

(1997) 08 KAR CK 0027

In the Karnataka High Court

Case No : Regular Second Appeal No. 347 of 1986

Smt. Shobha Sadanand Ramanakatti

APPELLANT

Vs

Smt. Vasantibai and others

RESPONDENT

Date of Decision : 06-08-1997

Acts Referred:

Specific Relief Act, 1963 — Section 27 (1)
Transfer of Property Act, 1882 — Section 3, 53 A

Citation : (1998) 1 CivCC 497 : (1998) ILR (Kar) 485 : (1998) 1 KarLJ 107

Hon'ble Judges : T.N. Vallinayagam, J

Bench : Single Bench

Advocate : Sri H.B. Datar and Sri K.S. Desai, for the Appellant; Sri G.S. Visveswara and Smt. Kalpana Datar, for the Respondent

Judgement

1. The legal representative of the plaintiff is the appellant. The suit for specific performance along with declaration that a sale subsequent to the agreement of sale in favour of the plaintiff is not binding, was decreed by the Trial Court. On appeal therefrom, the first Appellate Court allowed the appeal and dismissed the suit. On the death of the plaintiff pendente lite, the legal representative of the plaintiff has been brought on record and the L.R. is now before this Court questioning the judgment of the first Appellate Court.

2. The brief facts that gave rise to the second appeal are that the suit properties belong to the 1st defendant. He has leased out the northern front portion and upper storey of the second part of the suit house No. 1990 to one Sri Bandu Ganesh Sripannavar. The plaintiff is in possession of the remaining southern two parts and ground floor of the second part as tenant. He is also in possession and wahiwat of water tap, latrine and open site and the well in CTS No. 2629. The 1st defendant agreed to sell the suit properties to the plaintiff for a sum of Rs. 25,000/- and executed the agreement deed dated 15-9-1965. The 1st defendant received Rs. 1,000/- from the plaintiff by way of earnest money. The period for execution of registered sale deed was two years from the date of execution of

the agreement after receiving the remaining consideration amount. The plaintiff has spent a large amount for carrying out repairs to the house. The fact that the 1st defendant has executed the suit agreement and the plaintiff has carried out repairs is known to all neighbours. Sri Bandu Ganesh Sripannavar and his family members who are co-tenants also know these facts. The 1st defendant informed the plaintiff by letter dated 3-8-1967 that he has sold the suit property to the defendant 2 and that the plaintiff should pay rent to her. But on enquiry the plaintiff came to know that the 1st defendant in collusion with the second defendant has created a bogus and false sale deed. The second defendant is the wife of co-tenant Bandopanth Ganesh Sripannavar. The sale deed executed by the 1st defendant in favour of the second defendant is not binding on the plaintiff. The plaintiff by registered notice dated 25-9-1967 called upon the 1st defendant to execute the sale deed. In spite of it, the 1st defendant has not executed the sale deed. The plaintiff was and is always ready and willing to perform his part of contract.

3. The case of the 1st defendant is that he is the owner of the suit property. He had not executed any agreement in favour of the plaintiff on 15-9-1965 agreeing to sell the suit properties to the plaintiff for a sum of Rs. 25,000/-. This agreement produced in Court by the plaintiff is a false document. He had not received Rs. 1,000/-. He has sold the suit properties to the second defendant under registered sale deed dated 31-7-1967.

4. The case of the 2nd defendant is that she had no knowledge of the agreement said to have been executed by 1st defendant in favour of the plaintiff on 15-9-1965. She purchased the property from the 1st defendant for Rs. 30,000/- after she made all enquiries about the existence of any encumbrance upon the suit properties and after she had issued a public notice dated 13-7-1969. She is a bona fide purchaser for value without notice of the agreement in favour of the plaintiff. The agreement deed in favour of the plaintiff is not a genuine document and it is a forged one. The 2nd defendant has further denied that the plaintiff carried out repairs. The 1st defendant informed the plaintiff on 6-8-1967 regarding the sale. The plaintiff has sent reply dated 25-9-1967 for the first time setting up suit agreement. The plaintiff is not in possession of water tap, latrine and open space.

5. On this pleading the parties went for trial. After considering the oral and documentary evidence, the learned Munsiff held that the first defendant has executed the agreement dated 15-9-1965. The second defendant is the purchaser for value with notice of plaintiff's right under the agreement. Consequently, the plaintiff is entitled to specific performance of the contract.

6. On appeal, the Appellate Court concurred with the finding of the learned Munsiff regarding the validity of Ex. P. 1, but yet the Appellate Court held that the second defendant had purchased for value without notice of the agreement in favour of the plaintiff. Accordingly, the appeal was allowed and the suit for specific performance was dismissed.

7. It is contended before me by the Counsel for the appellant that the purchase by the second defendant is with notice of agreement of sale and his failure to make enquiries regarding any other agreement of sale prior to him, should be held to be fatal for his case. The learned Counsel for the appellant contended that Explanation II to Section 3 of T.P. Act will apply to the facts of the case.

8. The Counsel for the respondents vehemently contended that the second defendant made all possible enquiries with the Municipal Office, Revenue Authorities and checked up the Khata and other entries and such enquiries, according to him, shall be held to be the enquiry contemplated and consequently the second defendant should be held as a bona fide purchaser for valuable consideration.

9. The main question in this second appeal is whether the second defendant can be deemed to have notice of the agreement of sale in favour of the plaintiff. Admittedly, the north front portion of the suit property and also the first floor of the suit house No. 1990 has been leased out to the husband of the second defendant. The remaining portion of the suit house along with the water tap, latrine and open site and 1/4th right in the well situated in CTS 2629 was leased to the plaintiff. The plaintiff in pursuance of the agreement of sale dated 15-9-1965 spent considerable sum of money for carrying out repairs to the suit house. The repairs effected by him was replacing the country tiles roof with Mangalore tiles roof, after removing the broken rafters. The plaintiff also constructed a new bath-room. Thus, the plaintiff claimed under the very nose of the second defendant and to the knowledge of the second defendant he did the construction. In a sale transaction, possession plays an important role and it is normally expected of a purchaser to enquire about the possession of the property and to find out whether he would get vacant possession or khas possession (constructive possession) from the tenant. Had the second defendant made the smallest of small enquiry with the plaintiff and enquired about his possession and his position after the intended purchase by the defendant 2, the second defendant would have immediately come to know of the agreement of sale in favour of the plaintiff. The simplest of simple enquiry expected of the second defendant has not been embarked upon him. This one ground is sufficient to hold that he has not purchased without notice.

10. In *Parvathammal v Sivasankara Khattar and Others*, the question of imputation of notice has been considered and it has been held as follows:

"I do not consider that a prospective purchaser can be held to have made the sort of enquiry he should if he does not pursue the matter further. When a person other than the vendor is in actual possession of the property it behoves a prospective purchaser to ascertain what all rights the person in actual possession really has in respect of the property. And if he omits to do so and if equities exist in favour of the person in possession, the prospective purchaser would be bound by them".

In *Veeramalai Vanniar (deceased) by L.Rs. and Others v Thadikara Vanniar and Others*, a Division Bench of the Madras High Court has held as follows:

"The Trial Court has committed the same serious error in holding that the defendants are transferees without notice of the original contract u/s 27(1) of the Specific Relief Act. We have already held that the defendants had actual knowledge of the plaintiffs prior agreement of sale when they took the sale deeds, Exs. B-13 to B-15. Even if the defendants had no actual notice or knowledge of the agreement of sale, they must be deemed to have had constructive notice or knowledge of the agreement of sale, they must be deemed to have had constructive notice or knowledge on the admitted facts of the case. It is surprising how the learned Judge was persuaded to find this point in favour of the defendants despite the fact that his attention was invited to the decision in *M.R.P. Yella Reddi v Subbi Reddi*, of the Andhra High Court which contains a reference to all the leading decisions in England and India and in particular to the decisions of this Court, the latest being the decision of Balakrishna Iyer, J., in *Parvathammal's case*, supra. It only shows that the learned Judge has not carefully looked into the decisions referred to in his judgment. He says that no enquiry is necessary by the subsequent purchaser regarding the rights of the person who is already in possession, once it is found that person originally got into possession as a lessee under the vendor. In other words, the learned Judge holds that if the subsequent purchaser knew that at some earlier point of time the person who relied upon the prior agreement of sale was already in possession as a lessee, the subsequent purchaser need not make any enquiry as to whether the lessee was continuing in possession only as a lessee or in the assertion of any other right. It is this identical point which has been considered by the leading decisions in England and in India and the view has been uniformly taken in all the cases that it is the duty of the subsequent purchaser to enquire (of?) the persons in possession as to the precise character in which he was in possession at the time when the subsequent sale transaction was entered into".

In *Ramkrishna Singh v Mahadei Haluai and Another*, this question has been considered thus:

"The next question for consideration is whether the appellant can take advantage of the proviso to Section 53A of the Transfer of Property Act which runs as follows:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

Neither party has led any evidence on the question of notice and the applicability of the proviso solely depends on a decision on the question of burden of proof. The learned Single Judge thought that it was the duty of the plaintiff to establish affirmatively that he had no notice of the contract. Mr. Mahabir Prasad urged that this view was wrong and in support of his contention he relied on the decision of

the Rangoon High Court in *Ko Mar v Ma May*, which was also cited before the learned Single Judge. I would, with respect, agree with the learned Single Judge that the Rangoon decision cannot be accepted in view of Explanation II to Section 3 of the Transfer of Property Act which says that:-

"Any person acquiring any Immovable property or any share or interest in any such property shall be deemed to have notice of the title if any, of any person who is for the time being in actual possession thereof".

Admittedly defendant 1 was in actual possession of the property when the plaintiff purchased it from defendant 2. He will, therefore, be deemed to have notice of the title, if any, of defendant 1.

Mr. Mahabir Prasad, however, urged that the word "title" here refers to completed title and not a mere equitable interest which might accrue to the transferee under the provisions of Section 53A of the Transfer of Property Act. He could not, however, cite any authority in support of this contention. On the other hand, the principles gathered from English decisions indicate to the contrary. Thus, in the well-known case of *Daniels v Davison*, it was held that:

"Possession of a tenant is notice to a purchaser of the actual interest he may have, either as tenant, or, farther, as in this instance in an agreement to purchase the premises".

This has been followed in *Allen v Anthony*, where also it was held that possession of a tenant is notice to a purchaser the whole actual interest he may have in the estate. In *Barnhart v Greenshields*, the same principles were applied and it was further held that "where a tenant is in possession of land, a purchaser is bound by the equities which the tenant could enforce upon the vendor. It was also observed that this equity of the tenant extends not only to interests connected with his tenancy, but also to interests under collateral agreements.

Thus, the English decisions are unanimous to the effect that the possession of a tenant, even though his full title as a tenant may not be established, is sufficient notice to the purchaser of all the equitable interests including interest arising out of a collateral agreement".

In *Mahadeo Keshav Lingarkar and Another v Shamrao Balwant Kesarkar*, the question has been considered thus:

"As stated by Sir Lawrence Jenkins in *Baburam v Madhab Chandra*, "the occupation of property by a tenant ordinarily affects one who would take a transfer of that property with notice of that tenant's rights and if he chooses to make no enquiry of the tenant, he cannot claim to be a transferee without notice". In view of these principles, it was the duty of the plaintiff to make an enquiry with the defendants as to what their rights were. As the plaintiff admittedly failed to make any enquiry in respect of the rights of the defendants in the said house, it must be held that he had notice of the contract or part performance thereof; and hence, in my opinion, the learned District Judge erred

in law in holding that the proviso to Section 53A was attracted in this case. In the facts and circumstances of the case, it cannot be said that the plaintiff was a transferee for consideration, who had no notice of the contract or of the part performance thereof within the meaning of that proviso, because the defendants were in possession of the house and it was incumbent on the plaintiff to make proper enquiry into their rights before getting a sale of the half share in the property in his favour".

The purchase without notice has also been considered in *Asharam and Another v Bhanwarlal*, which reads thus:

"The Transfer of Property Act thus contemplates three kinds of notices, namely, (1) actual notice, (2) constructive or implied notice (that is, when, but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it) and (3) notice to agent. In the present case, the subsequent transferee, plaintiff 2, must be taken to have implied notice of the agreement dated 18-6-1948 and of the part performance thereof because he would have had actual notice as to the title of the defendant but for his wilful abstention from an enquiry at the time of purchasing the property which was admittedly in possession of the defendant".

11. The cumulative effect of all these decisions laid down the proposition that whenever the possession of a property is at the hands of the tenant, the intended purchaser must make enquiry with that tenant to ascertain the nature of possession and also to find out how he will get possession after he purchased the property. As already seen, the plaintiff is a tenant in possession and admittedly no enquiry is made in this case by the second defendant. Added to that, the second defendant and her husband were the silent spectators to the improvements made to the property by the plaintiff and did not even care to find out why such an improvement to the extent of changing their roof itself is being indulged by the plaintiff. In this view it has to be held that the purchase made by the second defendant is without proper enquiry and he cannot be considered as a bona fide purchaser without notice.

12. The second appeal is, therefore, allowed setting aside the judgment and decree of the first Appellate Court. The decree of the Trial Court is restored.