

(1989) 06 MAD CK 0019
In the Madras High Court

Ethirajulu Naidu and Another

APPELLANT

Vs

Bole Naidu (died) and Others

RESPONDENT

Date of Decision : 20-06-1989

Acts Referred:

Citation : (1989) 2 MLJ 357

Hon'ble Judges : Nainar Sundaram, J

Bench : Division Bench

Judgement

Nainar Sundaram, J.—This letters patent appeal is directed against the judgment of Sengattuvelan, J., in Appeal No. 56 of 1978. That appeal, in its turn, was one preferred against the judgment and decree in O.S. No. 113 of 1972, on the file of Subordinate Judge, Vellore. The suit was laid by the original plaintiff, the first respondent herein, who is no more, and whose legal representatives have been brought on record; the specific performance of an agreement of sale dated 28.4.1972, as per Ex A.1, executed and registered by respondents 2 and 3 herein defendants 1 and 2 in the suit. The property originally belonged to one Chelvanayakiammal by virtue of an acquisition on 19.3.1945 as per Ex. B.3. The second-defendant is the daughter of Chelvanayakiammal and the first-defendant is the husband of the second defendant. Chelvanayakiammal settled the property on defendants 1 and 2 on 12.9.65 as per Ex. B.4. The factual and legal implications flowing under Ex. B.4 so as to clothe defendants 1 and 2 with right to convey the property, are also the subject matter of controversy in the present litigation and we shall presently advert to the same. On 19.5.1972, the appellants herein, defendants 3 and 4 in the suit, purchased the property from Chelvanayakiammal and defendants 1 and 2 as per Ex. B.1 and B.2. The plaintiff laid the suit for specific performance of the agreement of sale dt.28.4.1972 as per Ex. A.1. on the contest raised by the defendants, the first court formulated as many as six issues, as follows:

(1) Whether the suit agreement to sell dt. 28.4.1972 is true, valid and binding on defendants 3 and 4.

(2) Whether plaintiff had been ready and willing to perform his part of the contract under the suit-agreement?

(3) Whether defendants 1 and 2 had no right to the suit property and to enter into the suit agreement to sell the same?

(4) Whether defendants 3 and 4 are bona fide purchasers of the suit property for value without notice of the suit agreement?

(5) Whether the plaintiff is entitled to the relief of specific performance as prayed for?

(6) To what relief, the parties are entitled?

2. The parties placed their evidence, oral and documentary, and that was the subject matter of consideration by the first court and the first court held that defendants 1 and 2, on the date of Ex. A.1 had not acquired absolute right to convey the property: Ex. A.1 is not binding on defendants 3 and 4; that the plaintiff was ready and willing to perform his part of the contract; defendants 3 and 4 have purchased the property for value without notice and hence the plaintiff is not entitled to any relief. As a result, the first court dismissed the suit with the costs of defendants 3 and 4. The plaintiff appealed in A.S. No. 56 of 1978 to this Court and that was dealt with by Sengottuvelan, J. The learned single Judge, differed from the view of the first court with regard to the rights of defendants 1 and 2 in a presenti to convey the property; and held that sales in favour of defendants 3 and 4 as per Ex. B.1 and B.2., were for value and without notice of Ex. A.1. However, the learned shingle Judge, on the question as to whether defendants 3 and 4 are bona fide purchasers opined differently. The learned single Judge permitted evidence on behalf of the plaintiff by marking the encumbrance certificates for the property as Ex. A.16 and A.17 and the Index Register in the office of the Sub-Registrar, Arakkonam as Ex. A.18 and the relevant entries therein as Ex. A.18 (a) and A.18 (b). On this ground alone the learned single Judge chose to allow the appeal, preferred by the plaintiff; set aside the judgment and decree of the first court; and decreed the suit of the plaintiff, as prayed for The learned Single Judge disallowed costs both in the suit as well as in the appeal.

3. In this letters patent appeal, Mr. M.R. Narayana swamy, learned Counsel appearing for defendants 3 and 4 the appellants herein, did not seriously challenge the view of the learned single Judge with regard to the factual and legal implications following from Ex. B.4. As already noted, that was a deed of settlement by Chelvanayakiammal in favour of her daughter the second defendant and son-in-law the first-defendant. The earlier recitals in Ex. B.4 clearly indicated an absolute disposition, there has been a restriction with regard to alienation by the settlees. When we take note of the well recognised principles, such a restriction must be held to be void. This is exactly what the learned single Judge opined. We did not hear any convincing submissions from the learned Counsel for defendants 3 and 4 to dislodge this legal implication

flowing from the rectials in Ex.B.4. Further more, Chelvanayakiammal died pending the suit and whatever controversy that prevailed with regard to the subsisting right of defendants 1 and 2 to convey the property receded to insignificance. Hence, this finding of the learned single Judge does not require disturbance, and we confirm the same.

4. The learned single Judge, taking up the question as to whether defendants 3 and 4 are transferees for value without notice, held that consideration did pass and defendants 3 and 4 could not be stated to have had notice of the suit agreement Ex.A.I either directly or constructively. But, on the aspect of good faith on the part of defendants 3 and 4 and hence they could not be held to be bona fide transferees. It is this finding of the learned single Judge that led him to discountenance the case of defendants 3 and 4, to allow the appeal, preferred by the plaintiff and to decree the suit. It is this finding that is the subject matter of serious challenge before us by learned Counsel appearing for defendants 3 and 4. As pointed out by a Bench of this Court, in *Arunachala Thevar and Others Vs. Govindarajan Chettiar and Others*, , the question of good faith is necessarily a question of fact, which has to be determined from the materials placed and surrounding circumstances; the test to be applied to find out whether there is good faith or not is to see whether the person concerned has acted honestly or not; in short, the essence of good faith is the honesty of implead on; The legal presumption of knowledge or notice arises from wilful absention from enquiry or search of gross negligence or omission to search the concerned registers kept under the Registration Act; these factors may amount to gross negligence, so as to attract the consequences, which result from notice; a purchaser is deemed to have notice of anything which he has failed to discover either because he did not make the due investigation with regard to the title to the property or because he did not enquire for the deeds relating to the property; and the onus of proof lies upon the party seeking to defeat the prior agreement to adduce prima facie evidence that he is a bona fide transfere for value without notice. Though it is said that this burden is light and is in the negative line, yet it is not possible to be little the significance of this onus and each case will have to be examined on its own facts to find out as to whether the onus has been fully and satisfactorily discharged or not. Heree, we find that the learned single Jdge found, on facts, that there was lack of bona fides on the part of defendants 3 and 4 with regard to entering into the sale transactions as per Ex.B.I and B.2. The learned Single Judge permitted the plaintiff to place additional evidence. We heard submissions from the learned Counsel appearing for defendants 3 and 4 attacking the reception of additional evidence and further attacking the credence that could be attached to the additional evidence placed. It is true that the powers of this court under the Letters Patent are not limited to questions of law alone and it will be open to this court to review even findings of facts in a Letters Patent Appeal from a frist appeal, heard by a learned single Judge of this Court.

5. We shall advert to and examine the factual features, which have emerged from the evidence already on record before reception of additional evidence and

which have been taken note of by the learned single Judge to hold that there was lack of bona fides on the part of defendants 3 and 4. This we shall do to find out as to whether they are to be counted against defendants 3 and 4 or to be eschewed as of no value at all on this court. The first feature is the residence of the parties. They were residents of the same village. The house of the third-defendant was situate at a distance of 900 feet from the house of the plaintiff. Diagonally, it was only 300 feet from the house of the plaintiff. Equally so, the house of the fourth-defendant was also situated at a distance of 300 feet from the house of the plaintiff. The village is a small one. In such a village, if there had been a transaction, like an agreement of sale in respect of properties in the village and belonging to the parties in the very same village, certainly the information would have got circulated rapidly and rampantly amongst the resident and it looks unnatural that defendants 3 and 4 should pretend ignorance about the suit agreement Ex.A.1. The second feature taken note of by the learned Judge, is the lack of an agreement of sale proceeding the sales in favour of defendants 3 and 4. Normally, we could expect an agreement of sale proceeding a sale transaction. There is no explanation as to why the parties never conceived of the normal course of entering into an agreement of sale in the case of the same transactions Exx.B.1 and B.2. The third feature that has been counted against defendants 3 and 4 by the learned single Judge is the failure on the part of defendants 3 and 4 to obtain an encumbrance certificate before they indulged in completing the transactions of sale. The third-defendant examined as D.W.1 admitted that he had not taken any steps to obtain any encumbrance certificate, he further admitted that he had not consulted any lawyer relating to the title to the properties. Exx.B.1 and B.2 were straightway entered into and registered. The fourth feature taken note of by the learned single Judge and put against defendants 3 and 4 is the unreliability of evidence of third-defendant, examined as D.W.1. He would say that he made enquiries in the office of the sub-Registrar, Arakkonam, and his enquiries revealed that there was no encumbrance as such. Apart from the ipse dixit of D.W.1 nothing convincing has been placed before the court to accept his version that he did make enquiries with regard to the subsisting of any encumbrance with regard to the property. No attempt was made to summon and examine the concerned Registrar with whom D.W.1 is stated to have made enquiries. Section 57 of the Registration Act does contemplate the making of such enquiries and there ought to have been payment of money for the purpose of making such enquiries. No receipt or other document in substantiation of this theory of D.W.1 having had made enquiries, has been produced.

6. Apart from the above features, the learned single Judge acted upon the additional evidence produced before him by the plaintiff. As already noted, there is an attack on the propriety of the learned single Judge permitting additional evidence at the appellate stage. It is contended by the learned Counsel for defendants 3 and 4 before us that there was no warrant for adduction of additional evidence at the appellate stage in the present case, as per the

provisions of Order 41, Rule 27 of the Code of Civil Procedure. It is submitted that the discretion given to the appellate court by Order 41, Rule 27 of the CPC to receive and admit additional evidence is not an arbitrary one, but is a judicial one circumscribed by the limitations specified in the rule. No exception could be taken to this principle as such. But, Order 41, Rule 27 of the CPC does permit the appellate Court to receive additional evidence to enable it to pronounce judgment or for any other substantial cause. The ability to pronounce judgment refers not to the ability to pronounce any judgment, but to the ability to pronounce the proper judgment, satisfactory to the judicial conscience of the court, which is called upon to deal with the controversy and resolve it. Where any point is required to be cleared in the interests of justice, the Appellate Court cannot disown its power to permit additional evidence on the technical plea that the party, who seeks the production additional evidence was guilty of laches. In the present case, defendants 3 and 4 having not only put forth the plea that enquires made by them did not reveal any encumbrance with regard to the properties, but also the third-defendant having gone into the box as D.W.I and spoken to this theory and the plaintiffs denying this theory, if the learned single Judge felt that the records from the office of the concerned Registrar must be placed before him to find out whether the version of defendants 3 and 4, could have been the factual state of affairs. We cannot say that there was not a proper exercise of the judicial discretion in this behalf. We cannot from upon this endeavour on the part of the learned single Judge, as falling outside the purview of Order 41, Rule 27 of the Code of Civil Procedure. What the learned single Judge did was for the advancement of the cause and interest of justice, so that there could be an adjudication of the controversy without any inkling of judicial conscience saying that a relevant material, which ought to have been placed before court, was consciously shut out. What the learned single Judge did was only for removing a lacuna in the evidence. Hence, we could not appreciate and accept the submission of the learned Counsel for defendants 3 and 4 that the learned single Judge was not quite in order in permitting additional evidence.

7. Now we take up the additional evidence placed before the learned single Judge. Ex.A.16 and A.17 are the encumbrance certificates relating to the properties for the relevant period. They did disclose the factum of the suit agreement as per Ex.A.1. Ex.A.18 is the index No. 11 register for the relevant period. The entries therein do bear out of the factum of the suit agreement as per Ex.A.1. Ex.A.18(a) is the entry relating to the suit agreement dt. 28.4.72. Ex.A. 18 (b) is the entry relating to a transaction dt. 10th May, 1972. The suit agreement was one entered into and registered in the office of the Registrar at Vellore and the memorandum of communication along with the relevant records must have been sent by the Registrar of Vellore to the Sub-Registrar at Arakkonam. In contrast, Ex.A.18 (b) relates to a transaction, which was a transaction completed at the office of the Sub-Registrar, Arakkonam itself. To prove Ex.A.18 and the entries therein, the Sub-Registrar at Arakkonam was summoned and examined before the learned single Judge. His evidence is clear

on this aspect. The entry Ex.A.18 (b) being one relating to the transaction completed at Arakkonam itself, it had been made on the very same day, namely 10th May, 1972. The entry Ex.A.18 (a) relating to the suit agreement dt.28.4.1972 had been made proceeding the entry Ex.A.18 (b). The entries have been made consecutively and certainly the interference is irresistible that after receipt of the concerned memorandum alongwith the connected proceedings, the entry relating to the suit agreement had already been made anterior to the entry Ex.A.18 (b) dt. 10.5.72. The sale transaction in favour of defendants 3 and 4 were on 19.5.72 as per Ex.B.1 and B.2. Hence, the interference is legitimate that the entry relating to the suit agreement Ex.A.1 stood reflected in the records available in the sub-Registrar's Office at Arakkonam anterior to the sale transaction Exx.B.1 and B.2 on 19.5.1972 and if there had been a genuine and a honest enquiry with regard to the title and subsisting encumbrance by defendants 3 and 4, certainly such enquiry would have revealed the above position. Even if we accept the evidence of the third defendant, examined as D.W.1., that he did make enquiries, as claimed by him, certainly this must have come to his knowledge and it must be held that inspite of that, defendants 3 and 4 wilfully indulged in the sale transactions, as per Exx.B.1 and B.2 and certainly this is not to be countenanced. On the facts of the present case, we are in complete agreement with the finding of the learned single Judge that defendants 3 and 4 cannot have the role of bona fide purchasers. The payment of consideration and the lack of notice direct or constructive could not be taken as a complete answer to the claim of the plaintiff to have the suit agreement enforced. Defendants 3 and 4 must further prove that they are bona fide purchasers and this element has been demonstrated to be totally lacking. In this view, we are not persuaded to interfere in this letters patent appeal and accordingly, the same is dismissed. The plaintiff is entitled to costs by in this letters patent appeal.