

(1980) 10 KAR CK 0029

In the Karnataka High Court

Case No : Regular Second Appeal No. 12 of 1974

Khadir Saheb Jaffar Saheb Nagarboudi and Others

APPELLANT

Vs

Amin Saheb Hussain Saheb Inamdar and Others

RESPONDENT

Date of Decision : 06-10-1980

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 1 Rule 9
Specific Relief Act, 1963 — Section 19

Citation : AIR 1981 Kar 89 : (1981) ILR (Kar) 344 : (1981) 1 KarLJ 321

Hon'ble Judges : G.N. Sabhahit, J

Bench : Single Bench

Advocate : V. Krishna Murthy, for S.D. Chatre, for the Appellant; R.P. Hiremath, for the Respondent

Judgement

1. This appeal by the original defendant No. 3 is directed against the judgment and decree dated 15-11-1973 passed by the learned Additional Civil Judge, Bijapur, in R. A. No. 175 of 1972 on his file, allowing the appeal of the plaintiff on reversing the judgment and decree dated 29-8-1972 passed by the teamed Munsiff, Bijapur in O. S. 16 of 1967, on his file, dismissing the suit of the plaintiff for specific performance of contract to sell the suit land in favour of the plaintiff.

2. The plaintiff sued for specific performance of contract of sale under Ext. P-1 of Sy. No. 167/2 of Mahalbagayat, Bijapur and for its possession or in the alternative for recovery of Rs. 2,000/- with future interest from the defendants. The suit land, according to him, belonged to defendants 1 and 2 who agreed to sell the same to him for Rs. 5,000/- on 31-10-1965 and received Rs. 1,000/- from him as advance with a condition that the balance should be paid within four months and they executed an agreement as per Ext. P-1 on that date. It was agreed that if they failed to execute the sale deed, they should return the advance of Rs. 1,000/- plus damages of Rs. 1,000/- to the plaintiff and this condition was in addition to and not in derogation of plaintiff's right to claim specific performance of contract. The plaintiff gave registered notice to

defendants 1 and 2 on 21-2-1966 calling upon them to receive the balance amount of Rs. 4,000/- and to execute the sale deed and the same was refused and was returned unserved. Later defendants 1 and 2 executed the sale deed of the suit land in favour of defendant No. 3 on 9-3-1966 for Rs. 6,300/- but mentioned in the sale deed only Rs. 5,000/- as the consideration. The suit land appears to have been mortgaged with possession to the father of defendant No. 4 who in turn appears to have leased out a portion of 6 acres to defendant No. 3 for a period of 10 years. The remaining portion of 2 acres 15 guntas was in possession of defendant No. 4 and a litigation appears to be pending between him and defendant No. 4.

3. The plaintiff further averred that he was ready and willing to perform his part of the contract by paying the balance amount of Rs. 4,000/- at the time of the execution of the sale deed. , Since the defendants committed breach of contract he sued for specific performance or in the alternative for refund of advance money.

4. Defendant No. 2 died during the pendency of the suit and defendant No. 1 was shown as his legal representative, Defendant No. 1 remained ex parte. Defendant No. 3 by his written statement dated 29-1-1968 contended that he too was under the impression that father of defendant No. 4 was a mortgagee in possession of the suit land and so he took 6 acres out of the suit land on lease from him But later he came to know That he had no rights whatsoever to the suit land. Further it is the case of defendant No. 3 that on coming to know that defendants 1 and 2 were intending to sell the suit land, he purchased the. same from them for Rs. 5,000/- on 9-3-1966. He was unaware that defendants 1 and 2 had executed an agreement of sale in favour of the plaintiff. Hence, he submitted that the plaintiff was not entitled to any relief against him.

5. Defendant No. 4 by his written statement contended that his father was not a mortgagee in possession of the suit land but was a protected tenant. After the death of his father, he himself was in possession of the same as tenant. He denied the agreement of sale in favour of the plaintiff. The learned Munsiff raised the following issues as arising from pleadings:

- (1) Does plaintiff prove that he was ready and willing to perform his part of the contract within the stipulated time?
- (2) Is time the essence of the contract?
- (3) Is the contract binding on defendant No
- (4) Does plaintiff prove that defendant-4 is a mortgagee in. possession?
- (5) Is defendant-4 a tenant? If so, is the contract in favour of plaintiff legal and valid?
- (6) Is plaintiff entitled for, specific performance of the contract?
- (7) What decree or order?

6. The learned Munsiff appreciating the evidence on record, answered issues as under:

- (1) No;
- (2) Yes;
- (3) No;
- (4) Does not survive;
- (5) Does not survive;
- (6) No

In that view he dismissed the suit of the plaintiff for specific performance or for refund of advance money. Aggrieved by the said judgment and decree, the plaintiff went up in appeal before the learned Civil Judge, Bijapur, in R. A. No. 175/72 and the Additional Civil Judge, Bijapur, raised the following points as arising for his consideration in the appeal.

- (1) Whether the plaintiff (appellant) was willing and ready to perform his part of the contract within the stipulated time?
- (2) Whether the terms of the agreement of sale (Ext. P-1) provide that the agreement should automatically stand cancelled if the plaintiff did not pay the balance amount to defendants I and 2 within the stipulated time?
- (3) Whether the plaintiff is entitled to specific performance of the agreement of sale dated 31-10-1965?
- (4) Whether the agreement of sale is binding on defendant 3 (respondent)?
- (5) Whether the appellant-plaintiff can enforce the agreement of sale (Ext. P-1) now against respondent-defendant No. 3 alone?
- (6) Whether alternatively the appellant is entitled to recover Rs. 2,000/- now from the respondent alone?
- (7) Whether proper issues were not framed in the trial court and if so it has resulted in miscarriage of justice?
- (8) Whether, the findings of the trial Court are proper and sustainable?

The learned Civil Judge reassessing the evidence on record in the light of the arguments addressed before him, answered points numbers 1, 3, 4 and 5 in the affirmative; point number 2 in the negative and in that view he allowed the appeal, setting aside the judgment and decree of the trial court and decreed the suit of the plaintiff for specific performance of the contract of sale of the suit land as per Ext. P-1 and for possession of the suit land in favour of the plaintiff against defendant No. 3 with costs throughout. He directed respondent No. 3 to execute a sale deed in favour of the appellant-plaintiff on his paying to the

respondent or depositing in Court the balance amount of consideration of Rs. 4,000/-. Aggrieved by the said judgment and decree the third defendant has come up in second appeal before this Court.

7. The learned Advocate Sri V. Krishnamurthi appearing for the appellant vehemently contended that the first appellate Court could not proceed to hear the appeal on merits and allow the same in the absence of necessary parties namely, original defendants 1 and 2 represented by defendant No. 1 in the suit. He invited my attention to the form of decree that is to be drawn up in the case of a suit for specific performance and submitted that the original party to the agreement of sale has to pass the deed of sale along with subsequent purchaser and as such the party to the agreement of sale would be necessary both in the suit as well as in the appeal. Hence, he submitted that the appeal, without more, should have been dismissed for want of necessary parties by the first appellate Court.

8. As against that the learned Advocate Sri Hiremath appearing for the respondent plaintiff in this appeal invited my attention, to O. 1, R. 9, C. P. C. submitting that no suit shall be defeated by reason of misjoinder or non-joinder of parties. In that way he supported the judgment and decree of the learned Civil Judge. The points, therefore, that arise for my consideration in this appeal are:

(1) Whether the appeal before the first appellate Court was properly constituted or did it suffer for want of necessary parties?

(2) Whether the first appellate Court could proceed to decree the suit in the absence of necessary parties, under O. 1, R. 9, C. P.C.?

9. The Supreme Court of India had an occasion to consider the necessary parties in a suit for specific performance as also the form of decree that has to be passed in such a suit in the case of Dwarka Prasad Singh and Others Vs. Harikant Prasad Singh and Others, . The Supreme Court of India in para 6 of the judgment has observed thus:

"Counsel for the appellants has relied on two points in support of the argument that the appeal cannot fail because of the non-imp leading of the legal representatives of Guha the deceased. The first is that he was not a necessary party being the vendor and the second is that the case would be covered by the provision of O. 41, R. 4 of the Civil P. C. There appears to be some divergence between the High Courts on the question whether in a suit for specific performance against a purchaser with notice of a "prior agreement" of sale the vendor is a necessary party or not. In other words the conflict has arisen on the question whether the decree in a suit for specific performer when the property in dispute has been sold to a third party should be to only direct the subsequent purchaser to execute a conveyance or whether the subsequent purchaser and the vendor should both execute a conveyance in favour of the plaintiff; See AIR 1929 298 (Nagpur) and Kafiladdin and Others Vs. Samiraddin and Others, . This Court has, however, held in Lala Durga Prasad and Another Vs. Lala Deep Chand and

Others, that in a suit instituted by a purchaser against the vendor and a subsequent purchaser for specific performance of the contract of sale the proper form the decree is to direct specific performance of the contract between the vendor and the plaintiff and further direct the subsequent transferee to join in the conveyance so as to pass on the which resides in him to the plaintiff. This was to course followed by the Calcutta High Court in the above cast and it appears that the English practice was the same. Thus according to this decision, the conveyance has to be executed by the vendor in. favour of the plaintiff who seeks specific. performance, of the contract in his favour and the subsequent transferee has to join he conveyance only to pass the title, which resides in him. It has been made quite clear that he does not join in any special covenants made between the plaintiff and his vendor. All that he does, is to pass on the title to the plaintiff. In a recent decision of this Court in R.C. Chandiok and Another Vs. Chuni Lal Sabharwal and Others, while passing a decree for specific performance of a contract a director was made that the decree should be in the same form as in Lala Durga Prasad and Another Vs. Lala Deep Chand and Others, . It is thus difficult to sustain the argument that the vendor is not a necessary party when, according to the view accepted by Court, the conveyance has to be executed by this although the subsequent purchaser bas also to, join so as to pass on the which resides in him to the plaintiff. It must be remembered that if then are any special, covenants and condition agreed upon in the contract for sale between the original purchaser and the vendor those have to be incorporated in the sale deed although it is only the vendor who will enter into them and the subsequent purchaser will not join in those special covenants. But without the vendor joining in the execution of the sale deed special covenants, if any, between him and the original purchaser cannot be incorporated in the sale deed. The whole idea and the purpose underlying a decree for specific performance is that it a deem for such a relief is granted be person who has agreed to purchase the property should be put in the same position which would have obtained in case the constructing parties i.e., vendor and the purchaser had, pursuant to the agreement, executed a deed of sale and completed it in every way. Therefore it is essential that the vendor must join in the execution of the sale deed. If that he so it is not possible to comprehend how he is not a necessary party. At any rate in the presence of the relief for a decree for refund of the amount paid by way of part consideration the vendor would be a necessary party. No such relief could be granted in his absence nor can it be granted now even if the appeal succeeds and the decree for specific performance is set aside."

Thus, the Supreme Court of India following its earlier decision rendered in the case of Lala Durga Prasad and Another Vs. Lala Deep Chand and Others, has held that the original executants of the agreement of sale are necessary parties to the, suit for specific performance and that the decree has to be passed against the original executants also. In fact, in the case on which the Supreme Court relied i.e., in the case of Lala Durga Prasad and Another Vs. Lala Deep Chand and Others, their Lordships have clearly observed thus:

"In our opinion, the proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff. This was the course followed by the Calcutta High Court in Kafiladdin and Others Vs. Samiraddin and Others, and appears to be the English practice. See Fry on Specific Performance, 6th Edn. page 90, para 207; also- "Potter v. Sanders" (1846) 67 ER 1057. We direct accordingly."

Thus, it is well established by the decisions of the Supreme Court, ex-cathedra, that the original vendors who have executed an agreement to sell are necessary parties to the suit for specific performance. A proper and legal decree cannot be given in their absence. Similarly, it is obvious that the appeal also cannot be decided on merits without making them parties to the appeal as appeal is only the continuation of the suit,

10. The learned Counsel for the respondent, however, advanced twofold argument to meet the above position. Firstly, he submitted that O. 1, R. 9, C. P. C enjoins upon the court to hear and decide the suit even in the case of mis - joinder or non-joinder of parties. Secondly, he submitted that S. 19 of the Specific Relief Act would enable the plaintiff to enforce the agreement of sale against the subsequent purchaser also for value with notice.

11. Adverting to the first contention, no doubt, O. 1, R. 9, C. P. C. reads before amendment thus:-

"No suit shall be defeated by reason of the mis -joinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

By the 1976 Amendment a proviso is added which reads:

"Provided that nothing in this rule shall apply to non-joinder of a necessary party."

12. The learned Counsel for the appellant submitted that the amendment has come in by way of clarification only to consolidate rulings rendered by the various High Courts in the country in that behalf and that the provision of law even before the amendment was only in respect of proper parties and not necessary parties. There is a distinction between non-joinder of necessary parties and non-joinder of proper parties. Necessary parties are those in whose absence the court cannot pass an effective decree at all Parbati Sham Achary Vs. Smt. Manasi Devi, . Thus, it is well settled that Order 1, R. 9 applies only in the case of proper parties and not necessary parties. In the absence of necessary parties, the court cannot proceed with the hearing of suit to award any relief.

13. Adverting to Section 19 of the Specific Relief Act, it states, inter alia, thus:

"Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against

(a) either party thereto

(b) any other person claiming under him title arising subsequently to the contract except a transferee for value who has paid his money in good faith and without notice of the original contract;

This does not mean or deal with necessary parties in a suit for specific performance or against whom a decree for specific performance shall be passed whether against the original vendors or against the subsequent transferee or both. In fact, in the aforesaid decision of the Supreme Court in the case of Gopal Krishnaji Ketkar Vs. Mahomed Jaffar Mohamed Hussein and Another, , these alternatives were considered in para 39 of the judgment. This is what is stated by the Supreme Court:

"Section 91 of the Trusts Act does not make the subsequent purchaser with notice a trustee properly so called but saddles him with an obligation in the nature of a Trust (because of Section 80) and directs that he must hold the property for the benefit of the prior "contractor", if we may so describe the plaintiff, to the extent necessary to give effect to the contract. Section 3 Illustration (g) of the Specific Relief Act makes him a trustee for the plaintiff but only for the purposes of that Act. Section 40 of the T. P. Act enacts that this obligation can be enforced against a subsequent transferee with notice but not against one who holds for consideration and without notice. Section 27 of the Specific Relief Act does not carry the matter any further. All it says is that specific performance may be enforced against

"(a) either party thereto;

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract."

None of this helps because none of these provisions directly relate to the form of the decree. It will, therefore, be necessary to analyse each form in the light of other provisions of law."

In the case of Dwarka Prasad Singh and Others Vs. Harikant Prasad Singh and Others, the Supreme Court has laid down that the original party to the agreement is a necessary party to the suit.

14. Thus, I am constrained to hold that there is no substance in the argument of the learned Counsel for the respondent-plaintiff that the appeal could have been decided even in the absence of the necessary parties that is the original vendor.

15. It is no doubt true that Sri. Hiremath invited my attention to the facts of the present case and the facts of the Supreme Court case which are different. The facts of no two cases are identical. What is necessary to observe is the ratio

decidendi and not the facts of each case though it is necessary that facts of the case should be understood in order to discern the ratio decidendi or what is the law laid down in that case. In the Supreme Court case referred to above, it is the purchaser who had brought the suit against the original vendors and the subsequent purchaser as in the present case and it is in that context that the Supreme Court has ruled as stated above. Hence, the decisions of the Supreme Court are direct authority on the controversy raised in the present case.

16. In the result, therefore, I hold that the appeal is entitled to succeed. The judgment and decree of the first appellate Court are set aside as they are passed without necessary parties on record. The judgment and decree of the trial court is restored and sustained.

17. Accordingly, the appeal is allowed with costs of this court.

18. Appeal allowed.