(2007) 12 MAD CK 0252

Madras High Court

Case No: A.S. No. 457 of 2000

M.C. Manickam Chettiar	APPELLANT
Vs	
Indrani Karmegam and 4 others	RESPONDENT

Date of Decision: Dec. 20, 2007

Acts Referred:

- Specific Relief Act, 1963 - Section 19, 19(b)
- Transfer of Property Act, 1882 - Section 52

Hon'ble Judges: G. Rajasuria, J

Bench: Single Bench

Advocate: R. Subramanian, for the Appellant; Anand Chandrasekar for M/s. Sarvabhauman Associates for R.2 No appearance for R1 and R3 Mr. T.K. Gopalan for R.5 R4 - Given up, for the Respondent

Final Decision: Dismissed

Judgement

G. Rajasuria, J.
This appeal is focussed as against the judgment and decree dated 12.09.2000 in O.S.No.47 of 1990 on the file of the 11 Additional Sub judge, Madurai. The parties, for convenience sake, are referred to hereunder according to their litigative status before the trial Court.

2. Broadly but briefly, the case of the plaintiff as stood exposited from the plaint would run thus:

(i) The plaintiff and the first defendant entered into an oral agreement to sell on 25.09.1989 under which the latter agreed to sell in favour of the former, the property described in the schedule of the plaint namely the plot and the house situated thereon for a sum of Rs.3,91,000/- in the presence of one Ramasamy, Chinnakaruppiah and Avudaiappan. A sum of Rs.1,001 /- was paid by the plaintiff to the first defendant as advance, which is evidenced by a voucher.

(ii) It was also agreed between the parties that the sale should be effected on or before 04.10.1989 and in the meanwhile, the first defendant agreed to evict one Advocate Jeyabalan who was occupying a portion of the suit property and so far one Chettiar who was occupying the remaining portion of the house was concerned, the first defendant agreed to obtain a letter from him undertaking that he would vacate that portion by end of Karthigai of 1989.

(iii) It was also one of the terms of that oral agreement that a sum of Rs.25,000/- less the said advance of Rs.1,001/- would be retained by the plaintiff till the tenant Chettiar would vacate the portion of the suit property. The plaintiff was ready with the sale consideration. But, the first defendant did not perform his part of contract by evicting the said Advocate from the portion of the suit property and he has also not obtained such undertaking from the tenant Chettiar. Thereupon, the plaintiff''s advocate notice was sent to the first defendant calling upon him to comply with the terms of the agreement for which reply was sent by the first defendant raising untenable claims. Hence, the suit

(iv) However, even before filing of the suit, a portion of the suit property was sold by the first defendant to the second defendant who purchased it after knowing the agreement to sell between the plaintiff and the first defendant relating to the suit property. The third defendant as on the date of filing of the suit, continued to be in occupation of the northern portion of the said property under the first defendant. The fourth defendant is the son of the first defendant who joined with the first defendant in executing the sale deed in favour of the second defendant. Hence, he was also added as one of the defendants.

(v) The fifth defendant also was impleaded consequent upon the sale deed executed by the first defendant in his favour relating to the remaining portion of the suit property during the pendency of the suit.

3. Per contra, denying and disputing the averments/allegations in the plaint, the first defendant filed the written statement which would run thus:

On 25.09.1989, the plaintiff expressed his willingness to purchase the suit property and paid a meagre amount of Rs.1,001 /- to the first defendant and in token of it, a voucher emerged liven though, the plaintiff agreed to purchase the suit property on or before 04.10.1989, he had committed default as he had no money to purchase. There was no valid agreement to sell between the first defendant and the plaintiff. The voucher will not constitute an agreement to sell. The southern half portion of the suit property was sold to the second defendant for valuable consideration so as to meet the first defendant''s urgent family expenses. The remaining portion was sold to the fifth defendant for valuable consideration. Accordingly, the first defendant prayed for the dismissal of the suit.

4. The second defendant in her written statement, detailed her case thus:

The second defendant is the bona fide purchaser of the suit property for value as per Ex.B.3, the sale deed dated 07.12.1989 without notice of such alleged oral agreement to sell. The first defendant and the fourth defendant did not disclose the alleged agreement to sell between the first defendant and the plaintiff. Accordingly, the second defendant prayed for the dismissal of the suit.

5. The fifth defendant filed the written statement alleging that he is the bona fide purchaser of the northern side of the suit property as per Ex.B.17, the registered sale deed dated 13.11.1991, executed by the first defendant in favour of the fifth defendant without notice of such oral agreement to sell.

6. The trial Court framed several issues. During trial, on the side of the plaintiff, P.W.1 to P.W.3 were examined and Exs. A. 1 to A.17 were marked and on the side of the defendants, D.W.1 to D.W.4 were examined and Exs. B. 1 to B.22 were marked.

7. Ultimately, the trial Court dismissed the suit.

8. Being aggrieved by and dissatisfied with, the judgment and decree of the trial Court, the plaintiff preferred this appeal on the following main grounds among others:

The judgment and decree of the trial Court is against law. There was an oral agreement to sell between the first defendant and the plaintiff and the trial Court failed to take into account the admission made by the first defendant in her written statement as well as in her deposition. Since the entire sale itself was sought to be concluded by 04.10.1989, the parties thought fit not to have an agreement to sell in writing, but it was only oral. Admittedly, the trial Court failed to note that the first defendant herself admitted that the suit property was under the occupation of the tenants at the time of agreement to sell between the first defendant and the plaintiff. Accordingly, the appellant prayed for the dismissal of the suit.

9. The points for consideration are:

(i) Whether there is any admission of the alleged oral agreement to sell between the plaintiff and the first defendant in respect of the suit property, in the written statement of the first defendant as well as in her deposition? If so, whether the defendant as integral part of such agreement agreed to vacate the advocate tenant well before 04.10.1989 and also obtain a letter of undertaking from Chettiar tenant (D.3) that he would vacate the suit property by the end of Karthigai 1989?

(ii) Whether the plaintiff was ready and willing to perform his part of the contract throughout, if so, whether the first defendant committed default in performing her part of the contract?

(iii) Whether the second defendant is the bona fide purchaser of the southern portion of the suit property without notice of the said agreement to sell?

(iv) What is the effect of the fifth defendant''s purchase of the northern portion of the suit property pending the suit? (v) Whether there is any infirmity in the judgment and decree of the trial Court? and to what relief? Point No:(i)

10. The learned Counsel for the plaintiff placing reliance on the written statement of the first defendant as well as her deposition as D.W.1, would develop his argument that there is candid and supine admission that there was an oral agreement to sell whereby the first defendant agreed to sell the suit property by 04.10.1989. Paragraph No.5 in the written statement of the first defendant is extracted hereunder for ready reference:

"5. This defendant respectfully submit that on 25.09.1989 the plaintiff expressed his willingness to purchase the suit property and paid a megre amount of Rs.1,001/- only and this 1st defendant gave only a voucher to the plaintiff on the promise made by the plaintiff to pay the sale price on 04.10.1989. The plaintiff as promised by him on 04.10.1989 he did not come with sale consideration to get the sale deed in his favour. Subsequently, on 25.09.1989 the plaintiff never met the 1st defendant. The plaintiff was not ready and willing to perform even as per the voucher for getting the sale deed on 04.10.1989. Because the plaintiff had no money and source of income for such a sale consideration that is why he had given a megre amount of Rs.1,000/-."

11. The mere perusal of the aforesaid excerpt would leave no doubt in the mind of the Court that there was an oral agreement to sell between the plaintiff and the first defendant and under such agreement, a sum of Rs.1,001/- was paid by the former to the latter. In such a case, absolutely, there is no rhyme or reason on the part of the first defendant to contend that there was no oral agreement to sell at all.

12. Certain excerpts from the deposition of D.W.1 (D.1) could also be reproduced hereunder for better appreciation:

13. As such, the aforesaid three excerpts extracted from the deposition of D.W.1 coupled with the extract of the written statement and also the recitals in Ex.A.1, would at once make the point clear that there was an oral agreement to sell between the plaintiff and the first defendant, wherein the parties had the suit property in mind as the subject matter of the agreement to sell; the sale consideration was arrived at Rs.3,91,000/- and that sale should be concluded on or before 04.10.1989. Hence, in such a case, it is beyond doubt that there was a proper oral agreement to sell between the plaintiff and the first defendant in respect of the suit property, whereby the first defendant agreed to sell the suit property. The trial Court without considering the aforesaid facts, simply got itself mislead in understanding the written statement as well as the deposition of O.W.1 erroneously. Accordingly, Point No.(i) is decided.

Point No:(ii)

14. Indubitably and indisputably, Ex.A.1 is only a voucher not embodying the whole terms and conditions of agreement to sell and my findings supra would show that there was an oral agreement to sell. However, the burden of proof is on the plaintiff to prove the terms and conditions of the agreement to sell.

15. It is the specific case of the plaintiff that the first defendant agreed to vacate the advocate tenant who was in occupation on the southern portion of the suit property on or before 04.10.1989 and in respect of the northern portion, the first defendant agreed to obtain from the Chettiar tenant that he would vacate it by the end of Karthigai 1989.

16. However, both in the written statement as well as in the deposition, the first defendant would vehemently deny such a condition. The first defendant''s specific contention is that on or before 04.10.1989, the plaintiff never approached the first defendant with the money to get the sale deed executed and the plaintiff had no financial wherewithal to pay such a sale consideration also. The trial Court has not at all adverted to these facts.

17. The learned Counsel for the plaintiff would contend that the trial Court failed in making correct approach to the problem. Be that as it may, this Court being the first appellate Court, obviously the last Court of facts, could rightly from the available evidence arrive at a conclusion regarding this aspect also.

18. To the risk of repetition, without being tautologies, I would like to highlight that the plaintiff miserably failed to prove that the first defendant agreed to such two conditions set out supra.

19. At this juncture, it is worthwhile to extract the relevant portion of the plaint as under:

''4. The dale under mentioned property belongs to the 1st defendant and she is the absolute owner thereof. The 1st defendant agreed to sell the under mentioned property to the plaintiff for a consideration of Rs.3,91,000/- on 25.09.89 in the presence of

1) A.R. Ramasamy residing at Door No.29, Kesavanagar Subramaniapuram Trichy.

2) Sri A.R.P.M. Chinna Karuppiah residing at Yanaikal Madurai.

3) Sri Avadayappan residing at 55, Raman Pettai, New Jail Road, Madurai,

and received from the plaintiff Rs.1,001/- (Rupees One thousand one) as advance for which she has passed a voucher in favour of the plaintiff on the said date."

20. It is quite obvious and unambiguous that according to the plaintiff, the aforesaid three persons were fully aware of those conditions. Even then, neither P.W.2, Ramasamy, the son-in-law of the plaintiff (P.W.1) nor P.W.3 Chockalingam, have

spoken about those two conditions. Other two persons namely, Chinna Karuppiah and Avadayappan were not at all examined for reasons best known to the plaintiff.

21. I am at a loss to understand as to why the plaintiff who specifically came with the case that Ramasamy, Chinna Karuppiah and Avadayappan, knew about the terms and conditions of the oral agreement to sell, should refrain from adducing evidence through them. As such, it is crystal clear that the plaintiff miserably failed to prove those two conditions. In such a case, it is obvious that he cannot be heard to say that the first defendant agreed to those two conditions.

22. The gist and kernel of the apple of discord between the plaintiff and the first defendant is relating to the alleged breach of those two conditions by the first defendant. The plaintiff has not even proved the very two conditions as the ones which formed part of the oral agreement to sell.

23. The learned Counsel for the plaintiff would submit that the first defendant candidly admitted as D.W.1 that she after evicting the tenant alone, sold the southern portion of the suit property to the second defendant and in such a case, the first defendant in all probabilities would have agreed to those two conditions, at the time of oral agreement to sell with the plaintiff.

24. The learned Counsel for the plaintiff would rely on the admission which the plaintiff got from D.W.1 during the cross-examination as under:

25. D.W.1 admitted about the general attitude of some of the prospective vendees in demanding that the tenants in occupation of the subject matter of the agreement to sell should be vacated before sale. Per contra, it is also a trite proposition that there arc prospective vendees who are ready to purchase the properties undertaking that the vendees themselves would evict the tenant after purchasing the property from the vendors.

26. Hence, the Court simply based on conjectures and surmises cannot jump to the conclusion in favour of the plaintiff. The way in which the plaintiff presented the plaint would clearly demonstrate that but for the failure on the part of the first defendant in complying with the two conditions, the plaintiff would have paid the entire money to the first defendant and got the sale executed in his favour. Ex.A.2, the pre-litigation notice, would also convey the same idea. He ought to have taken care to gel it in writing while entering into an oral agreement to sell, but he had not done so liven in Ex.P.1, the voucher, he has not chosen to get incorporated those conditions and furthermore, by way of adding fuel to the fire, in addition to worsening his own case, he has not chosen to examine the necessary witnesses as found set out in paragraph No.4 of the plaint, to prove the alleged two conditions.

27. The learned Counsel for the plaintiff would submit that this Court could infer that the first defendant agreed to the aforesaid two conditions, because before selling the southern portion of the suit properties to the second defendant, the

plaintiff got evicted the advocate tenant Jeyabalan from it. Such an argument is neither here nor there. Obviously because, from the subsequent conduct of a party, his previous intention cannot be presumed in all circumstances.

28. Hence, in these circumstances, 1 am having no hesitation in holding that the plaintiff miserably failed to prove the alleged breach of those two conditions by the first defendant and for that matter, he has not even proved that those two conditions formed part and parcel of the oral agreement to sell. Accordingly, this point is decided as against the plaintiff.

Point No:(iii)

29. The second defendant did not examine herself as a witness whereas her husband was examined as D.W.2, for which the learned Counsel for the plaintiff would take exception by arguing that non-examination of the second defendant before the Court as a witness is fatal to the case of the second defendant. The first defendant would contend that one Karmegam was the intermediary through whom the second defendant purchased the suit property for valid consideration.

30. It is also an admitted fact that the second defendant purchased the southern portion of the suit property well before the paper publication made by the plaintiff as per Ex.A.7. It is therefore clear that the contention of the second defendant is probable that she is a bona fide purchaser for value without notice of the prior agreement to sell. In civil cases, party to the suit need not necessarily be examined unless circumstances warrant so. Even though the plaintiff would state that the second defendant is not the bona fide purchaser for value, yet the second defendant would clearly and categorically contend that she had no notice of the oral agreement to sell between the plaintiff and the first defendant and that the first defendant did not disclose about it.

31. The cross-examination of D.W.1 also is not on the line which warranted the first defendant to examine herself as a witness before the Court. Over and above that, in view of the findings of this Court as against the plaintiff under Point No.(ii), the purchase made by the second defendant in no way gets affected. The learned Counsel for the plaintiff would cite the decision in Gostho Behari Sadhukhan and Another Vs. Omiyo Prosad Mullick and Others, . An excerpt from it, would run thus:

"27. The learned Advocate General contended next that the learned judge was wrong in his conclusion that the Bose defendants had not been able to establish that they were bona fide transferees for value without notice of the previous contract. The learned Judge held that they were transferees for value and this was not seriously disputed. The real question in dispute was whether before they took the transfer they had notice of the previous contract. Direct evidence that the transferees had notice of the previous contract is seldom available and in deciding whether the defendant in a suit for specific performance for a contract has been able to discharge the burden that he was a bona fide transferee without notice, the

Court has to depend necessarily on circumstances. The circumstances here are eloquent enough to indicate that the Bose defendants had notice of this previous contract. The haste with which the transaction was concluded as between the Boses and the Mullicks taken with the circumstance that no steps were taken by the Boses to investigate the title of the Mullicks are circumstances indicating that the Boses knew very well of the previous contract. The learned Advocate General tried to convince us that if they knew of the previous contract they must have known the fact that there had been repudiation of the implied term to pay the solicitor''s costs. As, however, in my opinion this term was not an essential term of the contract and the contract must be considered to be alive in spite of the repudiation of this non-essential term, it must be held that the Bose defendants at the lime they took transfer of this property acted with the knowledge that there was an existing contract between the Mullicks and the Sadhukhans under which the Mullicks were bound to grant lease of the property to the Sadhukhans."

32. There is no quarrel over such proposition as found set out in the cited decision. But, here, the circumstances discussed supra would demonstrate that the plaintiff has not proved the case relating to the aforesaid two conditions and the first defendant established her urgent requirement to sell the properties in favour of the second defendant and that too, the second defendant purchased the property well before the paper publication. Hence, the circumstances are not speaking against the second defendant. Accordingly, this point is decided.

Point No:(iv)

33. The fifth defendant is the purchaser during the pendency of suit, the northern half of the suit property and it is quite obvious that the fifth defendant is bound by the ultimate decision that might be arrived at by this Court. As such, in view of the finding under Point No.(ii), the sale by the first defendant in favour of the fifth defendant also in no way gets affected.

34. The learned Counsel for the plaintiff would rely on the decision in Sanjay Verma v. Manik Roy and others reported in Sanjay Verma Vs. Manik Roy and Others, An excerpt from it, would run thus:

"11. The principles specified in Section 52 of the T.P. Act are in accordance with equity, good conscience or justice because they rest upon an equitable and just foundation that it will be impossible to bring an action or Suit to a successful termination if alienations are permitted to prevail. A transferee pendente lite is bound by the decree just as much as he was a party to the Suit. The principle of list pendens embodied in Section 52 of the T.P. Act being a principle of public policy, no question of good faith or bona fide arises. The principle underlying Section 52 is that a litigating party is exempted from taking notice of a title acquired during the pendency of the litigation. The mere pendency of a Suit does not prevent one of the parties from dealing with the property constituting the subject matter of the Suit.

The Section only postulates a condition that the alienation will in no manner affect the rights of the other party under any decree which may be passed in the Suit unless the property was alienated with the permission of the Court."

35. The above excerpt would clearly show that the fifth defendant herein is bound by the ultimate decision under Point No.(ii).

36. The learned Counsel for the second defendant would cite the following decisions:

(i) Arunachala Thevar and Others Vs. Govindarajan Chettiar and Others, which would highlight as to who could be termed as bona fide purchaser for value without notice of prior agreement to sell. An excerpt from it, would run thus:

"7. Now we shall find out the legal position with reference to the burden of proof that is expected from either of the parties. Section 19, clauses (a) and (b) of the Specific Relief Act, 1963, reads as follows:-

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

(a) cither 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....."

These clauses of Section 19 of the New Act corresponded to clauses (a) and (b) of Section 27 of the old Specific Relief Act. On a plain reading of the above clauses, it appears that clause (a) only lays down the general principle that it is only a party to the contract who can be sued. In other words, this clause recognises and follows the general rule that a stranger to the contract is not a proper or necessary party to a suit to enforce it; but clause (b) provides exceptions to the general rule, according to which a subsequent purchaser, in order to successfully resist a suit for specific performance of a prior agreement for sale, must establish that he is a purchaser for value without notice of the general agreement of sale and he paid the consideration money for the sale before he had notice of the prior agreement. Clause (b) of Section 19 requires lour elements to be proved to successfully claim the benefit of the exception, viz..,

1. that the transfer is for value;

2. that the consideration has been paid;

2. that the subsequent transferee has taken the transfer in good faith; and

3. that both the purchase and the payment of the consideration had been made without notice of the prior contract.

The first two elements are positive and the rest are negative in character. Clause (b) lays stress upon the payment of money by the transferee in good faith and without

notice of the original contract, and does not go further. It contemplates a transferee who has got a document executed, who had paid the money in good faith and without notice and who gets the document registered in accordance with law, giving retrospective effect to the transaction from the date of execution. Thus, where a buyer paid full money before the date of the execution of the deed in good faith and before the receipt of the notice of the contract of sale from a buyer, he is a transferee in law from the date of execution of the conveyance within the meaning of Section 19 (b) of the Act and the transferee is protected."

In this case, my discussion supra would show that the second defendant is also a bona fide purchaser for value without notice.

(ii) Sahadeva Gramini v. Perumal Gramani reported in (2005) 11 SCC 454 which would posit the proposition that after agreement to sell concerned in the lis, the bona fide purchaser without notice of it, should be protected.

Point Nos:(v)

37. In view of the discussion supra, there is no infirmity in the judgment and decree of the trial Court. Accordingly, this point is also decided. In the result, this appeal is dismissed, confirming the judgment and decree dated 12.09.2000 in O.S.No.47 of 1990 on the file of the II Additional Sub Judge, Madurai. However, in the facts and circumstances of this case, there is no order as to costs.