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Court : Karnataka

Decided On : Aug-26-2014

Judge : Anand Byrareddy

Appeal No. : Writ Petition No.13520 of 2012 (GM-CPC)

Appellant : Narayanamma

Respondent : H.M. Krishnappa and Others

Judgement :

(Prayer: This Writ Petition filed under Article 226 of the Constitution of India praying to quash the impugned order dated 12.3.2012 passed by the Presiding Officer Fast Track Court-IV, Bangalore Rural District, Bangalore in I.A.No.II filed under Order I Rule 10(2) read with Section 151 of CPC., on the file of O.S.No.2289/2007 vide Annexure-E and allowing the I.A.No.II filed by the petitioner.)

1. The facts of the case are stated to be as follows:

2. It is the petitioner's case that she is the plaintiff in suit filed against respondents nos.1 to 3 herein, in OS 2289/2007 on the file of the Court of Civil Judge, Senior Division, Bangalore Rural District. The suit is for specific performance of contract in respect of an agreement to sell dated 13.7.2006. It is alleged that in order to deprive her of the property, respondents no.1 to 3 had colluded with respondent no.4 and a suit was said to have been filed, subsequent to the suit of the

petitioner, in OS 2289/2007 - by respondent no.4 against respondents 1 to 3, seeking specific performance of contract in respect of the same property, which is the subject matter of the petitioner's suit, under an agreement purported to have been executed on 20.1.2006. It is stated that the respondents had suppressed the fact of the pendency of the petitioner's suit and had entered into a compromise in the later suit, to which the petitioner was not a party and it is learnt by the petitioner in retrospect that a compromise decree has also been drawn up in the later suit, as on 20.6.2008.

It is in the above background that the petitioner had filed an application in her suit, invoking Order I Rule 10(2) of the Code of Civil Procedure, 1908 (Hereinafter referred to as the 'CPC', for brevity), seeking to implead the fourth respondent as the fourth defendant in the suit. The said application was contested by the proposed defendant. The trial court having dismissed the application, the petitioner being left with no alternative remedy has preferred this petition. The first respondent having died during the pendency of this petition, his legal representatives have been brought on record. The petition is resisted only by respondent no.4.

3. The learned Senior Advocate, Shri G.Krishnamurthy, appearing for the learned counsel for the petitioner contends that the subsequent suit having been facilitated by respondents no.1 to 3 and having enabled respondent no.4 to have the suit decreed, was blatantly collusive and mischievous and was possible only on account of the deliberate suppression of the fact of pendency of the petitioner's suit for a similar relief in respect of the same property. Therefore, it was but logical that as a natural consequence of the apparently collusive actions of the respondents, that the fourth respondent be impleaded as a defendant, as the property which is the subject matter of the petitioner's suit has been transferred in favour of the said respondent during the pendency of the suit he is a proper and necessary party, without whose presence the suit cannot be adjudicated completely.

It is contended that a transferee pendente lite is required to be added as a party in a suit for specific performance of contract, lest the plaintiff suffer prejudice on

account of the transferor losing interest in the litigation. It is urged that the vendor and the subsequent purchaser are both necessary and proper parties. For the decree for specific performance is to direct specific performance of the contract between the vendor and the plaintiff and to further direct the subsequent transferee to join in the conveyance, in order to pass title which is with the subsequent transferee.

It is contended that there are three aspects which are to be kept in view. In a suit for specific performance. Firstly, that specific performance prayed for continues to be enforceable not only against the original owner, but also against their transferee. In this regard attention is drawn to Section 19(b) of the Specific Relief Act, 1963. Secondly, that the doctrine of lis pendens does not annul the conveyance by a party to the suit, but only renders it subservient to the rights of the other parties to the litigation. Any such transaction would be subject to the decision in the suit. Thirdly, while it is an established principle that no one other than parties to an agreement to sell are necessary and proper parties, however, Order XXII Rule 10 of the CPC clearly postulates that in cases of assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the court, be continued by or against the person to or upon whom such interest has come or devolved. Hence it is contended that notwithstanding that the application in the instant case was one under Order I Rule 10(2) CPC, there is no bar in the Court invoking the enabling provision in aid, when the fact situation so demanded.

The learned Senior Advocate has drawn attention to the following authorities to urge the above propositions :

1. Thomson Press (India) Ltd., Vs. Nanak Builders and Investors Private Limited, AIR 2013 SC 2389
2. Dwarka Prasad Singh and others Vs. Harikant Prasad Singh and others, AIR 1973 SC 655
3. Kasturi Vs. Iyyamperumal and others, AIR 2005 SC 2813

4. Vimala Ammal Vs. C. Suseela and others, AIR 1991 Madras
5. A. Nawab John and others Vs. V.N.Subramaniam, (2012) 7 SCC 738
6. Gomi Bai and others Vs. Uma Rastogi and another, 2005(2)ALD 631.

It is hence contended that the petition be allowed as prayed for.

4. The learned counsel for respondent no.4, in seeking to justify the impugned order seeks to place reliance on the very decisions referred to and relied upon by the court below in passing the impugned order .

5. In the light of the factual matrix that there was said to be a prior agreement of sale in respect of the suit property as between respondents no.1 to 3 on the one hand and respondent no. 4 on the other, dated 20.1.2006, it is the plaintiff's case that respondents had entered into an agreement of sale dated 13.7.2006, in respect of the same property without revealing the subsisting agreement. When the respondents did not abide by the agreement, the petitioner had instituted the suit in OS 2289/2007, for specific performance on 29.10.2007, as against respondents 1 to 3.

It is the case of the petitioner that in order to defeat the right of the petitioner, respondent no.4 had filed a collusive suit in respect of the same property as against respondents 1 to 3, seeking specific performance of the alleged contract dated 20.1.2006, in OS 239/2008 as on 20.6.2008 and it was promptly compromised and a compromise decree obtained as on 20.6.2008. It is in the above background that the petitioner had sought to implead respondent no.4, which prayer has been rejected by the trial court.

6. The point for consideration in the present case is whether the fourth respondent, who is not a party to the agreement between the petitioner and respondents 1 to 3, is a proper and necessary party to the suit.

The trial court has answered the above point in the negative placing reliance on the decision of the apex court in Kasturi v. Iyyamperumal, supra. The question in the said case, before the apex court, was whether in a suit for specific

performance of contract for sale of a property instituted by a purchaser against the vendor, a stranger or a third party to the contract claiming to have an independent title and possession over the contracted property is entitled to be added as a party to the suit.

In answering the question it was held with reference to Order I Rule 10(2) CPC, and Section 19 of the Specific Relief Act, 1963, thus :

"6. In our view, a bare reading of this provision namely, second part of Order 1 Rule 10 sub-rule (2) of the CPC would clearly show that the necessary parties in a suit for specific performance of a contract for sale are the parties to the contract or if they are dead their legal representatives as also a person who had purchased the contracted property from the vendor. In equity as well as in law, the contract constitutes rights and also regulates the liabilities of the parties. A purchaser is a necessary party as he would be affected if he had purchased with or without notice of the contract, but a person who claims adversely to the claim of a vendor is, however, not a necessary party. From the above, it is now clear that two tests are to be satisfied for determining the question who is a necessary party.

Tests are - (1) there must be a right to some relief against such party in respect of the controversies involved in the proceedings (2) no effective decree can be passed in the absence of such party.

7. We may look to this problem from another angle. Section 19 of the Specific Relief Act provides relief against parties and persons claiming under them by subsequent title. Except as otherwise provided by Chapter II, specific performance of a contract may be enforced against:-

(a) either 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;

(c) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant;

(d) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;

(e) when the promoters of a company have, before its incorporation, entered into a contract for the purpose of the company and such contract is warranted by the terms of the incorporation, the company;

Provided that the company has accepted the contract and communicated such acceptance to the other party to the contract.

8. We have carefully considered sub-sections (a) to

(e) of Section 19 of the Act. From a careful examination of the aforesaid provisions of sub-sections

(a) to (e) of the Specific Relief Act we are of the view that the persons seeking addition in the suit for specific performance of the contract for sale who were not claiming under the vendor but they were claiming adverse to the title of the vendor do not fall in any of the categories enumerated in sub-sections (a) to (e) of section 19 of the Specific Relief Act.

9. That apart, from a plain reading of section 19 of the Act we are also of the view that this section is exhaustive on the question as to who are the parties against whom a contract for specific performance may be enforced."

It is evident from the above decision that respondent no. 4 in the present case on hand cannot claim to be having an independent title and possession over the contracted property, but was certainly claiming under respondents 1 to 3. The decision therefore could not be pressed into service and the trial court was in error in placing reliance on the same and two other decisions, to the same effect, given the facts of the present case.

On the other hand, the decision in Thomson Press (India) Ltd., supra , has extensively reviewed the case law on the point and is a complete answer to the question arising in this petition. In the said case the facts were, that the plaintiff, a

private limited company had entered into an agreement of sale with the owners of the suit property. The property was said to be tenanted, the agreement of sale envisaged that the tenant should vacate the premises before the sale could be completed. The tenant, however, demanded that without refund of a security deposit which was with the owners, they would not vacate the premises. In the mean while, the proposed purchaser continued to make payments, from time to time, of the purchase price. The tenant is said to have vacated the premises subsequently. The plaintiff had then approached the defendants to complete the sale transaction, which the defendants refused.

It also transpires that, parallely, a group company of the appellant, had approached the defendants to obtain the suit property on lease, the defendants had agreed and had received an advance, while assuring that possession would be delivered immediately after the tenant who was already in occupation vacated the same. When the defendants sought to resile from that agreement as well, the appellant's group company had filed a suit and obtained an order of temporary injunction restraining the defendant from parting with the possession of the property to any third party. The defendants are said to have entered into a compromise with the said company and had leased the suit property to the appellant.

In the mean time, the plaintiff is said to have filed a suit for specific performance of agreement, the defendants had entered appearance and had revealed that the property was now in the possession of the appellant and undertook not to alienate the property during the pendency of the suit.

The defendants are said to have borrowed a loan, much earlier to any of the above transactions, and had created an equitable mortgage in favour of the lending bank. The said bank having filed a suit for foreclosure and the suit having been decreed, the Debt Recovery Tribunal is said to have issued a recovery certificate. In order to save the property from being brought to sale to a third-party, a group company of the appellant is said to have intervened and paid the dues and other liabilities due to the bank. Eventually, sale deeds were executed in respect of the property in favour of the appellant. It is then the appellant had

moved an application in the pending suit for specific performance to be added as a party. A single judge of the High Court before which the suit was pending, had dismissed the application on the ground that the defendants having earlier undertaken not to alienate the property during the pendency of the suit, but having sold the same in favour the appellant, was in violation of the undertaking and hence the appellant claiming under such a defendant was held disentitled to any relief. That order was affirmed by a division bench of the High Court. It is in the above background that the appellant was before the apex court.

It is held in the said decision that it would be futile to deny that the specific performance prayed for by the plaintiff was and continues to be enforceable not only against the original owner but also against their transferee.

Sale of immovable property in the teeth of an earlier agreement to sell is immune from specific performance of an earlier contract of sale only if the transferee has acquired the title for valuable consideration, in good faith and without notice of the original contract, as is evident from Section 19(b) of the Specific Relief Act, 1963.

In the instant case on hand, though the alleged contract of agreement of sale set up by the fourth respondent is said to be earlier in point of time, the respondents 1 to 3, had enabled the fourth respondent to obtain a compromise decree in a suit filed by him during the pendency of the earlier suit filed by the petitioner and which was within the knowledge of the respondents 1 to 3, but which was conveniently suppressed to bring about a *fait accompli*, to apparently deprive the petitioner of the property. The good faith if any, on the part of the fourth respondent even if it could be said should be presumed, the want of good faith on the part of the respondents 1 to 3 is found wanting in having aided and abetted the fourth respondent in obtaining the compromise decree, even during the pendency of the suit of the petitioner. Hence the ratio of the above decision can certainly be applied to the facts of the present case.

On the second aspect, namely, the effect of the transfer *pendente lite*, it is stated that such a transfer is not illegal *ipso jure* but remains subservient to the pending litigation. The transfer may remain valid as between the parties to the transaction subject only to any directions which the competent court may issue in the suit

against the vendor.

It was held that the breach of the injunction or undertaking by itself did not render the transfer ineffective. The party committing the breach would incur the liability to be punished for the breach committed by it, but the sale may remain valid as between the parties to the transaction subject only to any directions which the competent court may issue in the suit against the vendor.

Hence, in the present case on hand when the vendors have no subsisting interest it is only the fourth respondent who is the proper and necessary party to receive any such directions, if the petitioner should succeed in the suit.

As regards a third dimension that is addressed namely, apart from the right of a transferee pendente lite to seek addition as a party defendant to the suit, under Order I Rule 10 CPC, it is also to be addressed whether the effect and scope of Order XXII Rule 10 CPC should be taken into account. And has held that though the application made was only one under Order 1 Rule 10(2) CPC the enabling provision, Order XXII Rule 10 CPC, namely, in cases of assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the court, be continued by or against the person to or upon whom such interest has come or devolved, the court could always invoke the same if the fact situation so demanded. It would only require to be examined whether a transferee pendente lite could in a suit for specific performance be added as a party defendant and if so, on what terms. In the instant case on hand, the fourth respondent would obviously take a stand that he held an agreement of sale prior to the sale agreement set up by the petitioner and that he was not placed on notice of any suit filed by the petitioner and was a bona fide purchaser for value. Therefore, he cannot be confined to the defence set up by the respondents 1 to 3, but may be allowed full rein to defend his position.

Accordingly, the writ petition is allowed, the impugned order is quashed, the fourth respondent shall be arraigned as the fourth defendant in the suit and he shall have the benefit of the time prescribed in law to file his written statement, if any, and the court below shall proceed from that stage in accordance with law.