablise the plaintiff's case that the agreement dated 06.01.1996 came into existence with the collusion of the first defendant to non-suit the plaintiff. Further, there was no reason as to why none of the witnesses examined by the defendants 2 and 3 to prove its execution.

33. It is also relevant to note that under Ex.A38, the plaintiff has issued a legal notice on 30.06.1997, narrating the nature of the payment made by him and he has given a minute details in this document. Said notice has been received by the first defendant and acknowledgment card has also been filed as Ex.B39. First defendant has issued a reply notice on 11.07.1997, which was marked as Ex.A40. In the said reply notice, though the first defendant has admitted the execution of Ex.A1, the only contention is that the parties agreed to enter into an agreement for sale within 7 days from 04.04.1996 and he has alleged that the plaintiff has trespassed into the property. Thereafter, the first defendant has filed a caveat petition on 05.08.1997, denying the sale agreement and payment of consideration and also made allegation of trespass and causing damages. Having pleaded all these facts in the reply notice, the reply notice is silent about Ex.B2, agreement. Reply notice-Ex.A40 clearly shows that there was already a dispute started between the brothers and the relationship between them become rancour. In such a situation, the normal conduct of the first defendant was to disclose the contract, if any, already entered with the defendants 2 and 3, but he has never wshipered anything about the agreement dated 06.01.1996.

34. It is also to be noted that on 18.10.1997, the plaintiff has issued a legal notice not only to the first defendant, but also to the second defendant calling upon the first defendant to execute the sale deed and also not to create any sale or encumbrance to the schedule mentioned property with the second defendant or to any third parties. This notice has been received by the first defendant on 20.10.1997, however, the second defendant avoided to receive the notice, despite intimation given by the postman. Therefore, the registered post came back to the sender. The first defendant is a Driver by profession and he has also admitted in his evidence that the registered post-Ex.A42 was also sent to the same address given in the deposition of the defendant. However, the same has been evaded. Therefore, this Court is of the view that when the registered post sent to the correct address, it is deemed service as per Section 27 of the General Clause Act and the defendants are not rebutted the presumption attached to the said deemed service and it is also well settled that the burden is on the person, who challenge the factum of service to rebut the presumption. However, the defendants have not brought any material to rebut such presumption also. The above notice clearly shows that the prior contract between the plaintiff and the first defendant was made known to the parties by way of a legal notice, which has been purposely evaded by the second defendant. Therefore, it cannot be said that the defendants 2 and 3 unaware of the prior contract. In fact, avoiding legal notice sent to the correct address makes it clear that they were aware of the prior contract between the plaintiff and the first defendant. Even then they purchased the property. Therefore, they cannot be termed as bona fide purchasers for value without notice.

35. The Division Bench of this Court in ***Arunachala Thevar And Ors. vs Govindarajan Chettiar And Ors.*** reported in ***1977 (2) MLJ 431***, has considered the claim of a subsequent purchaser as a bona fide purchaser for value without notice of the contract after considering the entire case law on point. The Division Bench had observed as follows:

> *"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 Division Bench has further observed as follows:

> *"13.The sum and substance of the above cited decisions is to the effect that a transferee should have paid the entire consideration money to the owner before he was put http://www.judis.nic.in 17 on notice of the prior agreement of sale, that such payment of consideration need not be in money only, but may be either in money or money's worth or may be by way of some adjustment, but there must be actual payment or adjustment and not merely a promise to pay or a mere agreement for adjustment....."*

The Division Bench also sounded a note of caution and observed as follows:

".....However, we make it clear that no hard and fast rule can be laid down regarding the ambulatory nature of the burden of proof in cases of this type, which is initially cast on the transferee, and each case as it arises must be decided according to its own peculiar facts, circumstances and probabilities....."

36. This dictum of Division Bench was followed by another Division Bench of this Court in B***.Nemi Chand Jain and others vs G.Ravindran and others*** reported in ***2010 (2) CTC 751***. While reiterating the General Principles on the applicability of the Section 19, the Division Bench observed as follows:

"The legal presumption of knowledge or notice arises from:
(a) Wilful abstention from an enquiry or search;
(b) Gross negligence;
(c) Registration, omission to search the register kept under the Registration Act, may amount to gross negligence so as to attract the consequences which result from notice;
(d) Actual possession; and
(e) Notice to an agent."

37. Considering the above dictum and conduct of the defendants and notice was also evaded by the second defendant and they have not discharged their burden to rebut the presumption attached to the service of notice under Section 27 of the General Clauses Act, 1897, this Court is of the view that the defendants 2 and 3 are not bona fide purchasers for value without notice. The plaintiff has also given an objection to the Sub-Registrar under Ex.A45. The objection also replied by the Sub-Registrar on 23.10.1997 under Ex.A.46.

Point No.4:

38. As discussed in Point Nos.1 and 2, the plaintiffs from the very inception of executing Ex.A1, made several payments and paid excess amount than the sale consideration. In fact he had also executed Ex.A2 to A7 also, which clearly show that he had paid the consideration to clear the loan to the Species Board. That apart, his evidence also clearly shows that he was also making request to the defendants to execute the document, immediately after the property had been re-conveyed to the first defendant. Besides, he had also given a complaint against the first defendant with the Jamath. P.W.4 had also spoken about this aspect. Immediately after the reconveyance, the plaintiff issued a legal notice to the first defendant on 30.06.1997, which was received by the first defendant and replied on 11.07.1997. Thereafter, again the plaintiff issued a legal notice on 18.10.1997 not only to the first defendant, but also to the second defendant. He had also given an objection to the Sub Registrar not to register any document relating to the suit property. This fact was proved under Ex.46, reply notice sent by the Sub Registrar. The suit was filed on 24.10.1997, immediately after the second legal notice sent to the first and second defendants. Further, the plaintiff had paid more than the agreed sale consideration. This fact also proves that the plaintiff was always ready and willing to perform his part of contract from the very inception of Ex.A1. Accordingly, the readiness and willingness on the part of the plaintiff is clearly established and accordingly, this point is answered.

Point No.6:

39. It is further to be noted that the plaintiff has filed a suit on 24.10.1997, wherein the second defendant was also made as one of the parties and third defendant was added on 26.11.1997. The sale deed has been registered on 27.10.1997, between 12.00 to 1.00 p.m. It is relevant to note that the documents have been presented before the registered office for registration only on 27.10.1997, much after the suit filed on 24.10.1997. However conveniently, the execution date has been shown as 24.10.1997 i.e., on the date of suit filed before the trial Court to avoid the plea of *lis pendens*. The registration of document normally relates back to the date of execution of the sale deed as per Section 47 of the Indian Registration Act, 1908. Admittedly, the suit has been presented in this case on 24.10.1997, but the registration of the document has been completed on 27.10.1997. Therefore, the fiction created by Section 47 of the Indian Registration Act, 1908 that registration of the sale deed relates back to the date of execution, cannot be mechanically applied to the cases where the very execution of date is conveniently made to avoid the legal consequences.

40. Much emphasis has been made to the judgment of this Court in **Sak Apparels Vs. Madras Management Association** reported in **2018 (2) CTC 407.** In the above case, this Court, considering the fact that much prior the suit was filed, necessary endorsements, required under Sections 54 and 58 of the Registration Act, have been made in the sale deed on 07.09.2007 itself and only certification of registration was issued on 30.10.2007 and all the formalities have been complied on 07.09.2007, has held that documents once registered takes effect from the date of execution . In the above case, all the endorsement have been made even prior to the filing of the suit. In such circumstances, this Court has held that the plea of *lis pendens* cannot be pressed into service. However, the above judgment is not applicable to the facts of this case.

41. Admittedly, defendants 2 and 3 also aware of the contract and the legal notice also sent through the registered post. Besides, legal notice also received by the first defendant and reply has also sent by him in earlier occasion. All these facts clearly indicate that defendants 2 and 3 were also aware of the earlier contract. Therefore, merely because the document has been registered later and earlier date is mentioned as execution to avoid the rigour of Section 52 of Transfer of Property Act. The defendants 2 and 3 cannot escape from the rigour of doctrine of *lis pendens,* when such execution has been made that too after notice of earlier contract and also the suit was filed on prior date.

42. Now the other contention is that at the time of execution of Ex.A1, the title is not with the first defendant and therefore, such a contract cannot be enforced. It is relevant to note that such contention has no legs to stand as per Section 13 of the Specific Relief Act, 1963 which reads as follows:

> *"13. Rights of purchaser or lessee against person with no title or imperfect title.—*
>
> *(1) Where a person contracts to sell or let certain immovable property having no title or only an imperfect title, the purchaser or lessee*

(subject to the other provisions of this Chapter), has the following rights, namely:—

(a) if the vendor or lessor has subsequently to the contract acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest;

(b) where the concurrence of other persons is necessary for validating the title, and they are bound to concur at the request of the vendor or lessor, the purchaser or lessee may compel him to procure such concurrence, and when a conveyance by other persons is necessary to validate the title and they are bound to convey at the request of the vendor or lessor, the purchaser or lessee may compel him to procure such conveyance;

(c) where the vendor professes to sell unencumbered property, but the property is mortgaged for an amount not exceeding the purchase money and the vendor has in fact only a right to redeem it, the purchaser may compel him to redeem the mortgage and to obtain a valid discharge, and, where necessary, also a conveyance from the mortgagee;

(d) where the vendor or lessor sues for specific performance of the contract and the suit is dismissed on the ground of his want of title or imperfect title, the defendant has a right to a return of his deposit, if any, with interest thereon, to his costs of the suit, and to a lien for such deposit, interest and costs on the interest, if any, of the vendor or lessor in the property which is the subject-matter of the contract.

(2) The provisions of sub-section (1) shall also apply, as far as may be, to contracts for the sale or hire of movable property."

Sub-clause (a) of Section 13 (1) of Specific Relief Act, 1963 makes it very clear that the vendor acquired any interest in the property, the purchaser may seek enforcement of the contract against the vendor, who acquired interest later. Therefore, the contention of the learned counsel appearing for the defendants 2 and 3 / appellants, in this regard, has no legs to stand.

43. Yet another submission made by the learned counsel for the defendants 2 and 3 / appellants is that since the relief is sought only against the first defendant to execute the sale deed and without any specific relief against defendants 2 and 3, who become the owner of the property, the specific performance cannot be enforced. In this regard, it is useful to refer the judgment of Hon'ble Apex Court in ***P.Ramasubbamma Vs. V.Vijayalakshmi*** reported in ***AIR 2022 SCC 1793,*** wherein, the Hon'ble Apex Court has followed the following judgments of the Hon'ble Apex Court:

1.***Lala Durga Prasad and Anr. Vs.Lala Deep Chand and Ors.*** reported in ***1954 SCR 360; AIR 1954 SC 75;***

2. ***Sono Lalji Jetha and Ors. Vs. Soni Kalidas Devchand and Ors.*** reported in ***(1967) 1 SCR 873; AIR 1967 SC 978***;

3. ***R.C.Chandiok and Anr Vs. Chuni Lal Sabharwal and Ors.***, reported in ***(1970) 3 SCC 140; AIR 1971 SC 1238***;

4. ***Dwarka Prasad Singh and Ors Vs. Harikant Prasad Singh and Ors.,*** reported in ***(1973) 1 SCC 179; AIR 1973 SC 655***; and

5. ***Rathanvathi and Anr V. Kavitha Ganashamdas*** reported in ***(2015) 5 SCC 223: AIR 2015 SC (Civ) 1.***

44. In the above judgment, the Hon'ble Apex Court has held that in a suit for specific performance, it is not necessary for the agreement holder to seek cancellation of sale deed executed in favour of a subsequent purchaser and it is sufficient to implead the subsequent purchaser in the suit and seek relief of specific performance against the original owner and also seek direction to the subsequent purchaser to join in the execution of the sale deed in order to completely convey title to the agreement holder. The judgments relied upon by the learned counsel for the appellant are not applicable to the facts of the present case. Such view of the matter, this Court is of the view that the mere decree directing the subsequent purchaser to join in the execution itself would meet the ends of justice. Though no relief is sought against the defendants 2 and 3, this Court is of the view that if they are directed to join in the execution, the same will meet the ends of justice. Accordingly, defendant 2 and 3 / appellants are directed to join in the execution along with the first defendant. Accordingly, all the points are answered.

45. In the result, this Appeal suit is dismissed and the decree and judgment passed by the learned Subordinate Judge, Srivilliputtur, in O.S.No.244 of 1997, dated 15.10.2003, is set aside. However, the judgment and decree is modified to the effect that all the defendants are directed to execute the sale deed to the plaintiff, within a period of one month from the date of receipt of a copy of this judgment, failing which the trial Court shall execute the decree. No costs.

......04.2023

NCC : Yes /No
Index : Yes/No

vsm/ta

To

1.The Subordinate Judge, Srivilliputtur.

2.The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.

N.SATHISH KUMAR, J.

vsm/ta

Pre-Delivery Judgment made in
A.S.No.78 of 2004

......04.2023