

PETITIONER:

R.K. MOHAMMED UBAIDULLAH & ORS.

Vs.

RESPONDENT:

HAJEE C.ABDUL WAHAB (D) & ORS.

DATE OF JUDGMENT: 18/07/2000

BENCH:

Shivaraj V. Patil, D.P.Mohapatro

JUDGMENT:

Shivaraj V. Patil, J.

The unsuccessful Defendants 2 to 5 in both the courts below in a suit for specific performance are the appellants herein. Hereinafter the parties will be referred to as arrayed in the original suit No. 241/71. Briefly stated the facts leading to filing of this appeal are : The Plaintiff filed the original suit in the Court of the Principal Subordinate Judge, Vellore for specific performance of the contract and other reliefs. According to the plaintiff, the suit scheduled property belonged to the defendant No. 1. He is carrying on business in hardware in the premises Door No. 39, Long Bazar, Vellore, the property belonging to the brother of the first defendant. He is in exclusive occupation and possession of the suit property Door No. 36 as a tenant of the first defendant from about 1962 on a monthly rent of Rs. 200 using it as godown for his business purpose. The Defendants 2-4 and the husband of the 5th defendant are also hardware merchants carrying on similar business in adjoining shop Door No. 38. The first defendant intended to sell the suit property and intimated the plaintiff about the same and requested him to permit intending purchasers and brokers to inspect the property. The first defendant offered to sell the property to the Plaintiff also. The plaintiff intimated Shri Yousuf Sharif, the husband of the 1st defendant by letter dated 8.1.1971 that he was interested in purchasing it. In July, 1971 one Tangvelli Chetty, the broker of the first defendant informed the plaintiff that the first defendant was prepared to sell the property to him. Therefore, the plaintiff and his son went to the house of the first defendant at Madras and negotiated. The first defendant agreed to sell the suit property to the Plaintiff for a sum of Rs. 55,000/-. Accordingly, the first defendant executed the agreement on 27.7.1971 having received a sum of Rs. 10,000/- as advance. It was agreed that the first defendant should execute the sale deed within 90 days from the date of the agreement after receiving the balance of sale price of Rs. 45,000/-. The plaintiff was always ready and willing to perform his part of the contract. The first defendant refused to execute the sale deed even after receiving notice from the plaintiff for completing the sale transaction taking a stand that the plaintiff had issued a notice asking her to execute the sale deed before the expiry of the 90 days fixed under

the agreement. According to the first defendant, the notice was issued by the plaintiff before the expiry of 90 days only to create litigation. While the correspondence was going on between the plaintiff and the first defendant, the defendants 2 to 4 and the husband of the 5th defendant brought into existence a sale deed executed and registered on 9.11.1971 for a sum of Rs. 50,000/- at Madras. The first defendant dishonestly sold the suit property to the defendants 2-5 who had knowledge of the prior agreement dated 27.7.71 executed in favour of the plaintiff. The subsequent transaction of sale by the defendant No. 1 in favour of defendants 2 to 5 was not bona fide. Hence the plaintiff filed the suit for specific performance and other reliefs against the defendants 1 to 5.

The first defendant filed the written statement resisting the suit among others that the plaintiff was not ready and willing to purchase the property as per the conditions in the agreement within the specified time of 90 days. However, the defence set up by the first defendant was struck off as per order dated 23.7.1974 of the trial court passed in I.A.No. 1050 of 1973.

The defendants 2 to 4 filed the written statement stating that the plaintiff be put to strict proof of everyone of the allegations made in the plaint in regard to the execution of the suit agreement. They also claimed that they were bona fide purchasers of the suit property for value without notice of the prior agreement of sale executed in favour of the plaintiff. The 5th defendant remained absent and ex-parte in the suit.

The trial court on the basis of the evidence and material placed on record held in favour of the plaintiff that he had been always ready and willing to perform his part of the contract; suit agreement was subsisting to specifically enforce it; the defendants 2 to 5 were not entitled to claim title to the suit property on the ground that they were bona fide purchasers for value without notice of the prior agreement. The trial court also held that until the plaintiff acquired title by means of a document, he was not entitled to seek for a decree for mesne profits and damages. In view of the findings so recorded and taking into consideration all aspects, the trial court found that the plaintiff was entitled for the relief of specific performance. Hence a decree for specific performance was granted in favour of the plaintiff directing the defendant 1 to 5 to execute and register the sale deed in respect of the suit property at the plaintiff's expenses and receive the balance of the sale consideration of Rs.45,000/- deposited in the court. The defendants 1 to 5 were also directed to deliver formal possession of the suit property and to pay Rs. 500/- as compensation in addition to pay the cost of the suit.

The defendants 2 to 5 filed an appeal No. 509/81 in the High Court of Madras challenging the judgment and decree passed by the trial court. Cross-objections were also filed by the plaintiff in the said appeal. During the pendency of the appeal, the plaintiff died. His legal representatives (respondent nos. 3 to 10 herein) were brought on record. The appeal was dismissed confirming the judgment and decree of the trial court. The cross-objections filed by the plaintiff were also dismissed. Hence the defendants 2 to 5 have brought this appeal to this court. The 1st defendant

(the respondent No. 2 in this appeal) was deleted as ordered on 3.3.1992 on the appellants giving up. It was contended on behalf of defendants 2 to 5 that they were bona fide purchasers of the suit property for value without notice of the prior agreement executed in favour of the plaintiff; the trial court as well as the High Court failed to see that the plaintiff was not ready and willing to perform his part of the contract; no notice was issued by the plaintiff to the defendants 2 to 5 not to purchase the suit property on the ground that there was a prior agreement to sell the property in his favour; and that trial court as well as the High court committed an error in concluding that defendants 2 to 5 had notice of the prior agreement on the basis that they had overheard telephonic conversation between the plaintiff and the husband of the defendant No. 1.

Per contra, submissions were made on behalf of the L.Rs. of the plaintiff in support of and justifying the impugned judgment and decree.

Before proceeding to appreciate the contentions urged and the submissions made on behalf of the parties it is considered appropriate to state the facts, which are either admitted or clearly established. The plaint scheduled property is the godown premises bearing No. 36 in Long Bazaar, Vellore, belonged to the first defendant. The plaintiff is carrying on hard-ware business in the premises bearing No. 39 in Long Bazar, vellore. The suit property is situate on the rear side of the said premises No. 39. The plaintiff is storing hardware material in the said premises, using it as a godown having direct access from the shop, as a tenant under the first defendant for about 20 years prior to the filing of the suit. The defendants 2 to 4 and the husband of the fifth defendant are also carrying on similar hardware business in the adjoining premises bearing No. 38. The plaintiff filed the suit for specific performance directing the defendants to execute the sale deed in respect of the suit property on the basis of the agreement of sale dated 27.7.1971, marked as Exhibit A-3, executed by the first defendant for a sum of Rs.50,000/- after receiving Rs.10,000/- as advance for the same. It was agreed between the plaintiff and the first defendant that the sale should be completed within 90 days from the date of the agreement. After exchange of notices and on the first defendant refusing to perform her part of the contract within the stipulated time in the agreement and she having sold the very suit property to the defendants 2 to 5 for a sum of Rs.50,000/- under Exhibit B-1, the sale deed dated 9.11.1971, the plaintiff was constrained to file the suit. The defendant No. 1 admitted the execution of agreement of sale but contended in a written statement that the plaintiff had never been ready and willing to perform his part of contract. The plaintiff had issued a notice - Exhibit A-1 dated 19.9.1971 - much before the expiry of 90 days stipulated in the agreement stating that he was ready to perform his part of the contract and calling upon the defendant No. 1 to execute the sale deed after receiving the balance consideration of Rs.45,000/-. It is to be noticed that the defence of the first defendant was struck off by the order dated 23.7.1974, passed by the trial court in IA No. 1050/1973. The plaintiff proved the due execution of Exhibit A-3. The learned counsel appearing for defendants 2 to 4 in the trial court did not advance any argument touching the validity or enforceability of Exhibit

A-3, the suit agreement, as against the first defendant. The defendants 2 to 4 resisted the suit on the ground that they were the bona fide purchasers for the value without notice of the agreement.

After the full-fledged trial, on the basis of the evidence and material placed before it and having due regard to the circumstances, the trial court concluded that the suit agreement was subsisting, the plaintiff was always ready and willing to perform his part of the agreement, time was not the essence of the suit agreement and the plaintiff could specifically enforce it. The learned trial Judge held that the defendants 2 to 5 were not the bona fide purchasers for value without notice of the suit agreement and that the plaintiff was entitled for the relief of specific performance. The High Court in the appeal preferred against the judgment and decree of the trial court did not find any good or valid ground either to differ or disagree with the findings recorded and conclusions reached by the trial court. Consequently the appeal filed by the defendants 2 to 5 as well as the cross-objections filed by the plaintiff were dismissed by the judgment and decree under appeal.

The trial court has considered the contentions of the parties in the light of the pleadings and the evidence elaborately. The High Court, in the appeal, having re-appreciated the evidence and the submissions keeping in view the legal position, has dismissed the appeal by a well-reasoned order. Thus the concurrent findings of fact are recorded. Added to this we do not find on the facts and circumstances of the case that the conclusions arrived at by the courts below are unsustainable.

However, in the light of the submissions made on behalf of the defendants 2 to 5 before us, we have to consider: 1) whether the defendants 2 to 5 are bona fide purchasers of the suit property in good faith for value without notice of original contract and 2) whether they were not required to make any inquiry as to the equitable or further interest the plaintiff had in the suit property at the time of execution of sale deed (Exhibit B-1) in their favour, on the ground that they were already aware of the nature of the possession of the plaintiff as a tenant.

It is not disputed that the plaintiff and defendants 2 to 4 carry on business in hardware in adjoining premises; only a common wall separates them. The suit property adjoins the premises bearing No. 39 where the plaintiff is carrying on his business; he can directly reach the suit property. He is using the suit property advantageously as godown for the last 20 years prior to the filing of suit, as a tenant. The plaintiff and defendants are neighbours not only in business premises but also in the residence in Ramanayakanpalayam of the same town as stated in the SLP itself. Agreement (Exhibit A-3) was executed on 21.7.1971 in favour of the plaintiff and sale deed (Exhibit B-1) was executed on 9.11.1971 in favour of the defendants 2 to 5. Husband of the defendant No. 1 was dealing with sale transactions of the suit property. He signed Exhibit A-3 as well as Exhibit B-1, the suit agreement and the sale deed respectively. Similarly Thangavelu Chetty, a broker, was also in know of Exhibit A-3 And exhibit B-1. Exhibit B-1 having come into existence much later to Exhibit A-3, husband of defendant No. 1 and said Thangavelu Chetty in all probability might have mentioned about Exhibit A-3, the

agreement, to defendants 2 to 5. The plaintiff and defendants 2 to 4 carry on business in adjoining premises and the suit property adjoins the premises Door No. 39 on the rear side and that they are also neighbours in residential locality. In the ordinary course the defendants 2 to 4 would have known about the prior agreement of sale made in favour of the plaintiff. It is the case of the defendants 2 to 4 that they were aware of the fact that the plaintiff was in possession of the suit property occupying it as a tenant for the last several years. The defendants 2 to 4 did not make any inquiry if the plaintiff had any further or other interest in the suit property on the date of execution of sale deed in their favour apart from that he was in possession of the property as a tenant. The trial court took note of telephonic conversation between the plaintiff and the husband of the first defendant on the basis of Exhibits A-4 to A-8 - the trunk call bills for the period 16.7.1971 to 15.11.1971 and was of the view that the defendants came to know of the prior agreement from the eave drop of conversation as the plaintiff and defendants carry on business in adjoining premises and only a common wall separates the premises. The learned counsel for the defendants commented on this aspect and contended that the learned trial Judge was not right in drawing such inference as to the knowledge of the defendants 2 to 4 in relation to the prior agreement Exhibit A-3. The trial court did not solely rely on this circumstance as can be seen from the judgment. Several circumstances, oral evidence and documents were taken into consideration for imputing knowledge of suit agreement to defendants 2 to 5. The trunk call bills during the relevant period, in the given situation probablised the case of the plaintiff that defendants were aware of Exhibit A-3.

In paragraph 6 of the written statement defendants 2 to 4 stated that they had purchased the property only after contacting the plaintiff; they sought the permission of the plaintiff to inspect the suit godown informing him of their intention to purchase the same from the first defendant. The trial court did not accept this contention and rightly so in our opinion. In the ordinary course a reasonable prudent person placed in the position of the plaintiff would not have failed to mention about the existence of the prior agreement in his favour particularly when he is using the very same godown as a tenant under the first defendant for the last 20 years prior to the filing of the suit. Similarly the defendants 2 to 4 intending to purchase the property in possession of a tenant would not have failed to make inquiry as to any further interest in relation to possession or title of the plaintiff over the suit property. It is not uncommon that where a tenant is in possession of the property, that too for a long time, using it for business purpose would always like to purchase the property getting all advantages if offered for sale. Normally the landlord or owner of the property would also be interested in selling the property to a person in possession if a reasonable price is given to avoid litigation and to have smooth transaction. In certain statutes even provisions are made to give first option to a tenant to purchase the property. In such situation the defendants 2 to 4 would have made inquiry with the plaintiff about the nature of his possession and title under which he is in possession on the date of sale deed (Exhibit B-1) executed in their favour. If they had made inquiry plaintiff would have certainly revealed about Exhibit A-3 the prior agreement in his

favour. If such inquiry was not made it only means that the defendants 2 to 5 willfully abstained from making such inquiry or they grossly neglected to do so. The defence of defendants 2 and 4 is not consistent with regard to contacting the plaintiff and informing of their intention to purchase the property. Once they took a stand that they directly contacted the plaintiff seeking his permission to inspect the suit property and in the evidence of DW-1 it is stated that they sent their clerk to the plaintiff seeking permission to inspect the suit property. Neither the name of that clerk was given nor he was examined nor it is stated about the same in the written statement.

Section 19 of the Specific Relief Act, 1963, to the extent it is relevant, reads:

"19. Relief against parties and persons claiming under them by subsequent title. - Except as otherwise provided by this Chapter, 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).....

(d).....

(e)....."

As can be seen from Section 19 (a) and (b) extracted above specific performance of a contract can be enforced against (a) either party thereto and (b) any person claiming under him by a title arising subsequent to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract. Section 19(b) protects the bona fide purchaser in good faith for value without notice of the original contract. This protection is in the nature of exception to the general rule. Hence the onus of proof of good faith is on the purchaser who takes the plea that he is an innocent purchaser. Good faith is a question of fact to be considered and decided on the facts of each case. Section 52 of the Penal Code emphasizes due care and attention in relation to the good faith. In the General Clauses Act emphasis is laid on honesty.

Notice is defined in Section 3 of the Transfer of Property Act. It may be actual where the party has actual knowledge of the fact or constructive. "A person is said to have notice" of a fact when he actually knows that fact, or when, but for willful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it. Explanation II of said Section 3 reads:

"Explanation II - Any person acquiring any immoveable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof."

Section 3 was amended by the Amendment Act of 1929 in relation to the definition of 'notice'. The definition has been amended and supplemented by three explanations, which settle the law in several matters of great importance. For the immediate purpose Explanation-II is relevant. It states that actual possession is notice of the title of the person in possession. Prior to the amendment there had been some uncertainty because of divergent views expressed by various High Courts in relation to the actual possession as notice of title. A person may enter the property in one capacity and having a kind of interest. But subsequently while continuing in possession of the property his capacity or interest may change. A person entering the property as tenant later may become usufructuary mortgagee or may be agreement holder to purchase the same property or may be some other interest is created in his favour subsequently. Hence with reference to subsequent purchaser it is essential that he should make an inquiry as to title or interest of the person in actual possession as on the date when sale transaction was made in his favour. The actual possession of a person itself is deemed or constructive notice of the title if any, of a person who is for the time being in actual possession thereof. A subsequent purchaser has to make inquiry as to further interest, nature of possession and title under which the person was continuing in possession on the date of purchase of the property. In the case on hand defendants 2 to 4 contended that they were already aware of the nature of possession of the plaintiff over the suit property as a tenant and as such there was no need to make any inquiry. At one stage they also contended that they purchased the property after contacting the plaintiff, of course, which contention was negatived by the learned trial court as well as the High court. Even otherwise the said contention is self-contradictory. In view of Section 19(b) of the Specific Relief Act and definition of 'notice' given in Section 3 of the Transfer of Property Act read along with explanation II, it is rightly held by the trial court as well as by the High Court that the defendants 2 to 5 were not bona fide purchasers in good faith for value without notice of the original contract.

The High Court of Andhra Pradesh in Mummidi Reddi Papannagari Yella Reddy vs. Salla Subbi Reddy and others referring to various decisions in paragraph 8 has stated thus:

"It may be mentioned here that an Explanation was introduced into the Transfer of Property Act by the Amending Act 21 of 1929. Even prior to this amendment, the law, as declared in decided cases, was that, when a person purchased property from the owner knowing that it is in the possession of another, he is under a duty to inquire into the nature of that possession, and, in the absence of such inquiry, knowledge of title under which possession is held, should be attributed to the purchaser. The leading case on the subject, relied on in a number of Indian decisions is - 'Daniels v. Davison', (1809) 16 Ves Jun 249 (B). The Lord Chancellor held that:

"Where there is a tenant in possession under a lease, or an agreement, a person purchasing part of the estate must be bound to inquire on what terms that person is in possession.....that a tenant being in possession under a lease, with an agreement in his pocket to become the

purchaser, those circumstances altogether give him an equity repelling the claim of a subsequent purchaser who made no inquiry as to the nature of his possession".

(Emphasis supplied)

Relying on the decision of this Court a Division Bench of the High court of Madras in Veeramalai Vanniar (died) and others vs. Thadikara Vanniar and others has held that it is also the duty of the subsequent purchaser to inquire from the persons in possession as to the precise character in which he was in possession at the time when subsequent sale transaction was entered into. If there be a tenant in possession of land a purchaser is bound by all the equities which the tenant could enforce against the vendor and such equity extends not only to the interest connected with the tenancy but also to interests under the actual agreement.

In Dr. Govinddas and another vs. Shrimati Shantibai and others this Court in para 14 has held:

"14. It will be noticed that the evidence is contradictory and we have to decide whose version is more acceptable. The learned counsel for the appellants contended that the onus of proof was very light on the appellants and they had discharged it by entering the witness-box and stating that they had no knowledge. We are unable to agree with him that in the circumstances of this case the onus was light on the appellants. The circumstances that tell heavily against the version of the appellants are these. First, all the parties are residents or have shops in the same vicinity and in places like this it is not probable that the appellants would not come to know of the execution of the agreement (Souda- Chitthi) of the plaintiff. Secondly, the haste with which the sale-deed in favour of the appellants was executed was unusual. It is more usual for an agreement to be executed in such cases rather than arrive at an oral agreement on one day and have the sale-deed executed the next day and registered the following day. For some reason the appellants were in a hurry to get the deed registered. What was the reason? In view of all the circumstances we are inclined to accept the evidence Hem Raj Chauhan, and corroborated by Hayat, that Goverdhandas knew of the execution of the agreement with the plaintiff on March 1, 1960."

As can be seen from the paragraph, extracted above, that in case of contradictory evidence the circumstances have to be kept in view in deciding whose version is more acceptable. One of the circumstances that was held against the subsequent purchasers was that the parties were residents or had shops in the same vicinity and it was not probable that the subsequent purchasers would not have come to know of the execution of the agreement. In the case on hand the trial court as well as the High Court have given reasons based on evidence and have indicated several circumstances for not accepting the version of defendants 2 to 4 that they had no knowledge of the prior agreement A-3; one of the circumstances being that the parties are neighbours in place of business as well as in residential locality. We have also already referred to that briefly.

In view of what is stated above, it is clear that the defendants 2 to 5 were not bona fide purchasers for value without prior notice of the original contract and that they were required to make inquiry as to the nature of possession or title or further interest if any of the plaintiff over the suit property at the time when they entered into sale transaction notwithstanding they were already aware that the plaintiff was in possession of the property as the tenant. What is material is the inquiry at the time when subsequent sale transaction was entered into.

Thus having regard to all aspects, we do not find any good or valid ground to disturb or interfere with the judgment and decree under appeal. Hence we confirm them. Consequently the appeal is dismissed with costs.