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S.A.No.611 of 2007

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Received on :14.12.2023
Pronounced on : 22.02.2024
CORAM :

THE HONOURABLE Mr. JUSTICE C.KUMARAPPAN

S.A.No.611 of 2007
and
C.M.P.No.1 of 2007

1.Swaminathan
2.Chinnasamy(Died)

...Defendants/Appellants
/Appellants

3.Muthumalasamy
4.Balasubramaniam(Died)
5.Devanathn
*(A3 to A5 are brought on record as
LRS of the deceased 2nd appellant
vide Court order dated 26.11.2019)*

6.B.Amutha
7.B.Vigneswaran
8.B.Vishupriya
9.B.Vijayakumari
*(A6 to A9 are brought on record as LRS
of the deceased 4th appellant vide Court
order dated 09.09.2022)*

Vs.

Muthusamy(Died)
2.M.Panchavarnam
3.M.Selvarasu
4.M.Gunasekaran
5.M.Murugan

... Plaintiffs/Respondents/
Respondents

(R2 to R5 are brought on record as



S.A.No.611 of 2007

*LRS of the deceased sole respondent vide
Court order dated 26.11.2019)*

Prayer: Second Appeal is filed under Section 100 of the Code of Civil Procedure, against the judgment and decree in order dated 31.08.2006 made in A.S.No.39/05 on the file of the Sub-Court, Chidambaram, confirming the judgment and decree order dated 28.04.2005 made in O.S.No.17 of 1995 on the file of the District Munsif Court, Chidambaram.

For Appellants	: Mr.Srinathsridevan, Sr.Counsel for Mr.K.Harishankar
For R3 to R5	: Mr.G.Rajagopalan, Sr.Counsel for Mr.R.Thanjan
For R1,R2&R4	: Died

J U D G M E N T

The present second appeal has been filed against the judgment and decree dated 31.08.2006 made in A.S.No.39/05 on the file of the Sub-Court, Chidambaram, confirming the judgment and decree, dated 28.04.2005 made in O.S.No.17 of 1995, on the file of the District Munsif Court, Chidambaram.

2.The instant second appeal has been filed at the instance of the defendants. The respondent herein is the plaintiff before the trial Court.

3.For the sake of convenience, the parties will be referred to according



S.A.No.611 of 2007

to their litigative status before the Trial Court.

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The brief facts which give rise to the instant Second Appeal are as follows:

4.The plaintiff purchased the suit property from one Duraisamy and Murugesan under a registered sale deed, dated 04.01.1977. Ever since the date of purchase, the plaintiff has been in actual physical possession and enjoyment of the same. After the purchase of the suit property, the plaintiff has put up a construction by borrowing loan from the Co-operative Society. In such circumstances, the plaintiff came to know about the filing of the suit in O.S.No.67 of 1976 between the defendants herein and one Ramalinga Chettiar and his son Duraisamy, who is the vendor of the plaintiff. While so, taking advantage of decree passed in O.S.No.67 of 1976, the defendants had attempted to take possession of the suit property. It is the submission of the plaintiff that the suit property referred to in O.S.No.67 of 1976 is not the property purchased by the plaintiff through the sale deed, dated 04.01.1977. The plaintiff further submitted that the obstruction petition filed by the plaintiff in E.A.No.129 of 1994 was allowed and stay of the execution was ordered. While so, the



S.A.No.611 of 2007

defendants claiming title under Will from one Chidambaram Chettiar, got decree against the said Duraisamy and Murugesan and filed execution petition and got delivery of property, except the suit item No.22 of the O.S.No.67 of 1976. It is the submission of the defendants that the said suit item No.22 include the portion of the suit property. The plaintiff further submits that only upon enmity between the plaintiff's son and the defendants, the defendants have been attempting to get delivery of the property under the premise of decree in O.S.No.67 of 1976, which pertains to some other property. Hence, the plaintiff has come forward with the present suit for declaration and for permanent injunction and for such other relief.

5.The said suit was resisted by the defendants by contending that the suit property is the portion of 22nd item of the decree in O.S.No.67 of 1976. The plaintiff claims to have purchased the same from Duraisamy and Murugesan, who are the defendants 1 and 2 in O.S.No.67 of 1976. The defendants herein got decree for declaration of title and for possession of the property including the suit property. The appeal and the second appeal filed against the decree in O.S.No.67 of 1996 was dismissed. It is the submission of the defendants that the



S.A.No.611 of 2007

purchase made by the plaintiff, was during the pendency of the suit in O.S.No.67 of 1976. Hence, such purchase is hit by the doctrine of *lis pendens*.

The defendants further submitted that the filing of separate suit instead of filing an application under Section 47 of C.P.C., is barred. Hence, they pray to dismiss the suit.

Evidence and Documents:

6.Before the trial Court, on the side of the plaintiff, three witnesses were examined as P.W.1 to P.W.3 and twenty nine documents were marked as Ex.A.1 to Ex.A.29. On the side of the defendants, two witnesses were examined as D.W.1 and D.W.2 and eight documents were marked as Ex.B.1 to Ex.B.8 and five Court documents were marked as Ex.C.1 to Ex.C.5.

Finding of both the Courts below

7.The trial Court, after having considered the oral and documentary evidence, has held that the suit property of the instant suit and the 22nd item of the property referred to in O.S.No.67 of 1976 are two different properties. Therefore, doctrine of *lis pendens* and Section 47 of C.P.C., are not applicable to the suit, and ultimately based upon the sale deed of the plaintiff, the trial Court decreed the suit. Being not satisfied with the decree of the trial Court, the



S.A.No.611 of 2007

defendants preferred the appeal. The first appellate Court has not found any merit in the defendants' case and confirmed the decree of the trial Court. Aggrieved against the concurrent findings, the defendants are before this Court by way of this second appeal.

Submissions on either side:

8. The learned Senior Counsel appearing on behalf of the defendants/appellants would vehemently contend that the contention of the plaintiff that the suit property of this suit and the suit property in another suit O.S.No.67 of 1976 are different, properties and not the same is contrary to the factual position. In this regard, the learned Senior Counsel would submit that there was an amendment in respect of the suit property, at the review stage. Therefore, the said amendment would relate back to the date of filing of the suit. Therefore, the plaintiff cannot take advantage of inadvertent mistake occurred while describing the suit property at the first instance. Therefore, it is the specific contention of the learned Senior Counsel that the instant suit is hit by the doctrine of *lis pendens*. It is also the contention of the learned counsel for the appellants/defendants that the finding recorded by the first appellate Court that the plaintiff is a bonafide purchaser, cannot be a good defence when the



S.A.No.611 of 2007

transaction is hit by doctrine of *lis pendens*. It was also the contention of the learned Senior Counsel that when there is a dispute with regard to the identity of the property, the appropriate remedy would be filing an application under Section 47 of C.P.C., and not filing a separate suit. It was also contended by the learned Senior Counsel that the instant suit is also hit by the provisions under Order 21 Rule 97 r/w Section 101 of C.P.C.

9.Per contra, the learned Senior Counsel appearing for the plaintiff/respondent would contend that the instant suit property is different from the suit property of O.S.No.67 of 1976. Therefore, when the plaintiff purchased the suit property, the pendency of the suit in O.S.No.67 of 1976 cannot be construed as *lis pendens*. It was also contended by the learned Senior Counsel appearing on behalf of the plaintiff/respondent that when the suit property is different, the question of filing an application under Section 47 of C.P.C., also does not arise. Therefore, it is the contention of the learned Senior Counsel that when there was a concurrent finding of both the Courts below that the instant suit property is, all together different from the 22nd item of the suit property in O.S.No.67 of 1976, and that such concurrent factual finding cannot



S.A.No.611 of 2007

be interfered at the second appeal stage. Hence, he prays for dismissal of the appeal.

10.I have given my anxious consideration on the submissions made by either side.

11.It is pertinent to mention here that in respect of the contention that the suit is barred under Order 21 Rule 97 r/w Section 101 of C.P.C., though such contention may be a question of law, but still, there is no factual foundation either in pleadings or in the grounds of memorandum of appeal. Therefore, this Court is of the view that all of sudden such argument cannot be agitated at the second appeal stage to put the respondent in surprise. It was the contention of the learned Senior Counsel for the plaintiff that when there is no factual foundation or no pleading, there was no occasion for the Court below to consider such objection. Therefore, this Court, at the second appeal stage, cannot go into the said plea. Hence, the submission made in respect of Order 21 Rule 97 r/w 101 C.P.C., is rejected. In this regard, it is useful to refer the judgment of the Hon'ble Supreme Court in ***Hero Vinoth (Minor)-Vs-***



S.A.No.611 of 2007

Seshammal, reported in ***(2006)5 SCC 545***.

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12.Coming to the main contention the learned Senior Counsel for the appellants would invite the attention of this Court in respect of Section 52 of the Transfer of Property Act and in this regard, the learned Senior Counsel has also relied upon the judgment of this Court in ***B.Rajamani and others-Vs-N.Gunasekaran and others***, reported in ***2023(5)CTC 571*** and in ***Sampath Kumar-Vs-Ayyakannu and Another***, reported in ***(2002) 7 SCC 559***.

13.In order to substantiate the contention in respect of Section 52 of the Transfer of Property Act, the learned Senior Counsel appearing for the appellants/defendants would contend that though the 22nd item of the suit property in O.S.No.67 of 1976 was originally described and referred to as 127/1, at the review application stage, an amendment was permitted by this Court and R.S number was amended as R.S.No.178/1and new R.S.Nos.332/5 and 332/6, and that such amendment would relate back to the date of filing of the suit. In this regard, both the Courts below have concurrently found that, on the date of purchase of the suit property dated 04.01.1977 under Ex.A.1, the survey number referred to for item No.22 of the property mentioned in O.S.No.67 of 1976 is **127/1**, whereas the amendment had taken place only during 1997.



S.A.No.611 of 2007

WEB COPY

14. Therefore, it is apparent that as on the date of purchase of the suit property through Ex.A.1, the property referred in O.S.No.67 of 1976 is not the one mentioned in Ex.A.1 sale deed, but different R.S number. Even for argument sake, if we assume that such amendment makes item 22 of the suit property in O.S.No.67 of 1976 is, as the same property purchased by the plaintiff under Ex.A.1, whether Section 52 of the Transfer of Property Act is applicable or not became a seminal question to be answered by this Court. To put it in other words, when there was misdescription of property, at the time of filing of suit, any subsequent amendment at latter stage can give the protection under Section 52 of the Transfer of Property Act.

15. The doctrine of *lis pendens* is on the basis of the principle of good conscience, equity and on public policy. In *lis pendens* proceedings no question of good faith arose. To attract Section 52 of the Transfer of Property Act, the essential factor to be analysed is, whether on the date of purchase, any suit or proceedings were pending in respect of the property purchased by the plaintiff. Admittedly, on the date of plaintiff's purchase, the suit property referred to in



S.A.No.611 of 2007

O.S.No.67 of 1976 was only **R.S.No.127/1** and the amendment had taken place only during 1997, that too in review application. However, the learned counsel by relying ***Sampath Kumar case(cited supra)***, would contend that the amendment would relate back to the date of filing of the suit. It is pertinent to mention here that such principle is not automatic and has no universal application, and in appropriate case, the Court is competent while permitting the amendment to direct that the amendment permitted by it shall not relate back to the date of the suit. The relevant portion of the judgment is extracted hereunder:

“10.An amendment once incorporated relates back to the date of the suit. However, the doctrine of relation back in the context of amendment of pleadings is not one of universal application and in appropriate cases the Court is competent while permitting an amendment to direct that the amendment permitted by it shall not relate back to the date of the suit and to the extent permitted by it shall be deemed to have been brought before the Court on the date on which the application seeking the amendment was filed.”

16.Therefore, since because, there was an amendment in the suit property during 1997, the benefit to the defendants to invoke Section 52 of the Transfer of Property Act cannot be held to be automatic. The misdescription of



S.A.No.611 of 2007

the suit property at the initial stage is fatal to trigger Section 52 of the Transfer of Property Act. Only in that context, both the trial Court as well as the first appellate Court have found that the property purchased by the plaintiff herein and the property referred to in O.S.No.67 of 1997 are two different properties.

17.It is pertinent to mention here that apart from variance from the description of the property from Ex.A.1-sale deed and the decree in O.S.No.67 of 1976, it is pertinent to mention here that even in the sale deed executed by Govinda Chettiar under Ex.B.1 refers only **S.F.No.127/1** and in the Will, through which the defendants claim title over the property also refers the S.F.No.127/1. Only because of that, while filing the suit in O.S.No.67 of 1976, the defendants have described the property as S.F.No.127/1. But, it was the contention of the learned Senior Counsel that the S.F.No.127/1 referred in O.S.No.67 of 1976 is nothing, but the property purchased by the plaintiff under Ex.A.1.

18.The further explanation given by the learned Senior Counsel for the appellant is that by efflux of time, new boundary name would have set in. But to sustain such argument, the change of boundary name has to be proved to



S.A.No.611 of 2007

the satisfaction of the Court. Here except the argument, there are no material to substantiate the above contention. Therefore, this Court is of the firm view that the property referred to under Ex.A.1, and the item 22nd property referred to in O.S.No.67 of 1976 are two different properties. Even for argument sake, if both the properties are one and the same, still Section 52 of the Transfer of Property Act is not applicable on the ground of misdescription of property until 1997.

19.In this regard, it is useful to refer the judgment in ***Khulna Loan Co., Ltd.,-Vs-Tarapada Bose and Ors.***, reported in ***1940 SCC Online Cal 119*** and the relevant portion is extracted hereunder:

*“It can be taken to be a settled principle of law, that **in order to attract the doctrine of lis pendens, the property in suit must be described with sufficient precision. If there is such misdescription of the property that its identity cannot be established, the doctrine of lis pendens cannot apply [Lokenath Sahu v. Achitananda Das [16 C.L.J. 391 (1909).]]. What description will be sufficient in a particular case, would of course depend largely on the facts of that case.***

In this case, the mortgage bond described the land as ancestral niskar of Troilokya butted and bounded in a certain way,



S.A.No.611 of 2007

and measuring two bighas in area. In the sale certificate of the Defendant No. 1, it is described as comprising certain C.S. Dags appertaining to two khaitans, and as a part of a mokarari holding carrying an yearly rental of Rs. 23 annas odd, the total area being over 16 acres. If the lower Appellate Court had held that the description of the land in the mortgage bond was not at all sufficient to establish its identity with the land purchased by the Defendant, that would have been a complete answer to the Plaintiffs' claim. The Subordinate Judge however does not say that; he finds though not very clearly that the lands are identical, but what he says is, that Defendant No. 1 having purchased the tenancy right, whereas the niskar right only was purchased by the Plaintiff, there is no conflict between the two interests. In other words the conclusion of the Subordinate Judge is that the jamai right was not mortgaged to the Plaintiff Company at all, and as the mortgage suit was in respect of the niskar right alone, no question of lis pendens Avould arise. I don't know that it is the case of any party that Troilokya had both niskar and tenancy right in the land in suit, and that he mortgaged the higher right only, keeping the lower still in him. If that is the position, it can certainly be said that the Plaintiff Company acquired the superior right only by purchase at the mortgage sale, and they were entitled to realise rents from Defendant No. 1 who got the tenancy right in the land."



S.A.No.611 of 2007

(emphasis supplied by this Court)

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20. It is also useful to refer the judgment of the Allahabad High Court in ***Wali Bandi Bibi-Vs-Tabeya Bibi***, reported in ***1919 SCC Online All122***. The relevant portion of the judgment is extracted hereunder:

“The contention is that under the law the amendment of a plaint relates back to the date of the institution of the suit and that for the purpose of lis pendens the suit becomes contentious from the date of its institution. In the present case, though there was a mistake in the description of a portion of the property in suit, yet by the amendment of the 21st of May, 1912, the defect was cured and the suit should be taken to have been a contentious suit qua item No. 6, from the 22nd of February, 1912, the date on which it was instituted. Some cases have been referred to us in support of the contention that the amendment relates back to the date of the institution of the suit. The contention may be correct with regard to certain pleas such as that of limitation, but we are not prepared to hold that the contention is true in every possible case. One of the matters that is essential for the application of the rule of lis pendens is that the property should have been directly and specifically in question in the suit. Bennet in his work on lis pendens says—“It may be said in general that a lis pendens will be created whether the property involved in suit is described,



S.A.No.611 of 2007

either by such definite and technically legal description that its identity can be made out by the description alone, or where there is such a general description of its character or status, and by such reference that upon inquiry the identity of the property involved in litigation can be ascertained.

(emphasis supplied by this Court)

21.Further, it is also useful to refer the judgment of the Karnataka High Court in ***B.V.Vasantha-Vs-Sha Poonamchand and others***, reported in ***ILR 1997 KAR 1561***. The relevant portion of the judgment is extracted hereunder:

11.2.The afore-quoted legal propositions enunciated by the High Courts of Allahabad and Oudh are followed by this Court in B.R. Rangaswamy v. Uppari Gowda,² In that case it was contended by Learned Counsel for appellant that as soon as the pleading is amended it relates back to the filing of the plaint and, therefore, acquisition of interest by any third party in the immovable property in dispute in the suit would attract applicability of the rule of lis pendens. Repelling this contention the Court has observed:

“The rule embodied in Section 52 is a rule of expediency. That rules has been enacted with a view to protect the parties who are litigating in a Court in respect of certain immoveable properties. Legal title acquired by third parties cannot be put to the risk of being



S.A.No.611 of 2007

defeated by parties to a pending suit, by amending their pleading and including the property purchased by such third parties. It is a settled principle of law that in order to attract the doctrine of lis pendens the property in suit must be described with sufficient precision. If there is such misdescription of the property as its identity cannot be established the doctrine of lis pendens cannot apply. The Court have consistently taken the view that if by a subsequent amendment certain property is included in a plaint and before that amendment had been made newly included property had already been purchased by a bona fide purchaser for value without notice of defect of title the doctrine of lis pendens will have no application to such a case.”

The same view has been taken by the High Court of Andhra Pradesh in *Abid Hussain v. R.K. Paul*,⁶ Discussing the question of applicability of doctrine of lis pendens to a purchase by a bonafide purchaser of a property which was the subject of a legally defective decree, the Learned Judge has held:

“5. From the above, the following emerge:

Firstly, that though a correction could be made under Section 152, Civil Procedure Code at any time, such a thing is possible only as long as interests of third parties do not intervane; Secondly any inertia on the part of a person asking for the amendment should not be tolerated when the third parties acquire interests though it is



S.A.No.611 of 2007

necessary that the third parties should have acted in good faith without the knowledge of the defective decree.

When these elements could be found in a case, there is no gain saying that, on the principles of equity, an exception to the rule contained in Section 152 C.P.C. has been made operative by judicial dicta. *It may, therefore, be said that the power of correction or amendment conceded by Section 152, C.P.C. is not so oblivious of considerations of equity, arising in the case of third persons who have acquired rights.”* (emphasis supplied by this Court)

Therefore, from the above precedents, what emerges is, if there was a misdescription of property, and that such property could not be identified with precision, then the subsequent amendment of suit property, will not cure the defect, so as to attract Section 52 of the Transfer of Property Act. To put it in other words, Section 52 of the Transfer of Property Act has no application where there was a misdescription of property at the crucial point of time.

22.Coming to the next defence put forth by the learned Senior Counsel is based upon Section 47 of C.P.C. In order to attract Section 47 of C.P.C., the plaintiff must be a party to the suit. Both the trial Court as well as the first appellate Court found that the plaintiff herein is not a party to the suit.



S.A.No.611 of 2007

Therefore, held that Section 47 of C.P.C., is not applicable. However, it is the contention of the learned Senior Counsel for the appellants that since the plaintiff purchased the property from the defendants in O.S.No.67 of 1976 he may be brought well within the definition of “representatives”. This Court absolutely do not have any grievance over the above contention put forth by the learned Senior Counsel and also upon the ratio held in ***Gangabai Gopaldas Mohata-Vs-Fulchand and Others***, reported in ***(1997) 10 SCC 387*** and ***Jai Narain Ram Lundia-Vs-Kedar Nath Khetan and Others***, reported in ***1956 SCR 62 : AIR 1956 SC 359***.

23.But, in order to bring the plaintiff within the definition of “representative”, the property which has been purchased by him under Ex.A.1, should have been the same property as found in O.S.No.67 of 1976. Both the Courts below have categorically held that the subject matter of the suit in O.S.No.67 of 1976 is different from the property purchased by the plaintiff through Ex.A.1. Further the Court is also in full agreement with the above factual findings. Therefore, in the above circumstance, the finding given by both the Courts below that Section 47 of C.P.C., is not applicable to the plaintiff, cannot be found faulted. Further, when both the Courts have seen a factual



S.A.No.611 of 2007

finding that the properties referred to in Ex.A.1 and the 22nd item of property referred to in O.S.No.67 of 1976 are two different properties, such factual finding can not be interfered under Section 100 of C.P.C., merely because there is a possibility for another alternative finding. It is imperative that, under Section 100 of C.P.C., this Court should be slow in interfering the concurrent finding unless the same are perverse. Here, this Court could not see any perversity in the above finding.

24.It is also pertinent to mention here that even the Commissioner, who has inspected the suit property has held that the property referred to in Ex.A.1 is not the property referred in O.S.No.67 of 1976. The learned Senior Counsel has also relied upon the judgment of the learned Single Judge of this Court in *B.Rajamani and others-Vs-N.Gunasekaran and others* reported in **2023(5)CTC 571**, to substantiate his contention that the defence of bonafide purchaser for valuable consideration is not applicable under Section 52 of the Transfer of Property Act.

25.As already discussed herein above, the invocation of Section 52 of



S.A.No.611 of 2007

the Transfer of Property Act, is ruled out to the instant suit, since the properties are different. Even for the argument sake, if we presume that the properties are one and the same, still on the ground of misdescription of the property, the defence of *lis pendens* cannot be brought in to service. Therefore, this Court is of the firm view that the finding of facts recorded by both the Courts below are well merited and this Court could not find any ground to deviate from the said findings and further there is no substantial question of law arising in this matter.

26.In the result, this Second Appeal stands dismissed. No costs.
Consequently, connected miscellaneous petition is closed.

22.02.2024

NCC:Yes/No
Index:Yes/No
Internet:Yes/No
To

- 1.The Sub-Court,
Chidambaram.
- 2.The District Munsif Court,
Chidambaram.
- 3.The Section Officer,
Vernacular Records,
Madras High Court,
Madras.

C.KUMARAPPAN.,J



WEB COPY



S.A.No.611 of 2007

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S.A.No.611 of 2007
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C.M.P.No.1 of 2007

22.02.2024