

(2011) 09 MAD CK 0169

Madras High Court**Case No:** Second Appeal No. 633 of 2011 and M.P. No. 1 of 2011

S.R. Jabaraj and S. Jayaseelan

APPELLANT

Vs

T.N. Gopal (dead) (Tatum, Smt.
Kavitha and G. Vijayakumar)RESPONDENT

Date of Decision: Sept. 30, 2011**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 22 Rule 4
- Limitation Act, 1963 - Section 5
- Specific Relief Act, 1963 - Section 19

Hon'ble Judges: R.S. Ramanathan, J**Bench:** Single Bench**Advocate:** P.S. Balasubramaniam, for the Appellant; J. Harikrishna for RR 1 to 3, for the Respondent**Final Decision:** Dismissed

Judgement

R.S. Ramanathan

1. Unsuccessful plaintiffs 3 and 4 are the appellants.
2. The case of the appellants was that their predecessor-in-title P. Lakshmanan purchased the suit property under a registered sale deed dated 2.6.1984 and ever since the date of purchase, he had been in possession and enjoyment of the same. Originally, a vacant land measuring 1 ground and 1884 sq.ft in Kannagi Nagar, Manali Salai, Madras comprised in S. No. 564, Re-Survey No. 3843 in Collector's Certificate No. 1369 of Korukkupet Village was owned by one Shanmugasundaram and six others and they formed a lay out and sold plot No. 3 to P. Lakshmanan under the sale deed dated 2.6.1984. Later, the defendant/deceased first respondent informed him that he was the prior agreement holder in respect of the entire one acre and 1884sqft of land and he purchased the same under a registered sale deed of the year 1991 and therefore, the plaintiff has no right or title to be in the suit

property. Thereafter, the deceased plaintiff Lakshmanan made enquiry and found that the deceased first respondent/defendant filed the suit against the original owners in the year 1984 without impleading the subsequent purchasers and obtained decree in the year 1988 and that suit filed by the deceased first respondent/defendant in O.S. No. 1223 of 1984 was after the purchase of the property by the plaintiff and therefore, the defendant cannot have any superior title than the plaintiff even assuming that his agreement was earlier in point of time and the plaintiff was not made a party i No. S. No. 1223 of 1984 and therefore, he is not bound by the decree passed in O.S. No. 1223 of 1984 and as his title was disputed, the suit was filed for declaration and injunction.

3. The defendant contested the suit stating that as per the agreement of sale entered into with the original owner on 23.3.1983, he filed the suit in O.S. No. 1223 of 1984 on 15.2.1984 for specific performance of the agreement of sale and after hot contest, the suit was decreed on 29.7.1988 and he got the sale deed executed by the court by filing E.P. No. 3185 of 1988 and the plaintiff's sale deed was dated 2.6.1984 after the filing of the suit and therefore, his purchase is subject to the result of the suit in O.S. No. 1223 of 1984 and therefore, the plaintiff cannot claim any right or title over the suit property and he has purchased litigation after the filing of the suit. It was further stated that the plaintiff also expressed his willingness to vacate and hand over possession by writing a letter dated 7.10.1986 as soon as the defendant got title from the court and therefore, it cannot be contended that the plaintiff was not aware of the earlier pleadings and his sale was during the pendency of the suit filed by the defendant in O.S. No. 1223 of 1984 and hence, the plaintiff cannot claim any superior title.

4. During the pendency of the suit, the plaintiff died and his legal representatives were added as plaintiffs 2 to 4 and the present appellants are plaintiffs 3 and 4.

5. The Trial Court held that the purchase by the plaintiff was after the filing of the suit in O.S. No. 1223 of 1984 and therefore, the same is hit by lis pendens and he has also admitted the title of the defendant and also undertook to vacate and hand over the possession if the defendant got decree in the suit filed by him and that is evidenced by Ex. B8 and as per the decree in O.S. No. 1223 of 1984, the defendant became the absolute owner of the entire extent of the property and the sale in favour of the plaintiff which was during the pendency of the said suit will not clothe any superior right on the plaintiff and therefore, the plaintiff is not entitled to the decree as prayed for.

6. The lower appellate court concurred with the findings of the Trial Court. Hence, this second appeal.

7. It was argued by the Learned Counsel for the appellants that the judgment of the Trial Court is a nullity as the sole defendant died on 21.11.2005 and when the suit was posted for argument on 22.11.2005, he was not alive and the judgment was

delivered on 25.11.2005 and therefore, the judgment was against a dead person and that it was brought to the knowledge of the lower appellate court but that was not properly appreciated and the lower appellate court proceeded with the appeal and dismissed the appeal. He further submitted that admittedly, the plaintiff had purchased the property after the filing of the suit in O.S. No. 1223 of 1984 by the deceased defendant and there was no proof adduced by the defendant that the plaintiff was aware of the earlier agreement of sale and the suit filed by the deceased defendant to enforce the earlier agreement of sale and therefore, the plaintiff was a bona fide purchaser for value and u/s 19(b) of the Specific Relief Act and specific performance of a contract cannot be enforced against a transferee for value who has paid his money in good faith and without knowledge of the original contract and therefore, this aspect was not appreciated by the courts below and hence, the judgment and decree of the courts below are liable to be set aside.

8. On the other hand, the Learned Counsel for the respondents submitted that the lower appellate court considered the arguments of the appellants that no decree can be passed against a dead person and held that after the suit was posted for arguments, the parties were not prepared to argue the suit and hence, the suit was reserved for judgment on 17.11.2005 and therefore, the Trial Court has validly passed the decree. He further submitted that when the plaintiff was the subsequent purchaser, he was not entitled to any equity unless he pleaded and proved that he was the bona fide purchaser for value and in this case, there was no allegation made by the appellants that the plaintiff was the bona fide purchaser for value without notice. He further submitted that the plaintiff was aware of the suit filed by the deceased defendant in O.S. No. 1223 of 1984 and the sale deeds in favour of the deceased plaintiff and others were marked in the earlier suit as Exs. B4 to B8 and the deceased plaintiff also executed a letter Ex. B8 undertaking to hand over possession if the deceased defendant obtained sale deed in the suit filed by him and the deceased plaintiff did not take any steps to implead himself in the suit for specific performance filed by the deceased defendant in O.S. No. 1223 of 1984 and therefore, the appellants are not entitled to invoke the provisions of section 19(b) of the Specific Relief Act.

9. On the basis of the above arguments, the following substantial questions of law are framed:-

1. Whether the decree passed by the Trial Court is non-est as on the date of judgment by the Trial Court, the sole defendant was dead?

2. Whether the appellants are entitled to invoke the provisions of section 19(b) of the Specific Relief Act as plaintiff was the bona fide purchaser for value?

10. As per Order XXII Rule 4 of the Code of Civil Procedure, when a sole defendant dies and the right to sue survives, the court, on application made in that behalf, shall cause the legal representatives of the deceased defendant to be made a party and

shall proceed with the suit. As per sub-clause 3 of Order XXII Rule 4, where within the time limited by law, no application is made under sub-rule (1), the suit shall abate as against the deceased defendant. Sub-clause 5 also makes provisions for adding the legal representatives even after the suit was abated as per Order XXII Rule 3 by filing necessary application u/s 5 of Limitation Act explaining the reason for not making the application within the period prescribed under the Act. Order, XXII Rule 6 makes it clear that notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not, there shall be no abatement by reason of the death of either parties between the conclusion of hearing and the pronouncement of the judgment even though the judgment was pronounced notwithstanding the death and the judgment shall have the same force and effect as if it had been pronounced before the death took place. Therefore, having regard to the provisions under Order XXII Rules 4 and 6, a duty was cast upon the plaintiff to take steps to bring on record the legal representatives of the deceased defendant within the time limit and if he fails to bring on record, the suit shall abate as against the deceased defendant.

11. As per Rule 6 of Order XXII, when the death had occurred between the conclusion of the hearing and the pronouncement of the judgment, there shall be no abatement and the judgment pronounced shall be valid. In this case, it is seen from the judgment of the Trial Court that the judgment was delivered on 25.11.2005. Further, it is seen from the discussions made in the judgment in the first appeal that the suit was initially posted for arguments on 10.11.2005 and on that day, as there was no representation for the plaintiff, the case was adjourned to 17.11.2005 as last chance and on 17.11.2005, there was no representation for the plaintiffs and the defendant and therefore, the case was reserved for delivering judgment on 25.11.2005 and permission was granted to the parties to file written arguments on or before 22.11.2005. Therefore, after the case was called on 17.11.2005 and adjourned for delivering judgment to 25.11.2005, the defendant died on 21.11.2005. Therefore, it is clear that after the conclusion of the hearing, the sole defendant died. Therefore, having regard to Order XXII Rule 6, when the case was posted for judgment, after the conclusion of the hearing and one of the parties dies before delivering judgment, the judgment shall have same force as if it had been pronounced before the death of the party.

12. Further, judgment against a dead person only is a nullity and in this case, it was not a case of judgment against a dead person. Admittedly, the suit was dismissed by the Trial Court and the legal heirs of the deceased defendant have no grievance about the judgment. According to me, if the suit had been decreed without hearing the parties and after the death of the defendant, then the legal representatives of the defendant may have a grievance. As the suit was dismissed even assuming that the judgment was pronounced after the death of the defendant, that cannot be taken advantage of by the appellants/plaintiffs as the suit was dismissed on merits and not dismissed as abated by reason of the death of the defendant. Hence, the

first substantial question of law is answered against the appellants.

13. Admittedly, the present suit is for declaration and injunction and it was not a suit filed for enforcing an agreement. As per section 19 of the Specific Relief Act, specific performance of contract may be enforced against any person claiming under any party by a title arising subsequent to the contract, except the transferee for value who has paid his money in good faith and without knowledge of the original contract. Therefore, in a suit for specific performance, if the subsequent purchaser takes the plea that he was a bona fide transferee for value who has paid money in good faith, the same can be considered while granting the relief of specific performance by the court. As stated supra, the deceased plaintiff was aware of the suit filed by the deceased defendant in O.S. No. 1223 of 1984 and he also agreed to hand over possession on being satisfied about the decree granted in favour of the deceased defendant and he also did not take any steps to get himself impleaded in the suit filed by the defendant i No. S. No. 1223 of 1984. Further, there was no proof or pleading adduced in this case that the plaintiff was a bonafide purchaser for value and he was not aware of the earlier proceedings. Considering all these issues, the appellants cannot take the benefit of section 19(b) of the Specific Relief Act. The second substantial question of law is also answered against the appellant. The judgment and decree of the courts below are confirmed.

In the result, the second appeal is dismissed. No costs. The connected miscellaneous petition is also dismissed.