



S.A.No.1254 of 2012

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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Reserved on: 10.09.2024

Delivered on: 28.10.2024

CORAM:

THE HONOURABLE MR.JUSTICE N.SENTHILKUMAR

S.A.No.1254 of 2012

and

M.P.Nos.1 of 2012 & 1 of 2013

P.Govindaraj

...Appellant

-Vs-

- 1.Bhakthavatchalam
- 2.B.Senthil Kumar
- 3.B.Munisamy @ Suresh Kumar
- 4.Sagunthala
- 5.Venkatesan
- 6.Meenakshi
- 7.Geetha
- 8.Manjula
- 9.Lata
- 10.Rajeswari
- 11.Jyothi
- 12.Kalpana
- 13.Radhika

...Respondents

(The respondents 4 to 13 are not necessary parties for the second appeal since they were held as not required parties by Lower Appellate Court in paragraph 12 of page 7 of the judgment itself.
Appeal is not pressed against them)



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Prayer:-Second Appeal filed under Section 100 of CPC, to set aside the decree and judgment dated 20.07.2012 passed in A.S.No.1 of 2012 on the file of the Court of the Additional Districts and Sessions Judge (FTC No.3), Tirupattur, Vellore District reversing the judgment and decree dated 30.06.2208 passed in O.S.No.121 of 1992 on the file of the Court of the learned Subordinate Judge, Tirupattur, Vellore District.

For Appellant : Mr.K.Sankaran
For R1 to R3 : Mr.V.Srimathi
For R4 to R13 : Given up

J U D G M E N T

The present second appeal is filed challenging the judgment and decree passed in A.S.No.1 of 2012. The plaintiff in the suit in O.S.No.121 of 1992 is the appellant herein.

2. Before the Trial Court, the plaintiff had succeeded and before the First Appellate Court, the defendants had succeeded.

3. For the sake of convenience, the parties are referred as Plaintiff and Defendants as referred in the suit.



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4. The plaintiff originally filed the suit in O.S.No.121 of 1992 on the file of the Sub Court, Tirupattur with a prayer to direct the defendants to execute a registered sale deed in favour of the plaintiff as per sale agreement dated 02.11.1990. The plaintiff had filed amended plaint under Section 26 Order VII Rule 1 of CPC.

5. During the pendency of the suit, the first defendant, M.Pappaiah Achari had died on 05.09.1994 and the legal representatives of the first defendant, were added as defendants 2 to 11 by way of order in I.A.No.119 of 2005 dated 02.11.1995. As per the order in I.A.No.323 of 1995 dated 01.11.1996, the subsequent purchasers were added as D12 & D13.

6. The case of the plaintiff is that the first defendant had obtained a share of his property in a family partition that took place on 12.04.1982. The first defendant had executed a mortgage in favour of D.K.Kesavelu Reddiar for a sum of Rs.15,000/- on 09.12.1982 rendering suit scheduled property as security. The first defendant had executed another simple mortgage in favour of one J.Kanthammal on 18.02.1984 for a sum of Rs.10,000/- and again he executed a simple mortgage on 13.07.1987 in favour of said Kanthammal for



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another sum of Rs.20,000/- in respect of the remaining portion of the suit scheduled property.

7. On 02.11.1990, the first defendant had entered into an agreement of sale with the plaintiff, on the condition that he has to execute the sale deed after discharging the mortgage debts. Out of the advance received by him, he discharged the simple mortgage debts on 09.12.82 and 02.11.90. The said discharged mortgage deed was delivered to the plaintiff by the first defendant.

8. The other two simple mortgages created by the first defendant on 18.02.1984 and 13.07.1987 in favour of Kanthammal have to be discharged by the first defendant. Since the first defendant had failed to discharge the same, the plaintiff has obtained an assignment from the defendants on 22.11.1991 by paying a sum of Rs.20,950/- and Rs.30,400/- respectively.

9. The plaintiff is entitled to deduct the payments made by him for the transfer of the mortgages to the tune of Rs.51,350/- and further the first defendant had received a sum of Rs.25,000/- on 20.11.1990 and another Rs.25,000/- from the plaintiff on 02.01.1991. On 10.03.1991, a further sum of



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Rs.10,000/- was received from the plaintiff by the first defendant. In total, the first defendant had received a sum of Rs.1,10,000/- from the plaintiff. The first defendant has also made an endorsement that he has received a sum of Rs.1,10,000/- from the plaintiff.

10. Since a sum of Rs.51,350/- was settled by the plaintiff to the said Kanthammal in respect of assignment of the mortgages, the plaintiff is entitled to add it to the amount of Rs. 1,10,000/-. The plaintiff had in total paid a sum of Rs.1,61,350/- and the balance sale consideration to be paid is Rs. 88,650/- only and the plaintiff was always ready and willing to pay the balance sale consideration. The first defendant had leased the suit scheduled property in favour of one C.Jaganathan, who is the husband of Kanthammal by agreeing to receive Rs.350/- per month towards rent. The first defendant had issued rent receipts dated 08.03.1983, 20.02.1984 and 20.03.1986. The last receipt covered the period ending with 05.06.1991. The tenants delivered the vacant possession of the suit property to the plaintiff on 22.11.1991 and executed a receipt for the same.



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11. On 25.02.1991, the plaintiff had issued a legal notice to the first defendant calling upon the first defendant to execute the sale deed in his favour. On such situation, the first defendant had approached the plaintiff on 10.03.1991 and obtained a sum of Rs.10,000/- and the same was paid by the plaintiff as stated above. The first defendant had written a letter to the plaintiff on 07.09.1991 about the income tax clearance certificate to be obtained for the sale of suit scheduled property. The first defendant died on 05.09.1994 and the defendants 2 to 11, the legal heirs of the first defendant were made as parties in the suit. Defendants 12 and 13 are the subsequent purchasers of the suit scheduled property.

12. The plaintiff had filed the suit for specific performance with a prayer to direct the defendants 2 to 13 to execute the sale deed in favour of the plaintiff. The second defendant who is the wife of the first defendant had filed written statement and contended that the defendants 2 to 11 are binding themselves for the prayer made by the plaintiff in the suit.

13. The Defendants 2 to 11 filed the Civil Revision Petition before this Court in C.R.P.PD.No.195 of 2005 against the order dated 07.12.2004 in



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I.A. No. 386/2004 in O.S. No. 121/1992 filed for permission of the trial court to file additional written statement.

14. The order passed in C.R.P.PD.No.195 of 2005 would show that the application in I.A.No.386 of 2004 in O.S.No.121 of 1992 was rejected by the Trial Court. The order of this court in CRP. PD. No. 195/2005 dated 18.06.2005 reads as follows:

“4. The Trial Judge has rejected the request of the petitioners on the ground that the petitioners want to file the additional written statement with contradictory statement of the earlier written statement, which cannot be permitted under Order VIII Rule 9 of the Civil Procedure Code and no fresh or additional pleading has been pleaded.

5. On going through the records, I am of the view that the order of the Trial Court cannot be found fault as the request for filing of the additional written statements has not been supported with any materials and the finding arrived at by the Trial Court is supported with reasons. Hence, the Civil Revision Petition is dismissed. No costs. Consequently, connected C.M.P. is dismissed.”

15. Defendants 12 and 13 had filed their written statement and contended that the defendant 12 and 13 and the first defendant namely, PappaiahAchari, had entered into an agreement dated 24.09.1990 for the sale of suit property, for a sale consideration of Rs.1,95,000/-. Based on the said agreement, a sale deed was executed in respect of the suit scheduled property



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on 07.09.1992 by way of registered Doc.No.2385 of 1992 before the Sub Registrar Office, Tirupattur at Vellore District.

16. According to defendants 12 and 13, the first defendant had mortgaged the suit property and borrowed a sum of Rs.25,000/- from the 12th defendant on 07.10.1987. Thereafter, to discharge the abovesaid mortgage, the sale deed was executed by the first defendant in favour of defendants 12 and 13. On 28.05.1999, the plaintiff with the aid of one Jagannathan and rowdy elements had made an attempt to trespass and take forceful possession of the suit scheduled property. Therefore, the defendants 12 and 13 had filed a suit in O.S.No.141 of 1999 before the District Munsif Court at Tirupattur and the Court was pleased to grant an interim injunction in I.A.No.326 of 1999 in O.S.No.141 of 1999.

17. The defendants 12 and 13 denied all the contentions raised by the plaintiff with regard to the payment made by the plaintiff and execution of sale agreement dated 02.11.1999 for a sum of Rs.2,50,000/-. The defendants 12 and 13 contended that since the date of execution of sale deed, they are in absolute possession and enjoyment of the suit scheduled property.



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18. Another contention raised by the defendants 12 and 13 is that the money lenders by name B.K.Kesavalu Reddiar, Kanthammal and Jagannathan, who are the necessary parties, are not made as defendants in the suit instituted by the plaintiff and as such they prayed for dismissal of the suit for non-joinder of necessary parties.

19. The Trial Court framed 13 issues for consideration. On the side of the plaintiff, Ex. A1 to Ex.A22 were marked and PW1 to PW4 were examined. On the side of the defendants, Ex. B1 to B6 were marked and two witnesses were examined.

20. Based on the above facts, the Trial Court decreed the suit on the following reasons:

21. While examining Ex.A-1 sale agreement between the plaintiff and the first defendant, the Trial Court had come to the conclusion that the plaintiff had paid a sum of Rs.15,000/- as advance and a sum of Rs.25,000/- was paid on 20.11.1990 and another Rs.25,000/- on 02.01.1991 and another Rs.10,000/- was paid on 10.03.1991 which is reflected in Ex.A-1 and the



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amount paid by the plaintiff to settle the mortgages created by the first defendant are reflected in Exs.A-7 A-8 and A-10 and Ex.A-14 is the made over document executed by Jagannathan in favour of the plaintiff for the amount received by the first defendant from the said Jagannathan.

22. The evidence of P.W-1 and P.W-2 has established that the plaintiff had discharged the mortgage created between the first defendant and one B.K.Kesavalu Reddiar for a sum of Rs.15,000/-

23. The Trial Court has taken note of the suit in O.S.No.168 of 1991 filed by the 12th defendant as against the first defendant and the plaintiff with a relief to direct the first defendant not to alienate the suit property. However, the same was dismissed for non prosecution and the said judgment was marked as Ex.A-17.

24. The Trial Court came to the conclusion that the defendants 12 and 13 had filed the suit in O.S No. 168/91 only to grab the suit property which was originally agreed to be sold in favour of the plaintiff by the first defendant vide Ex. A1. The Trial Court found that there is nothing to suspect the



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genuineness of sale agreement in Ex.A-1 and the sale agreement in Ex. B2 entered between the first defendant and the 12th & 13th defendants is not genuine and the sale deed in Ex. B3 dated 07.09.1992 was created subsequent to Ex.A-1.

25. The Trial Court held that the mortgage deeds produced by the plaintiff in support of his case are true and valid. The Trial Court disbelieved the documents and evidence produced by the defendant for the reason that the defendant failed to disprove the contention of the plaintiff that the sale agreement in Ex.B2 was created by the defendant with an intention to defraud the plaintiff.

26. The Trial Court came to the conclusion that, though the house tax receipts marked as Exs.A18 to A21 are subsequent to the date of institution of the suit, the said exhibits prove the possession of the plaintiff in the suit property.

27. The Trial Court has taken note of the fact that the defendants 12 and 13 have not proved their possession through oral and documentary



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evidence and the legal heirs of the first defendant, in their evidence, has made a statement that they are ready to execute the sale deed in favour of the plaintiff.

28. The Trial Court held that the plaintiff is entitled to the relief of specific performance as the payment of advance amount by the plaintiff is established vide Exs.A2 to A4 and for the reason that the mortgages created by the first defendant were discharged by obtaining the advance amount from the plaintiff and the plaintiff is ready and willing to deposit the balance sale consideration. The suit was decreed by the Trial court.

29. Aggrieved by the judgment and decree passed in O.S.No.121 of 1992, the appellants, namely, defendants 12 and 13 in the suit had filed the appeal in A.S No. 1/2012. Appellants 3 and 4 were made as appellants as per I.A.No.5 of 2012 dated 15.03.2012 and I.A.No.7 of 2012 dated 23.04.2012.

30. The First Appellate Court did not frame any point for determination in the appeal.



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31. The First Appellate Court found that the Ex.B2 sale agreement in favour of the 12th and 13th defendants was executed prior to the execution of sale agreement in favour of the plaintiff which is marked as Ex.A1. That apart, the sale deed in Ex.B3 has also been executed based on Ex.B2 and the plaintiff has not challenged the sale deed in Ex. B3. The Trial court has not considered the above fact.

32. In the evidence of DW1, the wife of the first defendant has admitted the execution of sale deed in favour of the 12th and 13th defendants and handing over of possession of suit property. Therefore, the sale deed marked as Ex.B3 is true and valid.

33. The First Appellate Court noted that the plaintiff marked only the photocopy of the sale agreement dated 02.11.1990 entered between the plaintiff and the first defendant as Ex.A1 and the same was objected by the defendants before the Trial Court. The plaintiff has contended that the original of the sale agreement dated 02.11.1990 was filed along with the plaint and the same was misplaced during the court proceedings. Therefore, the plaintiff has approached the Hon'ble High Court. Pursuant to the order of the Hon'ble



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Chief Justice, enquiry was conducted by the Learned Principal District Judge, Vellore. Based on the enquiry, the document was ordered to be reconstructed by comparing the same with the true copy of the sale agreement and the same was accepted by the trial court.

34. The First Appellate Court found that the plaintiff has not filed the details of the enquiry and the order passed by the Learned Principal District Judge, Vellore regarding reconstruction of the sale agreement dated 02.11.1990 marked as Ex.A1.

35. The First Appellate Court found that the telegram communication marked as Ex.A16 and Judgment of the suit in O.S No. 168/91 marked as Ex. A17 are not useful for the case of the plaintiff as the Ex. A16 communication was created subsequent to the sale deed in Ex. B3 and the suit was dismissed only for the reason that the plaintiff in O.S. No. 168/91 has not amended the plaint even after grant of sufficient time.

36. The First Appellate Court noted that the Ex. B5 and B6 which are the Judgment and Decree in O.S. No. 141/1999 confirms the possession of the



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defendants 12 and 13, as the exparte judgment was passed against the plaintiff and one Jaganathan in O.S. No. 141/1999.

37. The First Appellate Court has taken a view that as the Ex.B3 sale deed and the sale receipt marked as Ex. B4 are in the possession of the defendants 12 and 13, they have better title to the suit property. Though the plaintiff has claimed to be in the possession of the suit property, he has failed to prove his possession by producing the oral and documentary evidence before the Trial Court. Therefore, the First Appellate Court came to the conclusion that the plaintiff is not entitled to the relief of specific performance and allowed the appeal.

38. The present second appeal is filed challenging the judgment and decree passed in A.S.No.1 of 2012 dated 20.07.2012. The plaintiff in the suit who lost before the First Appellate Court has filed the present second appeal. The Second Appeal was admitted on the following substantial questions of law:

- 1. Whether the omission of the Lower Appellate Court to frame the necessary points for determination in accordance with Order XLI Rule 31 CPC will render**



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the decree of the Lower Appellate Court unsustainable?

- 2. Whether the Lower Appellate Court has committed an error in not considering the fact that the purchase made by defendants 12 and 13 was after the institution of the suit and hence hit by doctrine of lis pendens enshrined in Section 52 of the Transfer of Property Act?**
- 3. Whether the finding of the Lower Appellate Court that defendants 12 and 13 had got a better title by virtue of the sale deed, which came into existence during the pendency of the suit, without there being any plea of collusion made by defendants 12 and 13, is erroneous and liable to be set aside?**

39. Learned counsel for the appellant would contend that the First Appellate Court had failed to see the sale agreement between the plaintiff/appellant and the first defendant in the suit entered on 02.11.1990 for a sale consideration of Rs.2,50,000/-, pursuant to which, a sum of Rs.50,000/- was paid as advance. The First Appellate Court has not considered the fact that totally a sum of Rs.1,61,350/- was paid by the plaintiff/appellant towards advance for the sale of suit schedule property. The mortgages created by securing the suit schedule property by the first defendant in the suit were



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discharged by obtaining the said advance amount from the plaintiff. The First Appellate Court failed to consider the readiness and willingness of the plaintiff/ appellant to pay the remaining sale consideration of Rs. 88,650/- and get the sale deed executed in favour of the plaintiff/appellant. The learned counsel for the appellant would contend that the Judgment and Decree of the First Appellate Court is unsustainable and liable to be set aside.

40. In support of his arguments, the learned counsel for the appellant relied upon the following judgments:

(1) The judgment of the Hon'ble Supreme Court reported in **(2005) 6 SCC 733** in the case of **Kasturi Vs. Iyyamperumal and Others**, wherein the Hon'ble Supreme Court held as follows:

“11. As noted herein earlier, two tests are required to be satisfied to determine the question who is a necessary party, let us now consider who is a proper party in a suit for specific performance of a contract for sale. For deciding the question who is a proper party in a suit for specific performance the guiding principle is that the presence of such a party is necessary to adjudicate the controversies involved in the suit for specific performance of the contract for sale. Thus, the question is to be decided keeping in mind the scope of the suit. The question that is to be decided in a suit for specific performance of the contract for sale is to the enforceability of the contract entered into between the parties to the contract. If the person seeking addition is added in such a suit, the scope of the suit for specific performance would be enlarged and it would be



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practically converted into a suit for title. Therefore, for effective adjudication of the controversies involved in the suit, presence of such parties cannot be said to be necessary at all. Lord Chancellor Cottenham in Tasker v. Small [(1834) 40 ER 848 : 3 My & Cr 63] made the following observations: (ER pp. 850-51)

“It is not disputed that, generally, to a bill for a specific performance of a contract of sale, the parties to the contract only are the proper parties; and, when the ground of the jurisdiction of Courts of Equity in suits of that kind is considered it could not properly be otherwise. The Court assumes jurisdiction in such cases, because a court of law, giving damages only for the non-performance of the contract, in many cases does not afford an adequate remedy. But, in equity, as well as at law, the contract constitutes the right, and regulates the liabilities of the parties; and the object of both proceedings is to place the party complaining as nearly as possible in the same situation as the defendant had agreed that he should be placed in. It is obvious that persons, strangers to the contract, and, therefore, neither entitled to the right, nor subject to the liabilities which arise out of it, are as much strangers to a proceeding to enforce the execution of it as they are to a proceeding to recover damages for the breach of it.”

(emphasis supplied)”

(2) The judgment of this Court reported in **2024 (1) CTC 167** in the case of ***Vijayalakshmi @ Vennila Vs. P.Kandaswamy***, wherein this Court held as follows:

“8. As far as the contention raised by the learned counsel for the appellant that reconstruction of misplaced suit promissory note was ordered by the Trial Court without issuing any notice to the appellant is concerned, a perusal of the order



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passed by the Trial Court ordering reconstruction of misplaced suit promissory note dated 28.01.2013 would suggest that the Court exercised its inherent power under Section 151 of the Civil Procedure Code suo motu ordered reconstruction of Ex.A1. In the very same order, the Trial Court directed issue of court notice to both side counsel and directed plaintiff to produce xerox copy of Ex.A1-promissory note for reconstruction. Therefore, it is clear the reconstruction was intimated to both the parties by express notice with direction to reconstruct Ex.A1 with xerox copy. The appellant failed to raise any objection regarding reconstruction before the Trial Court. On the contrary, she proceeded with the case and conducted trial by continuing the cross examination of witnesses without any murmur. In these circumstances, the contention raised by the learned counsel appearing for the appellant that reconstruction of suit promissory note was ordered without notice to appellant cannot be accepted.”

41. **Per contra**, the learned counsel for the Respondent Nos. 1 to 3 would contend that the First Appellate Court had rightly taken a view that the initiation of suits in O.S No. 168/91 and O.S. No. 141/1999 by the 12th defendant/1st Respondent herein would show that the defendants 12 and 13 were in actual possession of the suit schedule property. The learned counsel would further contend that as observed by the First Appellate Court, the Respondents 1 to 3 has better title by virtue of Ex. B2 to Ex.B4 and prayed for dismissal of this second appeal.

42. The First Appellate Court though relied upon the judgment in O.S. No. 168/91 of 1999 which was marked as Ex.A-17, has miserably failed



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to see that the suit itself was dismissed for the reason that the amended plaint was not filed by the plaintiff therein. This fact was not considered by the First Appellate Court.

43. The First Appellate Court based on the available evidence produced by the plaintiff in Exs.A-2 to A-9 which are the endorsements made in Ex. A1 sale agreement regarding various amounts paid by the plaintiff, which were used to discharge the mortgages created by the first defendant. The First Appellate Court had failed to note that even after the issuance of legal notice by the plaintiff to the first defendant marked as Ex.A-15 dated 25.02.1991, the first defendant had received a sum of Rs.10,000/- on 10.03.1991, which was marked as Ex.A-4.

44. These facts would clearly show that the plaintiff and the first defendant were in consistent agreement. The plaintiff was constantly making payments which were used to redeem the mortgages created by securing the suit property and the sale agreement entered between the plaintiff and the first defendant on 02.11.1990 makes it clear that the first defendant was willing to sell the property in favour of the plaintiff. The First Appellate Court has not



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framed the necessary points for determination and examined the validity of Ex.

A1, Ex. B3 and Ex.B4 along with the oral evidence of PW1, PW2 and DW1.

The First Appellate Court has not appreciated the evidentiary value of Ex. A1 to A9.

45. The reversal finding given by the First Appellate Court with regard to better title in favour of the defendants 12 and 13 would clearly show that the First Appellate Court has gone beyond the scope of the prayer made by the plaintiff. The First Appellate Court while granting a reversal judgment ought to have looked into the relief sought for by the plaintiff in the suit. The plaintiff has filed the suit only to direct the defendants to execute sale deed in favour of the plaintiff as per the sale agreement marked as Ex.A1. The First Appellate Court had gone beyond the scope of the prayer made in the plaint and has given a finding on the title which was not an issue raised before the Trial Court or before the First Appellate Court. Therefore, the finding on the title rendered by the First Appellate Court is not only without jurisdiction and is also beyond the scope of the appeal.



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46. With regard to the first substantial question of law, non-framing of necessary points for determination as per order XLI Rule 31 CPC will certainly render the decree of the Lower Appellate Court unsustainable.

47. With regard to the second substantial question of law, the purchase made by the defendants 12 and 13 after the institution of the suit is hit by the doctrine of lis pendens enshrined in Section 52 of the Transfer of Property Act.

48. With regard to the third substantial question of law, the Hon'ble Supreme Court had recently held in a judgment in ***Civil Appeal No.5919 of 2023 (Shingara Singh Vs. Daljit Singh & Another)*** that any sale which takes place during the pendency of the suit becomes null and void. The relevant portion is extracted hereunder:

“15. In the case in hand also, it is an admitted position that the suit was filed on 24.12.1992 and the sale deed was executed on 08.01.1993 by defendant no. 1 in favour of defendant no. 2/appellant during pendency of the suit. The doctrine of lis pendens as contained in Section 52 of the Transfer of Property Act, 1882 applies to a transaction during pendency of the suit. The Trial Court found execution of agreement to be proved and directed for refund of the amount of Rs. 40,000/- by defendant no. 1 to the plaintiff/appellant with further finding on issue no. 5



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that the agreement was not a result of fraud and collusion. The defendant did not prefer any cross-appeal or cross objections against the said partial decree and allowed the finding to become final. The plaintiff was non-suited only on the ground that defendant no. 2 had no notice of the agreement and is a bona fide purchaser. However, once sale agreement is proved and the subsequent sale was during pendency of the suit hit by the doctrine of lis pendens, the High Court was fully justified in setting aside the judgment and decree of the Trial Court and the First Appellate Court and passing a decree for specific performance.”

49. In view of the same, all the substantial questions of law are decided in favour of the appellant.

50. In the result, the **second appeal stands allowed**. The judgment and decree passed by the Additional District & Sessions Court (FTC-3), Tirupattur in A.S.No.1 of 2012 dated 20.07.2012 is hereby set aside. The Judgment and Decree passed by the Subordinate Court, Tirupattur in O.S.No.121 of 1992 dated 30.07.2008 is hereby confirmed. No costs. Consequently, connected miscellaneous petitions are closed.

28.10.2024

cda



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Index : Yes / No

Speaking / Non-Speaking Order

Neutral Citation : Yes / No

To

- 1.The Additional Districts and Sessions Judge (FTC No.3),
Tirupattur, Vellore District.
- 2.The Subordinate Judge, Tirupattur,
Vellore District.
- 3.The Section Officer
VR Section, High Court,
Chennai.



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N.SENTHILKUMAR, J.

cda

Judgment in
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