
(2011) 04 MAD CK 0212
In the Madras High Court
Case No : Second Appeal No. 160 of 2000

Kulandaisami Gounder and K. Balasubramaniam	APPELLANT
Vs	
R. Srikumar and K. Ranganathan	RESPONDENT

Date of Decision : 09-04-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 1
Specific Relief Act, 1963 — Section 19, 22, 27, 27(2)
Trusts Act, 1882 — Section 91

Citation : (2011) 04 MAD CK 0212

Hon'ble Judges : R. Subbiah, J

Bench : Single Bench

Advocate : Nalini Chidambaram for C. Uma, for the Appellant; S. Parthasarathy for V.P. Sengottuvel, for R1, for the Respondent

Final Decision : Dismissed

Judgement

R. Subbiah, J.—The Second Appeal is directed against the decree and judgment dated 14.09.1998 passed by the learned Principal District Judge, Coimbatore, in A.S. No. 4 of 1997, whereby the decree and judgment passed by the learned Subordinate Judge, Tirupur, dated 26.02.1996 in O.S. No. 536 of 1990, were confirmed.

2. The 1st Respondent is the Plaintiff and the 2nd Respondent and the Appellants are the Defendants before the trial court and the Plaintiff filed the suit for a specific performance, directing the Defendants to execute a sale deed in respect of the suit properties in his favour and also to put the Plaintiff in possession of the same. The 2nd Defendant Kulandaisamy (1st Appellant herein) is the father and Defendants 1 and 3 are his sons (2nd Appellant and the 2nd Respondent). The case of the Plaintiff is that the 1st Defendant Ranganathan (2nd Respondent herein) is the owner of the suit properties and he agreed to sell the same to the Plaintiff by an agreement dated 19.10.1989 for a sum of Rs.2,40,000/- and received an advance of Rs. 20,000/- on the same day and the 1st Defendant also

agreed to execute the sale deed on payment of the balance amount in six months. Subsequently, the Plaintiff paid another sum of Rs. 10,000/- on 05.12.1989 and the same was endorsed in the agreement and the period of agreement was extended till 19.10.1990. While so, Defendants 2 and 3, the father and brother of the 1st Defendant, issued a notice to the 1st Defendant on 03.11.1989, a copy of which was also sent to the Plaintiff, demanding share in the suit properties and stated that the 1st Defendant had no absolute right over the suit properties and that they are the joint family properties. On enquiry with the 1st Defendant, the Plaintiff was informed that Defendants 2 and 3 had no right over the suit properties and that he alone is entitled to the same. Though the Plaintiff was ready and willing to perform his part of the contract by paying the balance amount of Rs. 2,10,000/-, the 1st Defendant was evading the execution of the sale deed. Hence, he came forward with the suit.

3. The 1st Defendant (2nd Respondent), who entered into an agreement with the Plaintiff, remained ex parte. Defendants 2 and 3 filed a written statement contending that in the suit properties, the 1st Defendant had only 1/3rd share and Defendants 2 and 3 are having each 1/3rd share. The 2nd Defendant was residing in the suit property for 40 years as a tenant and was running a petty shop and a cycle shop and earning a monthly income of Rs. 1,000/- and the 3rd Defendant was working in a Finance Corporation and earning Rs. 300/- per month and thereafter he was working as Bill Collector in Thirupur Municipality on a monthly income of Rs. 750/-. Similarly, the 1st Defendant, as an agent in abanian company, was earning Rs. 500/- per month. So, out of the joint income earned by all the Defendants, the 2nd Defendant instructed the 1st Defendant to purchase the suit properties jointly in their names; but the 1st Defendant purchased the same only in his name and this fact came to be known by Defendants 2 and 3 when the 1st Defendant was making attempts to sell the suit properties to a third-party. Hence, they went to the registrar office and obtained a certified copy of the sale deed dated 17.06.1981, through which they found that the suit properties were only in the name of the 1st Defendant, leaving the names of Defendants 2 and 3. Hence, they issued a notice to the 1st Defendant calling upon him to execute the sale deed in their favour. Accordingly, the 1st Defendant executed sale deed in favour of the 3rd Defendant for his 1/3rd share for a consideration of Rs. 82,000/-. Thereafter, the 3rd Defendant was paying property tax and water tax to the property. Defendants 2 and 3 are in possession and enjoyment of the suit properties and the agreement entered into between the Plaintiff and the 1st Defendant will not be binding on them and hence, the Plaintiff is not entitled to the claim of specific performance.

4. The 3rd Defendant filed an additional written statement stating that even prior to the agreement dated 19.10.1989 executed between the 1st Defendant and the Plaintiff, the 1st Defendant had entered into an agreement dated 17.08.1989 with the 3rd Defendant to sell the property and pursuant to which, the 1st Defendant executed a sale deed on 15.02.1990 in favour of the 3rd Defendant. Hence, after the sale, the 1st Defendant had no right whatsoever in the suit

properties.

5. Originally the Plaintiff filed the suit for a direction to the Defendants to execute the sale deed. Subsequent to the filing of the written statements, the Plaintiff has amended the prayer "for a direction to Defendants 1 and 3 to execute the sale deed in respect of the suit properties in favour of him and put him in possession of the same".

6. On the said pleadings, the trial court framed necessary issues and on the side of the Plaintiff, the Plaintiff examined herself as P.W.1 besides examining one Thyagarajan as P.W.2 and marked Exs.A-1 to A-7 and on the side of the Defendants, Defendants 2 and 3 were examined themselves as D. Ws.1 and 2 besides examining two other witnesses as D. Ws.3 and 4 and marked Exs.B-1 to B-15. The trial court, after considering the entire evidence on record, both oral and documentary, had decreed the suit. Challenging the said finding, Defendants 2 and 3 filed A.S. No. 4 of 1997 on the file of Principal District Court, Coimbatore, wherein the decree and judgment of the trial court were confirmed and the appeal was dismissed. Aggrieved over the same, Defendants 2 and 3 filed the present second appeal.

7. At the time of admission of the second appeal, this Court has framed the following substantial questions of law for consideration:

(1) Whether in law the courts below are right in overlooking that the persons seeking to enforce specific performance has to prove readiness and willingness to perform his part throughout the period from the date of contract as laid down in Viswanathan and Others Vs. R. Lakshmi Ammal (deed.) and Others, and that the first Respondent had woefully failed to do so ?

(2) Whether in law the courts below are not wrong in failing to note that the contract was impossible of performance as the applicants were in possession and vacant possession could not be given ?

(3) Whether in law the courts below were right in shifting the burden on the Defendants instead of casting the onus on the Plaintiff ?

(4) Whether in law the courts below are not wrong in failing to frame adequate issues under Order 14 Rule 1 CPC and points determination as mandated under Order 41 Rule 31 of the Code of Civil Procedure?

8. On 21.03.2011, this Court has framed the additional substantial questions of law for consideration:

(1) Whether in the absence of a specific prayer to set aside the sale deed dated 15.02.1990 or for a prayer to declare the sale as not binding on the Plaintiff by paying the appropriate court fee, is the Plaintiff entitled to specific performance of the agreement for sale dated 19.10.1989 ?

(2) Whether in the absence of a prayer for a decree for possession against the 1st Appellant, the decree for possession can be executed against the 1st

Appellant ?

(3) Whether in the absence of a suit prayer for eviction and consequential relief of possession against the 1st and 2nd Appellants, the prayer for possession alone cannot be maintained against the Appellants ?

9. Learned Senior Counsel for the Appellants/Defendants 2 and 3 submitted that admittedly, on 15.02.1990, the 2nd Respondent/1st Defendant had executed a registered sale deed in favour of the 2nd Appellant in respect of his 1/3rd share of the suit properties, even before the filing of the suit and this fact was also pleaded in the additional written statement. Since the sale was completed even before the filing of the suit, the 1st Respondent/Plaintiff ought to have amended the prayer to set aside the sale deed dated 15.02.1990 and declare the same as not binding on them. But the 1st Respondent had not done so, but he amended the prayer to the effect that "directing the 2nd Respondent as well as the 2nd Appellant to execute the sale deed in respect of the suit properties in his favour and put the 1st Respondent in possession of the same". In the absence of the prayer for setting aside the sale, the suit for specific performance is not maintainable. In support of her contentions, the learned senior counsel has relied on the decision reported in the case of K. Jagannathan Vs. A.M. Vasudevan Chettiar and 12 others, . It is further submitted that since the property was sold even before the filing of the suit, the doctrine of lis pendens will not apply to a purchaser who buys the property which is the subject matter of the agreement.

10. The next fold of the submission made by the learned senior counsel for the Appellants is that the 1st Appellant, the father of the 2nd Respondent, is admittedly in possession of the suit properties initially as the tenant under the erstwhile owner and subsequently in his own right as a tenant continuing in possession and claiming to be the owner of 1/3rd share and as such, a decree cannot be executed against him. Therefore, the decree for possession cannot be executed against the 1st Appellant. In this regard, the learned senior counsel made an elaborate argument, by relying upon Ex.B-1 i.e. the legal notice dated 03.11.1989 sent by the Appellants, Ex.A-2, the endorsement made in Ex.A-1 agreement, Ex.A-4-the legal notice sent by the 1st Respondent to the 2nd Respondent, that the contents of the above documents would show that the property is in possession of the 1st Appellant. Therefore, the 1st Respondent ought to have prayed for eviction of the Appellants, but on the other hand, no prayer was made by the 1st Respondent against the 1st Appellant. Even in the amended prayer, he sought for a direction only against the 2nd Respondent and the 2nd Appellant to execute a sale deed and put him into the possession of the property. When the relief sought for by the 1st Respondent, leaving the 1st Appellant, the suit is not maintainable. Under such circumstances, by considering the substantial questions of law as well as the additional substantial questions of law raised in this appeal, the appeal has to be allowed.

11. Per contra, the learned senior counsel for the 1st Respondent/Plaintiff submitted that the 2nd Respondent Ranganathan alone was the absolute owner

of the property, which could be evident from the sale deed dated 17.06.1981 marked as Ex.A-6. Though the Appellants had stated in the additional written statement that prior to the agreement dated 19.10.1989 executed between the Respondents, the 2nd Respondent Ranganathan entered into an agreement with his brother, the 2nd Appellant, on 17.08.1989, the said agreement was not marked before the trial court. Had the agreement been executed as alleged by the 2nd Appellant, at least, the said agreement would have been referred to in the legal notice Ex.B-1 dated 03.11.1989 sent by the Appellants to the 1st Respondent or at least they would have stated about the same in the written statement. But, only by way of additional written statement, the Appellants have taken a plea that the 2nd Respondent had entered into an agreement in favour of the 2nd Appellant on 17.08.1989. The cumulative effect of these aspects would show that only in order to defeat the legitimate claim of the 1st Respondent, the 2nd Respondent, in collusion of the Appellants, had sold the property in favour of the 2nd Appellant. Though the Appellants have claimed that the Appellants and the 2nd Respondent were having 1/3rd share, by a sale deed dated 15.02.1990, the 2nd Respondent had sold the entire property in favour of the 2nd Appellant and this conduct of the 2nd Respondent would further support the case of the 1st Respondent that only in order to defeat the legitimate claim of the 1st Respondent, the entire property has been sold. The courts below by deeply going into all these facts, have correctly dismissed the suit.

12. With regard to the legal submission, the learned senior counsel for the 1st Respondent submitted that after the sale agreement entered into between the Respondents, the property was sold to the 2nd Appellant by the 2nd Respondent. Since the property was sold subsequent to the contract, the law does not mandate for setting aside the sale which was made subsequent to the contract. In this regard, the learned senior counsel for the 1st Respondent, by relying upon Section 19(b) of the Specific Relief Act, would contend that the relief against the subsequent purchaser for specific performance was maintainable and the only exception is that the transferee has paid his money for the value in good faith, without notice of the original contract. But, in the instant case, the Appellants were aware of the sale agreement dated 19.10.1989 entered into between the 1st Respondent (the Plaintiff) and the 2nd Respondent (1st Defendant) even before the sale deed was registered in their favour by the 2nd Respondent herein. Therefore, the prayer for setting aside the sale does not arise. In support of his contentions, the learned senior counsel relied on the decisions reported in *Marina Appa Rao and Others Vs. Marina Veeranna*, *Lala Durga Prasad and Another Vs. Lala Deep Chand and Others*, *Babu Lal Vs. Hazari Lal Kishori Lal and Others*, and *K. Raghavendra Raju v. Syed Yousuf* 2005 AIHC 2795.

13. The learned senior counsel for the 1st Respondent further submitted that since the property is in possession of the Appellants, there is no need to ask for a prayer for eviction since the specific performance is only with regard to the execution of sale deed pursuant to the agreement and the Plaintiff can always

work out his remedy for possession after the execution of sale deed in his favour, in accordance with law.

14. This Court has paid its anxious consideration on the submissions made by the learned senior counsel appearing on either side.

15. In view of the said submissions, the questions that have to be decided in this appeal are,

(1) Whether the suit for specific performance was maintainable without the prayer for setting aside the sale dated 15.02.1990 by the 2nd Respondent in favour of the 2nd Appellant ?

(2) Whether the suit for specific performance is maintainable since the 1st Respondent has not asked for eviction, in view of the fact that the Appellants are in possession and enjoyment of the suit properties ?

16. With regard to the first question, it is the submission of the learned senior counsel for the Appellants that the agreement was entered into between the 1st Respondent and the 2nd Respondent on 19.10.1989; but the property was sold on 15.02.1990 to the 2nd Appellant by the 2nd Respondent and the suit was filed only in November, 1990. Since the sale was much earlier to the filing of the suit, the principle of *lis pendens* applies to this case. Under such circumstances, the 1st Respondent ought to have asked for the relief of setting aside the sale.

17. On the contrary, it is the submission of the learned senior counsel for the 1st Respondent that the suit for specific performance could be enforced as against the subsequent purchaser unless the transferee has paid money in good faith without the notice of original contract. In the instant case, the materials available on record would show that the Appellants were well aware of the original contract entered into between the 1st and 2nd Respondents on 19.10.1989, but the sale deed was executed by the 2nd Respondent in favour of the 2nd Appellant only on 15.12.1990. Therefore, the factual background available in this case would show that the Appellants were well aware of the Ex.A-1 sale agreement. The 1st Respondent, having known that the property was sold by the 2nd Respondent in favour of the 2nd Appellant on 15.02.1990, immediately amended the prayer for a direction against the 2nd Respondent and the 2nd Appellant to execute a sale deed in his favour and directing them to put him in possession of the suit properties.

18. A reading of Section 19(b) of the Specific Relief Act would show that IF only the money is paid by the transferee in good faith without notice to the earlier contract, the Plaintiff cannot enforce the contract. In the instant case, knowing fully well about the contract, the 2nd Appellant has paid the amount to the 2nd Respondent and got the sale deed executed in his favour. Therefore, what is required under law to the 1st Respondent/Plaintiff is to add the subsequent purchaser to get a relief of specific performance. In the instant case, the 1st Respondent has amended the prayer by adding the 2nd Appellant and asking the

relief of specific performance particularly against the 2nd Appellant. Therefore in my consideration, there is no need for the 1st Respondent to ask for the relief offsetting aside the sale deed dated 15.02.1990 and the suit filed by the 1st Respondent was maintainable.

19. In this regard, it would be appropriate to rely on the judgments relied on by the learned Counsel for the 1st Respondent and in AIR 1953 MAD 409 (supra), this Court has observed as follows:

7. The legal position may, therefore, be put thus: An agreement to sell immovable property does not create any interest in the said property unless a sale deed is executed conveying the said property. The vendor, who has not transferred his interest in the property, though he entered into an agreement with another to sell the same, can certainly confer title on a third party by executing a sale deed in his favour. As between the vendor and the subsequent purchaser, there can be little doubt that there is a transfer of ownership and, therefore, the title to the property vests in the latter. But the title of the subsequent purchaser with notice of the prior agreement in favour of another is subject to the obligation under Sections 91, Trusts Act. He holds the property for the benefit of the latter to the extent necessary to give effect to the contract. The person in whose favour there was a prior agreement can specifically enforce his agreement under Sections 27(2) (Section 27(b)?), Specific Relief Act, and compel him to execute a sale deed in his favour. But till such a sale deed is executed by the subsequent purchaser, the person in whose favour there was a prior agreement cannot acquire any title to the same. If the contract for the purchase of immovable property with the original owner does not create any interest in him, the subsequent sale by the owner to a third person cannot confer a better title on him. He can only acquire title to the property by getting a conveyance from the subsequent purchaser. That is the reason why though at one time Courts were directing only the original owner to execute a conveyance in favour of the Plaintiff, they are now adopting the procedure, consistent with principle and the legal title of the parties, directing the subsequent purchaser also to execute the sale deed in favour of the Plaintiff. I must, therefore, hold that the execution of a sale deed by the original owner without the subsequent purchaser joining the same will not confer any title on the person in whose favour there was a prior agreement to sell.

20. In *Lala Durga Prasad and Another Vs. Lala Deep Chand and Others*, , the Hon'ble Apex Court has held as follows:

Where there is a sale of the same property in favour of a prior and subsequent transferee and the subsequent transferee has, under the conveyance outstanding in his favour, paid the purchase-money to the vendor, then in a suit for specific performance brought by the prior transferee, in case he succeeds, the question arises as to the proper form of decree in such a case. The practice of the Courts in India has not been uniform and three distinct lines of thought emerge. According to one point of view, the proper form of decree is to declare the

subsequent purchase void as against the prior transferee and direct conveyance by the vendor alone. A second considers that both vendor and vendee should join, while a third would limit execution of the conveyance to the subsequent purchaser alone. According to the S.C., the proper form of decree is to direct specific performance of the contract between the vendor and the prior transferee and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the prior transferee. He does not join in any special covenants made between the prior transferee and his vendor; all he does is to pass on his title to the prior transferee.

21. The Hon''ble Supreme Court in Babu Lal Vs. Hazari Lal Kishori Lal and Others, has held as follows:

Section 22 of the Specific Relief Act which enacts a rule of pleading provides that a person in a suit for specific performance of a contract for the transfer of immovable property, may ask for appropriate relief''s, namely, he may ask for possession, or for partition or for separate possession including the relief for specific performance. These relief''s he can claim, notwithstanding anything contained in the Civil P.C., to the contrary, Sub-section (2) of this section, however, specifically provides that these relief cannot be granted by the Court, unless they have been expressly claimed by the Plaintiff in the suit.

The proviso to this sub-s.(2), however, says that where the Plaintiff has not specifically claimed these relief''s in his plaint, in the initial stages of the suit, the Court shall permit the Plaintiff at any stage of the proceedings, to include one or more of the relief''s, by means of an amendment of the plaint on such terms as it may deem proper. The only purpose of this newly enacted provision is to avoid multiplicity of suits and that the Plaintiff may get appropriate relief without being hampered by procedural complications.

The expression "in an appropriate case" in S. 22(1) is very significant. The expression only indicates that it is not always incumbent on the Plaintiff to claim possession or partition or separate possession in a suit for specific performance of a contract for the transfer of the immovable property. That has to be done where the circumstances demanding the relief for specific performance of the contract of sale embraced within its ambit not only the execution of the sale deed but also possession over the property conveyed under the sale deed. It may not always be necessary for the Plaintiff to specifically claim possession over the property, the relief of possession being inherent in the relief for specific performance of the contract of sale....

22. In 2005 AIHC 2795 (supra), it has been held that it is not obligatory on Plaintiff to seek for cancellation of sale deed executed in favour of subsequent purchaser, provided, the said agreement of sale in favour of Plaintiff is prior to sale deed of subsequent purchaser.

23. A reading of the above judgments would clearly show that the transfer of ownership of the property to the subsequent purchasers with the notice of prior

agreement, which would amount to holding of the property by the subsequent purchasers, is only for the benefit of the agreement holder to give effect to the contract. Further, it is clear that there is no need to ask for a specific prayer to set aside the sale of the Plaintiff and what he has to do is to imp lead the subsequent purchasers and to direct them to execute the sale deed along with the vendor of the property.

24. The facts of the case reported in K. Jagannathan Vs. A.M. Vasudevan Chettiar and 12 others, , the judgment relied on by the learned senior counsel for the Appellant, would show that in the partition, the members of the joint family property allotted only an indefinite small share to the Plaintiff, who was a minor at the time of execution of partition deed; subsequently when the Plaintiff filed a suit for partition and separate possession of a share in the property, this Court has held that the Plaintiff must sue for the cancellation of the document; but that was not the case arising under the sale agreement. Therefore, the dictum laid down in that case cannot be made applicable to the present case and as such, I am not inclined to accept the case of the Appellant.

25. With regard to the next question, when the 1stAppellant is in possession of the properties, a decree cannot be executed against him since there is no prayer for eviction. In my considered opinion, the object of specific performance is only to get a sale deed executed. In the instant case, the 1st Respondent filed the suit as against the Appellants, who are the owner and the subsequent purchaser of the property, which is suffice to maintain the suit for specific performance. Once the sale deed is executed, the 1st Respondent is always at liberty to initiate necessary action to recover possession of the suit properties from the 1st Appellant. Therefore, I am not inclined to accept the submission of the learned senior counsel appearing for the Appellant in this regard.

26. The courts below have correctly appreciated the evidence and the documents adduced by the parties and the concurrent findings of the courts below reflect the evidence on record. The reasoning's and findings do not suffer from any infirmity warranting interference and as such, the substantial questions of law and the additional substantial questions of law are answered against the Appellants.

27. For the foregoing reasons, the second appeal fails and accordingly the same is dismissed. No costs.