
(1998) 12 AP CK 0085

In the Andhra Pradesh High Court

Case No : Second Appeal No. 64 of 1996

Kondapalli Satyanarayana

APPELLANT

Vs

Kondapalli Mayullu and Others

RESPONDENT

Date of Decision : 30-12-1998

Acts Referred:

Specific Relief Act, 1963 — Section 27
Transfer of Property Act, 1882 — Section 40, 54
Trusts Act, 1882 — Section 91

Citation : (1999) 2 CivCC 434

Hon'ble Judges : T. Ranga Rao, J;B. Subhasan Reddy, J

Bench : Division Bench

Advocate : V.L.N. Gopala Krishana Murthy, for the Appellant; M. Adinarayana Raju, for the Respondent

Final Decision : Allowed

Judgement

B. Subhashan Reddy, J.—The substantial question of law at issue in this Second Appeal is regarding the scope of Section 40 of the Transfer of Property Act read with Section 91 of the Indian Trusts Act.

2. Since this is a second appeal findings of fact cannot be disturbed and that too in a case like this where the findings of fact are concurrent. In fact, there is also no scope to challenge the findings of fact of the Courts below and rightly Mr. V.L.N.G.K.Murthy, the learned counsel for the appellant, did not assail the findings of fact. On the basis of the findings of fact, he has raised the legal contentions centering round the provisions contained in the Transfer of Property Act as also Indian Trusts Act mentioned above.

3. The brief facts leading to hearing of the second appeal are thus stated:

The parties are referred to as arrayed in the Original Suit. Defendant No.4 is the appellant herein, while the plaintiff is the 3rd respondent, his mother and step mother are respondents 4 and 2 respectively (defendants 2 and 3) and father is

the 1st respondent (1st defendant). The suit land comprises of agricultural land admeasuring Ac.0.52 cts. situated at Antarvedipalem village. Razole Mandal of East Godavary district. The same was purchased by the 1st defendant under the registered sale deed dated 11.4.1973 (Ext.A3). As he was in necessity of money, he had entered into agreement to sell the same in favour of the plaintiff and a written agreement of sale dated 7.2.1974 (Ext.A1) was executed. On 18.2.1974 a gift deed (Ex.B7) was executed in favour of the appellant-4th defendant and his mother, i.e. 2nd defendant. An attempt was made by the defendants as though the gift deed was executed on 26.12.1973, that is, anterior to the agreement of sale. But, the same was disbelieved by the Courts below concurrently and rightly so. Notwithstanding the execution of the gift deed, the 1st defendant again executed a registered sale deed dated 29.5.1974 (Ex.A2) purporting to convey the rights and title in the suit land in favour of the plaintiff, but the plaintiff having not been inducted into possession of the suit lands, pursuant to the sale deed, had initiated O.S.No.37 of 1975 on the file of the Court of the Principal District Munsif. Razole, claiming the relief of declaration and possession, past and future mesne profits against the defendants. In the said suit, the plaintiff had pleaded that the gift deed executed by the 1st defendant in favour of defendants 2 and 4 was sham and nominal. He also pleaded that after taking possession of the suit land, the same was again given on lease to the 1st defendant. The trial Court has not accepted the plea of the plaintiff that the gift deed was sham and nominal and that possession was handed over by the 1st defendant to him. The finding is that possession was not handed over and that the 1st defendant was not a lessee of the plaintiff. The suit was decreed declaring the plaintiff as the owner of the suit land basing on ex.A2 sale deed and ignoring Ex.B7 gift deed and directed delivery of possession of the same to the plaintiff and also for payment of future profits, while rejecting the claim for past mesne profits. It was on the premise that Ex.B7 gift deed was always subject to Ex.A2 sale deed. Aggrieved by the same. A.S.No. 12 of 1988 on the file of the Court of the Subordinate Judge. Razole, was filed by defendants 2 to 4 and the plaintiff had filed the cross-objections against the adverse findings mentioned above. But, the first appellate Court had dismissed both the appeal and the cross-objections affirming the findings recorded by the trial Court. The result is this Second Appeal.

4. In fact, the Second Appeal is a subject of the leaned single Judge, who had elaborately heard and dealt with the matter and in view of the importance of question of law and for authoritative pronouncement thereon, had referred the matter to the Division Bench and that is how this matter is placed before this Bench.

5. As it concluded that defendants 2 and 4 are the gratuitous transferees with notice of the prior agreement of sale, the question which falls for consideration is whether the suit for declaration and possession, which was laid by the plaintiff and decreed by the Courts below, is sustainable basing on Ex.A2 sale deed ignoring the gift deed, which is prior to the said sale deed. The Courts below

have held that such a suit for declaration and possession is maintainable. It is needless to mention that the relief of future profits is ancillary to the right to have the reliefs of declaration and possession of the plaintiff.

6. Mr. V.L.N.G.K.Murthy, the learned counsel for the appellant strenuously contends that the decree granted by the trial Court and affirmed by the lower appellate Court for declaration and possession and also future profits is not sustainable of the reason that the 1st defendant had no subsisting title or right to convey anything to the plaintiff, as lost the same in view of Ex.B7 gift deed and the agreement of sale Ex.A1 alone did not create any rights or interest over the suit land and even assuming that Ex. A1-agreement of sale-was enforceable against the 1st defendant by seeking nullification of gift deed-Ex.B7 by filing a suit with the said appropriate reliefs, as the plaintiff did not choose to file the suit with appropriate reliefs and has deliberately chosen to ignore the gift deed - Ex.B7 and sought for declaration and possession on the basis of Ex.A2 sale deed, as. the suit is not maintainable, as no rights accrued under the said sale.

7. Mr.M.Adinarayana Raju. the learned counsel for the 3rd respondent-plaintiff submits that the rights and interest were created in favour of the plaintiffs in view of Ex.A1 agreement and they have culminated in the sale deed-Ex.A2 - resulting in crystallisation of the rights and title of the plaintiff an that even if Ex.B7 gift deed is not sham and nominal, the plaintiff, both in law and equity, is entitled for declaration of his rights basing on Ex.A2 sale deed and for possession and future profits. According to the learned counsel, Ex.B7 gift deed does not have the effect of demolishing Ex.A1 agreement and on the other hand, the same was always subject to Ex.A1 agreement and that the plaintiff has got superior rights over defendants 2 and 4.

8. Learned counsel for the appellant relies upon the judgment of the Supreme Court in Lala Durga Prasad and Another Vs. Lala Deep Chand and Others, in support of his arguments. In similar circumstances, the Supreme Court has emphatically held that when the vendor after entering into the contract of sale again transfers the same properly in favour of others by conveyance, the proper remedy for the first purchaser (agreement-holder) is to sue for specific performance of the contract between himself and the vendor and also directed the subsequent transferee to join in the conveyance so as to pass on the title which recites in him to the prior transferee (agreement holder). Section 40 of Transfer of Property Act as also Section 27 of the Specific Relief Act were considered fro arriving at the above proposition. The said legal principle enunciated by the Supreme Court was further reiterated in Soni Lalji Jetha and Others Vs. Soni Kalidas Devchand and Others, It was held that the subsequent transferee with notice of prior agreement of sale is in a fiduciary position holding the property in trust for the prior agreement-holder. To the same effect is the proposition laid down by the Supreme Court in Bai Dosabai Vs. Mathurdas Govinddas and Others, O.Chinnappa Reddy. J. speaking for the Supreme Court has authoritatively held "the ultimate paragraph of Section 54 of the Transfer of

Property act expressly enunciates that a contract for the sale of immovable property does not, of itself, create any interest in or charge on such property. But the ultimate and penultimate paragraphs of Section 40 of the Transfer of Property act make it clear that such a contract creates an obligation annexed to the ownership of immovable property, not amounting to an interest in the property, but which obligation may be enforced against a transferee with notice of the contract or a gratuitous transferee of the property." The effect of the provisions of the Indian Trusts Act was also considered by the Supreme Court in the said case.

9. Mr. M. Adinarayana Raju, the learned counsel for the 3rd respondent-plaintiff has heavily relied upon the decision of a learned single Judge of this Court in Dharma Rao V. Panduranga Rao, 1975 ALT 334. Dealing with a similar situation and the provisions contained under Sections 40 and 54 of the Transfer of Property Act and Section 91 of the Indian Trusts Act, the learned Judge held that a person who purchases the property with notice that another person has entered into an existing contract, affecting that property he must hold that property for the benefit of the latter to the extent necessary to give effect to the contract and if in pursuance of a contract, the vendor executes a sale deed, which he is bound to do under the terms of the contract, in discharge of the obligation arising under that contract on him. the subsequent purchaser must hold the property for the benefit of the person, whose purchase of property under an earlier contract was not even by a private sale, and if that be not so then the provisions of Section 40 of the Transfer of Property Act become otiose and redundant. The learned Judge was of the view that if the subsequent purchaser with notice of prior agreement of sale holds the property in trust, in view of Section 91 of the Indian Trusts Act, the same need not be given effect to only subject to enforcing of the prior agreement of sale, but straightaway the rights of the prior agreement-holder can be recognised, as the subsequent purchaser is obligated to honour the terms of the prior agreement of sale. In effect, what the learned Judge meant was that even without a suit for specific performance, a declaration of the kind granted by the Courts below in the instant case is valid. Learned counsel for the 3rd respondent has also cited the judgment in Chand Mohammad Vs. Murtuzakhan Mohammad Mustafakhan, , which was also to the same effect and which in fact was considered by the learned Judge in Dharma Rao's case (supra) and the said view was approved.

10. It is apt to extract the provisions contained under Sections 40 and 54 of the Transfer of Property Act as also Section 91 of the Indian Trusts Act. 1882. Section 40 of the Transfer of Property act reads:

"Burden of obligation imposing restriction on use of land - Where, for the more beneficial enjoyment of his own immovable property, a third person has, independently of any interest in the immovable property of another or of any easement thereon, a right to restrain the enjoyment in a particular manner of the said property, or

or of obligation annexed to ownership, but not amounting to interest or easement -where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon, such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands." (Emphasis is ours)

Section 54 of the Transfer of Property Act reads:

"Sale" defined - "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. Sale how made- Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immovable property, of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes, place when the seller places the buyer, or such person as he directs, in possession of the property.

Contract for sale - A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property. (Emphasis is ours)

Section 91 of the Indian Trusts Act, 1882 reads:

"Property acquired with notice of existing contract - Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract." (Emphasis supplied by us)

11. A careful reading of the above statutory provisions makes it abundantly clear that the subsequent transferee with notice stands in a fiduciary capacity and holds the property in trust to the prior agreement-holder, but the prior agreement-holder cannot automatically become the owner by seeking declaratory relief and has to necessarily file a suit for specific performance impleading both the vendor and the subsequent transferee and that is the ratio decidendi laid down by the Supreme Court in Durga Prasad's case (supra). Laji Jetha's case (supra) and Bai Dosabai's case (supra) and the contra views expressed in Dharma Rao's case (supra) and Chand Mohammad's case (supra) cannot be held as laying down correct legal principles and more so in view of the later Supreme Court judgment in Bai Dosabai's case (supra).

12. In view of the foregoing discussion, we hold that the suit as framed by the plaintiff is not maintainable and we accordingly set aside the decree for declaration, possession and future profits granted by the trial Court are affirmed by the lower appellate Court. But the matter does not conclude here and the question still to be considered is as to what is the kind of relief the plaintiff is entitled for? The plaintiff has paid Rs.2,000/- way back in the year 1974 to the 1st defendant and an alternative prayer of refund of the amount of Rs.2,314.50ps with interest was sought for. The said alternative relief was not granted for the reason that the main relief was granted. Now that we have set aside the main relief, we decree the plaintiff's claim for recovery of Rs.2,314.50 ps. with simple interest at the rate of 12% per annum from 29.5.1974 till realisation. Defendants 1, 2 and 4 shall be jointly and severally liable to pay the said amount.

13. In the result, the Second Appeal is allowed in part to the extent indicated above. The parties shall bear their own costs.