

Sebastian Vs. Bipin

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SooperKanoon Citation : sooperkanoon.com/730063

Court : Kerala

Decided On : Nov-29-2003

Reported in : AIR2004Ker265; 2004(1)KLT159

Judge : S. Sankarasubban and; A.K. Basheer, JJ.

Acts : [Transfer of Property Act, 1882](#) - 55(6) and 100

Appeal No. : R.F.A. No. 224 of 2003

Appellant : Sebastian

Respondent : Bipin

Advocate for Def. : Ignatius Philip, Adv.

Advocate for Pet/Ap. : T.V. George, Adv.

Disposition : Appeal dismissed

Judgement :

S. Sankarasubban, J.

1. This appeal is filed by the additional second defendant in O.S. No. 545 of 1997 of the 2nd Additional Sub Court, Ernakulam. The suit was filed for specific performance of an agreement for sale of the property or for the return of the advance amount from the first defendant. The first defendant agreed to sell the

property to the plaintiff as per agreement dated 20.12.1996 for a total consideration of Rs. 2,70,000/-. The agreement period was 5 months from 20.12.1996. On the date of the agreement, an amount of Rs. 1 lakh was paid by the plaintiff to the first defendant. The plaintiff issued Ext. A2 registered notice dated 18.9.1997 demanding specific performance of the agreement. The first defendant executed a sale deed in favour of the second defendant on 15.10.1997. Hence, the plaintiff prayed for specific performance or for a decree for the return of Rs. 1 lakh with 12% interest.

2. Since this appeal is filed by the second defendant, we are not concerned with the first defendant. The Court below found that there was breach of agreement by the first defendant. It decreed the suit and ordered to return the amount of advance given by the plaintiff to the first defendant. A charge was created on the plaint schedule property. The second defendant is aggrieved by the direction in the decree creating a charge on the plaint schedule property.

3. The second defendant filed appeal challenging the decree in so far as a charge is created over the plaint schedule property. The total extent of the plaint schedule property is 6 cents and the area purchased by the second defendant is 4 cents. Learned counsel took the contention that since the transaction was for consideration and without notice of the agreement between the plaintiff and the first defendant, his property should not be encumbered with the charge. Learned counsel argued his point getting sustenance from Section 100 of the Transfer of Property Act.

4. There is no dispute that under Section 55(6)(b) of the Act, a charge is created for the prepaid purchase money. Learned counsel contended that under Section 100 of the Transfer of Property Act, which refers to the charge further states that no charge shall be enforced against the property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge save as otherwise expressly provided by any law for the time being in force. Learned counsel contended that there is no law expressly providing for the liability of the appellant's property. Learned counsel referred to a decision of the Supreme Court reported in The Ahmedabad Municipal Corporation of the City of

Ahmedabad v. Haji Abdul Gafur Haji Hussienbhai, AIR 1971 SC 1201. According to us, the argument of the appellant cannot be accepted. Section 55(6)(b) of the Transfer of Property Act itself clearly states that the charge will be binding on all persons even if it is a transfer for consideration and without notice. The decisions of this Court reported in Ayyakutty Chettiar v. Imbichiamina Bi, 1962 KLT 728, Madhava Kammathi v. Gopala Pai, 1965 KLT 877 and Ibmyi v. Pokkan, 1989 (1) KLT 581 speak with one voice that a transferee for consideration and without notice is also bound by the charge. So far as the decision reported in The Ahmedabad Municipal Corporation of the City of Ahmedabad v. Haji Abdul Gafur Haji Hussienbhai, AIR 1971 SC 1201, is concerned, the Supreme Court was considering the liability under the charge created by the Bombay Provincial Municipal Corporation Act. It was held that the Act did not expressly provide for enforcing a charge against the property which was sold for consideration and without notice. Hence, that decision can be distinguished. The Supreme Court in Delhi Development Authority v. Skipper Construction Co. (P) Ltd. and Ors., 2000 (1) Supreme 105, observed as follows:

'It is plain from the provision of Section 55(6)(b) that, in the absence of a contract to the contrary, the buyer will have a charge on the seller's interest in the property which is the subject matter of the sale agreement insofar as the purchase money and interest on such amount are concerned, unless the buyer has improperly declined to accept delivery. The charge is available against the seller and all persons claiming under him. The charge in favour of the buyer is the converse of the seller's charge under Section 55(4)(b). The buyer's charge under this Section is a statutory charge and differs from a contractual charge which a buyer may be entitled to claim under a separate contract. The charge on the property under Section 55(6)(b) is enforceable not only against the seller but against all persons claiming under him'.

In the above view of the matter, we don't find any ground in the appeal. Appeal is dismissed.