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Chinnammal Vs. Periyasami,

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Court : Chennai

Decided On : Feb-06-2003

Reported in : 2003(1)CTC545; (2003)1MLJ659

Judge : A.S. Venkatachalamoorthy and ;M. Choclalingam, JJ.

Acts : Code of Civil Procedure (CPC) - Sections 96

Appeal No. : A.S. Nos. 1088/87 and 767/89

Appellant : Chinnammal;periannan

Respondent : Periyasami, ;periannan, ;parvathi, ;kunjammal and Minor Dhanalakshmi;periyasami, ;chinnammal, ;parva

Advocate for Def. : K.M. Santhanagopalan, Adv. For RR3 to 5 in AS 1088/87 and RR2 to 4 in AS 767/89, ;S.A. Hafiston, Adv. for 1st Respondent in both appeals, ;R.M. Krishnaraju, Adv. For Appellant in AS 1088/87 and 5th Re

Advocate for Pet/Ap. : R.M. Krishnaraju, Adv. For Appellant in AS 1088/87 and 5th Respondent in AS 767/89 and ;R.G. Annamalai, Adv. For Appellant in AS 767/89 and 2nd respondent in AS 1088/87

Disposition : Suits allowed

Judgement :

M. Chockalingam, J.

1. This judgment shall govern both the appeal suits in A.S.Nos.1088 of 1987 and 767 of 1989.

2. The 5th defendant is the appellant in A.S. No. 1088/87, while the first defendant is the appellant in A.S. No. 767/89.

3. Both the above appeals have arisen from the judgment and decree of the learned Subordinate Judge, Sankari, granting the relief of specific performance along with the other reliefs sought for by the first respondent/plaintiff.

4. The plaintiff filed the suit with the following averments:

The suit properties belonged to the first defendant. An agreement was entered into between the plaintiff and the first defendant on 24.9.1980 for the sale of the suit properties to the plaintiff for a sum of Rs.37,000/-. A sum of Rs.1,000/- was paid as advance by the plaintiff. The balance of sale consideration is to be paid within six months i.e. 24.3.1981. The first defendant executed the said agreement for himself and as guardian for his minor daughter Dhanalakshmi, who has no interest in the property. The plaintiff is not seeking any remedy from the said minor. The plaintiff is always ready, willing and able to perform his part of the agreement. Since the first defendant was putting off the request of the plaintiff, the plaintiff issued a notice on 29.9.1980. The first defendant sent a reply dated 22.11.1980 refusing to execute the sale deed. Again two notices were sent by the plaintiff on 3.12.1980 and on 13.3.1981. When the plaintiff was waiting at the Sankari Sub Registrar's Office on 21.3.1981 from 10.00 a.m. to 5.00 p.m. with the balance of sale consideration, the first defendant did not turn out. The first defendant refused to receive the telegram sent by the plaintiff. All these would show that the first defendant is unwilling to execute the sale deed. The first defendant in collusion with the other defendants had allowed the properties to be sold in the court auction on the basis of a decree, while the instant suit was pending. The court auction in favour of the fifth defendant who is none other than the sister of the first defendant, is hit by the doctrine of lis pendens. Only the execution of the sale deed in favour of the plaintiff would meet the ends of justice. Subsequent to the agreement for

sale, the first defendant set up the defendants 2 to 4 to file a suit in O.S. No. 1356 of 1980 on the file of the District Munsif's Court, Tiruchengode for maintenance at the rate of Rs.100/- for each per month and also for a charge decree. On the basis of the endorsement made by the first defendant submitting to a decree as prayed for, the decree in O.S.1356 of 1986 was passed. Immediately, execution proceedings were iN initiated in REP 372/83. The suit properties were sold in court auction sale, suppressing the fact of the suit properties being subjected to the prior agreement for sale dated 24.9.1980. The first defendant set up his sister's daughter, the fifth defendant to purchase the suit properties for Krs.8,100/- only. All the above proceedings initiated subsequent to the sale agreement were not known to the plaintiff. The defendants 2 to 5 with the full knowledge and notice of the prior agreement for sale in favour of the plaintiff, had acted in collusion with the first defendant. The plaintiff was not a party to the said proceedings. All the above proceedings should be subject to the result of the instant suit. Hence, the suit may be decreed.

5. The defendants 1, 2 and 5 contested the suit by filing separate written statements. The first defendant would state that there is no such agreement between the parties as alleged by the plaintiff; that he never entered into any agreement either for himself or as guardian for his minor daughter Dhanalakshmi; that the notice dated 29.9.80 was properly replied by him; that he approached the plaintiff to get electric connection for his poultry shed; that the plaintiff wanted his signatures in several blank papers as well as in the stamped papers; that subsequently the plaintiff created forged documents in the form of an agreement to grab his properties; that the plaintiff is taking illegal action against him with the help of created documents; that the plaintiff is not entitled to any relief, and hence, the suit may be dismissed with costs.

6. The second defendant would aver that the plaintiff and the first defendant are relatives; that the first defendant deserted his wives, defendants 2 and 3 and his daughter, the fourth defendant, and so, the 2nd defendant along with the defendants 3 and 4 filed a suit for maintenance in O.S. No. 1356/80 against the first defendant and obtained a decree, and a charge has been created over the suit property; that execution proceedings were initiated, and the suit property was

sold in court auction on 7.6.84; that the defendants 2 to 4 before filing of the said suit issued a notice to the plaintiff and the first defendant; that the plaintiff received the said notice and gave a false reply; that since the plaintiff filed a counter in I.A. No. 562/82 in O.S.326/81, filed by the defendants 2 to 4 to implead themselves as defendants in the suit and he contested the revision in C.R.P. No. 4563/82 preferred against the order of dismissal passed in the said application, it is false to state that the plaintiff has no knowledge to the proceedings; that the suit is bad for misjoinder of parties; and that the suit is liable to be dismissed with costs.

7. The fifth defendant would state that the recitals in the sale agreement are not known to her; that the exchange of notices between the plaintiff and the first defendant is also not known to her; that it is true that the defendants 2 to 4 filed a maintenance suit against the first defendant, obtained a decree for maintenance and also a charge over the suit property; that they filed an execution petition, and the property was sold to her in court auction on 7.6.84; that the said sale was confirmed on 8.8.84; that she took possession of the suit property through Court on 28.11.84; that the delivery was also recorded on 3.12.84; that the first defendant has no right over the suit property; that she is a bonafide purchaser without the notice of prior agreement for sale; that if there is real agreement, the plaintiff would have taken steps to stop the sale or stay of the proceedings, but it was not done so, and hence, the sale in favour of the fifth defendant is valid and binding on everyone including the plaintiff; that as such the prayer of the plaintiff cannot be fulfilled unless separate steps have to be taken against the present owner; that she is not bound to execute the sale deed; that the suit is bad for misjoinder of parties; and therefore, the suit has to be dismissed.

8. On the above pleadings, the trial Court framed 3 issues and 5 additional issues, tried the suit and granted a decree in favour of the plaintiff. Aggrieved fifth defendant and first defendant have brought forth the respective appeals.

9. As seen above, A.S. No. 1088/87 was filed by the fifth defendant/auction purchaser, while A.S. No. 767/89 has been filed by the first defendant in the suit. The first respondent in both the appeals filed a suit for specific performance seeking a direction for execution of a sale deed in his favour by all the defendants

in respect of the suit Schedule mentioned immovable property alleging that the first defendant, who was the owner of the property, entered into an agreement for sale on 24.9.1980 agreeing to sell the same for a consideration of Rs.37,000/-; that he received an advance of Rs.1,000/-, but despite demands through notices, he did not execute the sale deed, and hence, there arose a necessity to file a suit for specific performance. Subsequently, the defendants 2 to 5 were added by an amendment of the plaint, wherein it was stated that the defendants 2 to 4 filed a suit for maintenance against the first defendant in O.S. No. 1356/80; that they obtained a decree; that a charge was created over the suit property, and the same was brought in execution for the recovery of the arrears of maintenance; that the property was sold in court auction, wherein the fifth defendant purchased the property; that it was a collusive suit brought forth by all the defendants in order to defeat the right of the plaintiff under the said agreement for sale, and hence, the decree passed in the maintenance suit and the pursuant court auction sale all are invalid, and thus, all the defendants should be directed to execute the sale deed in his favour and hand over possession. The first defendant contested the suit stating that he did not enter into any agreement with the plaintiff for the sale of the suit property; that he approached the plaintiff, who is his close relative, to get electricity service connection for his poultry shed; that he put his signature in several blank papers as well as the stamped papers and handed over the same to the plaintiff, who has subsequently filled up and fabricated the same as an agreement for sale; and that despite a demand and police complaint, the plaintiff was evading to hand over the same, and instead, he has filed the false and vexatious suit. The fifth defendant contested the suit stating that he has purchased the property in court auction sale; that he had no notice about the said agreement for sale; that he was a bonafide purchaser; that the doctrine of lis pendens has no application to the present facts of the case, and hence, his purchase under the court auction sale and the possession have got to be protected, and the suit has to be dismissed. Agreeing with all the contentions put forth by the plaintiff's side, the lower Court has decreed the suit. Thus, the aggrieved first and fifth defendants have brought forth these two appeals.

10. Concededly, the suit property originally belonged to the first defendant, who purchased the same on 11.9.1974 under Ex.B2 for a consideration of Rs.2,500/-.

The plaintiff issued a notice to the first defendant on 29.9.1980 under Ex.A2 stating that the first defendant entered into an agreement for sale in respect of the suit property. The defendants 2 to 4 issued a notice to the plaintiff and the first defendant on 7.10.1980 as evidenced by Ex.A4 claiming maintenance and a charge over the suit property. Following the said notice, the defendants 2 to 4 filed a suit in O.S. No. 1356/80 seeking for maintenance and a charge over the suit property on 1.12.1980. A decree was passed in the said suit on 6.1.1981, consequent on the first defendant's submissions to decree. The plaintiff filed the instant suit for specific performance on 10.4.1981 in the Sub Court, Salem in O.S. No. 326/81, and subsequently, the suit was transferred and taken on file as O.S.31/85 by the Sub Court, Sankari. The decree obtained by the defendants 2 to 4 in the said suit was put in execution in R.E.P.372/83 for the recovery of the arrears of maintenance amount. The property was brought for sale, and the same was purchased in court auction by the fifth defendant on 7.6.1984. The said sale was confirmed on 8.8.84, and the property was delivered through Court to the fifth defendant on 28.11.1984, and the delivery was also recorded on 3.12.1984. Thus, the fifth defendant is in possession and enjoyment of the suit property. At this juncture, it has to be necessarily pointed out that in view of the court auction sale and the confirmation of the same, the first defendant ceases to have any right or interest in the suit property.

11. The contention put forth by the appellant/first defendant's side that he was owning a poultry shed; that in order to get electricity service connection, he approached the plaintiff; that he was an illiterate; that considering the relationship of the plaintiff, who was an educated person, he signed some blank papers and also stamped papers and handed over the same to the plaintiff, and the same was filled up by the plaintiff as an agreement for sale, and thus, Ex.A1 document was a fabricated one cannot be accepted for more reasons than one. It is pertinent to point out that the first defendant has well admitted his signature in Ex.A1, and hence, one would naturally expect him to explain the circumstances under which he signed the said document. According to him, he reposed confidence on the plaintiff, who happened to be his close relative, in order to obtain electricity service connection for his poultry shed. But, he has categorically admitted that the construction of the poultry shed was over even five years prior to the said

document. A perusal of Ex.A1 agreement would reveal that one of its four pages contained printed matter. But, it is not the case of the first defendant that he ever signed in a printed paper. In order to prove the said document, the plaintiff has examined one of the attesting witnesses as P.W.2 and the scribe as P.W.3. Both these witnesses have clearly spoken about the execution of the document. No circumstance or reason is brought forth to discredit their testimonies. It is the specific case of the plaintiff that out of the consideration of Rs.37,000/- as found under the document, only Rs.1,000/- was paid as advance. Had it been true that the said document was a fabricated one, the plaintiff would have shown higher amount as advance instead of Rs.1,000/- as found under Ex.A1. In view of the available evidence and the circumstances, the said contention of the appellant/first defendant has got to be rejected, and the lower Court was perfectly correct in recording a finding that Ex.A1 document was executed by the first defendant as alleged by the plaintiff.

12. Arguing for the appellant/5th defendant, the learned Counsel would submit that the defendants 2 to 4 filed a suit for maintenance; that they obtained a decree; that pursuant to the decree, the suit property was brought in execution, and the fifth defendant has purchased the same, and on confirmation, he obtained delivery of the property; that he is in possession of the property; and that the findings of the lower Court that Ex.A1 agreement was true and valid, and when it remained enforceable, the defendants 2 to 4 have filed the suit for maintenance and obtained a charge decree, and pursuant to the same, the property was sold in court action, and in the circumstances of the case, the court auction sale in favour of the fifth defendant cannot be held valid, since the sale agreement executed by the first defendant in favour of the plaintiff was in force are erroneous. Contrary to the above contentions, the learned Counsel for the first respondent/plaintiff in his sincere attempt to sustain the judgment of the lower Court would submit that the first defendant has executed Ex.A1 sale agreement in favour of the plaintiff on 24.9.1980; that the same was in force, when the defendants 2 to 4 filed the maintenance suit; that it remains to be stated that the said suit was a collusive one and at the instigation of the first defendant in order to defeat the rights of the plaintiff, and hence, the lower Court was perfectly correct in applying the doctrine of lis pendens to the present facts of the case.

13. In order to apply the doctrine of lis pendens, as enunciated under S.52 of the Transfer of Property Act, the following three conditions have got to be necessarily satisfied.

(1) A suit or proceeding, wherein a right to immovable property is specifically and directly in question, must be pending.

(2) The said suit or proceeding shall not be a collusive one.

(3) During the pendency of such suit or proceeding, such property cannot be transferred or dealt with otherwise by any party to the suit or proceeding in such a way as to affect the right of the other party thereto under any decree or order except under the authority of the Court.

In view of the said provision, the pendency of the suit or the proceeding would begin only from the presentation of the plaint or the institution of the proceeding.

14. Admittedly, the defendants 2 to 4 claiming maintenance and charge decree in respect of the suit property filed the suit in O.S. No. 1356/80 on 1.12.1980, and the same was decreed on 6.1.1981. The plaintiff has filed the instant suit for specific performance on 10.4.1981. The defendants 2 to 4 in order to execute the decree obtained in O.S. No. 1356/80 brought the suit property for sale in REP No. 372/83, and the same was sold in court auction in favour of the fifth defendant on 7.6.1984. At this juncture, it has got to be necessarily pointed out that on the day when the suit property was sold in court auction on 7.6.1984, the suit filed by the plaintiff on the basis of Ex.A1 sale agreement was pending on the file of the trial Court. It is true that a charge was created on the suit property, when a decree was passed in O.S.1356/80. But, the instant suit for specific performance in respect of the suit property was already pending. The plea of the fifth defendant stating that he was a bonafide purchaser without notice was of no consequence, when the property was purchased during the pendency of the civil action against the vendor viz. the first defendant for specific performance of a contract to sell the suit property. Under the above stated circumstances, it would be very difficult to accept the contention put forth by the appellant/fifth defendant that the doctrine of lis pendens is not applicable to the present facts of the case. However, the Court is of

the considered view that the plaintiff is not entitled for the discretionary relief of specific performance, in view of the suppression of material facts and also in view of the fact that the relief asked for is inconsistent to Ex.A1 agreement, on which the plaintiff has wholly rested his case. Ex.A1 agreement contains a recital as follows:

'fpua xg;ge;j brhj;jpy; tpthpj;jpUf;Fk; t PL tifawhit 2 yf;fkpl;ltUk; mtUila kidtp ghuhap mk;khs; ,UtUk; capUld; ,Uf;Fk; tiu ve;jtpj tpy;y';fj;Jf;Fk; cl;gLj;jhky; mDgtpj;J tu ntz;oaJ/ gpd; fpuajhuuhfpa 1 egnu rh;t Rje;jpuj;Jld; mDgtpj;Jf; bfhs;s ntz;oaJ/'

Thus, from the very recital, it would be clear that the first defendant and his wife were entitled to continue to reside in the agreement mentioned property till their life time, despite the execution of a sale deed by the first defendant in favour of the plaintiff. Nowhere the plaintiff has averred the same in the plaint. The plaintiff as P.W.1 has also admitted in evidence that he has not stated anything about the rights available to the first defendant and his wife to enjoy the property till their life time. It is pertinent to point out that the plaintiff has not mentioned anything about those reservation of right of enjoyment till the life time of the first defendant and his wife in any one of his pre-suit notices. When a query was made by the Court, the plaintiff was unable to tender any explanation in that regard. Needless to say that it was a suppression of a very material fact, which would be indicative of the fact that the plaintiff, who sought the Court's help for a discretionary relief, has not come with clean hands.

15. As stated above, the first defendant and his wife were entitled to be in possession and enjoyment of the suit property even after the execution of a sale deed by the first defendant in favour of the plaintiff in respect of the suit property, and hence, it would be clear that the delivery of possession of the suit property could not follow the execution of the sale deed by the first defendant; and that the plaintiff has to necessarily wait till the life time of the first defendant and his wife. The plaintiff has not stated about the same in the plaint, but has asked for delivery of possession of the suit property originally. It is pertinent to point out that the defendants 2 to 4 were added in the suit at the instance of the plaintiff on amendment of the plaint. The plaint has also been subsequently amended seeking

the execution of the sale deed by all the defendants and delivery of possession of the suit property by them. Under such circumstances, the relief sought for as to the delivery of possession of the property stood inconsistent to the term found in Ex.A1 agreement as to the same. Hence, on these grounds, the plaintiff is not entitled for the discretionary relief of specific performance of the agreement found under Ex.A1. The Court below without taking into consideration the above aspects of the matter, has erroneously decreed the suit, which is liable to be set aside.

16. In the result, both the appeal suits are allowed, setting aside the judgment and decree of the lower Court. The suit in O.S. No. 31/85 is dismissed. There shall be no order as to the costs.

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