

CASE NO.:
Appeal (civil) 854 of 2001

PETITIONER:
Seenivasan

RESPONDENT:
Peter Jebaraj & Anr

DATE OF JUDGMENT: 04/04/2008

BENCH:
DR. ARIJIT PASAYAT & P. SATHASIVAM

JUDGMENT:
JUDGMENT

CIVIL APPEAL NO. 854 OF 2001

Dr. ARIJIT PASAYAT, J.

1. Challenge in this appeal is to the judgment of a learned Single Judge of the Madras High Court in Second Appeal filed by the respondent No.1.

2. Background facts in a nutshell are as follows:

On 12.2.1978 an agreement for sale was entered into between one Shahul Hameed and Arunchalam (father of the appellant). On 26.5.1978 Shahul Hameed sold the property to one Saraswathi Ammal who was not a party to the proceedings. On 3.2.1981 aforesaid Arunachalam instituted suit No.OS 528 of 1981 against Shahul Hameed for specific performance. Initially Saraswathi Ammal was not a party. On 13.7.1983 an application (I.A. No. 830 of 1983) was filed to implead Saraswathi Ammal as defendant. On 28.1.1984 Saraswathi Ammal sold the property to Anna Pushpam Ammal and Lalitha Ammal under two sale deeds. I.A. No. 830 of 1983 to implead Saraswathi Ammal was allowed on 16.4.1984. On 17.9.1984 plaint was amended showing Saraswathi Ammal as defendant. An ex-parte decree was passed in OS No. 528 of 1981 on 11.7.1985. On 30.12.1985 Anna Pushpam Ammal sold the property to the respondent No.1. On 8.8.1986 Lalitha Ammal sold the property to respondent No.2. On 10.11.1987 Execution Petition was filed to execute the decree in the aforesaid OS No. 528 of 1981. On 11.1.1988, the Executing Court executed sale deed in favour of Arunachalam. On 23.3.1988 I.A. No. 640 of 1988 was filed by Saraswathi Ammal to condone the delay in seeking to set aside ex parte decree in the suit. On 21.7.1989 the said I.A. was dismissed as not pressed. On 29.7.1989 a second application was filed i.e. I.A. 987 of 1989 to set aside the ex parte decree. On 20.6.1990, the same was dismissed on merit. On 12.10.1992 Appeal (CMA 3 of 1991) filed by Saraswathi Ammal was dismissed. On 7.11.1994 Revision Petition i.e. CRP No. 3139 of 1994 was dismissed. On 12.12.1994 the suit O.S. No. 673 of 1994 was filed by the respondents for declaration of title and injunction. The same was decreed on 26.4.1996. An appeal filed by the appellant (AS 23 of 1999) was allowed on 24.9.1999. By the impugned judgment dated 3.1.2000 second appeal filed by the respondents was allowed. The High Court held that to a proceeding of this nature Order I Rule 10 (4&5) applied and held that Saraswathi Ammal had got absolute title when sale to Anna Pushpam Ammal was

made to plaintiffs' vendors under Exhibit A2 and A7 who in terms sold the same to the plaintiffs. The subsequent transferees Anna Pushpam Ammal and Lalitha Ammal are not parties to the suit and the title vests with them and the plaintiffs also got absolute title. On the date when the ex-part decree was passed, Saraswathi Ammal did not have any right to the property. It was also held that Exh. A2 & A7 were not hit by the principles of lis pendens and Saraswathi Ammal was also able to convey the title to the vendors of the plaintiffs.

3. Learned counsel for the appellant submitted that once the application for bringing Saraswathi Ammal as party was allowed, the same became operative from the date of its filing and therefore, the sale by Saraswathi Ammal to Anna Pushpam Ammal and Lalitha Ammal under Ex. A2 to A7 did not convey any title. It was also submitted that the effect of Section 52 of the Transfer of Property Act 1882, (in short the 'Act') has also to be noted.

4. Learned counsel for the respondents on the other hand supported the order of the High Court.

5. The Order 1 Rule 10 (so far as relevant) and Section 52 of the Act read as follows:

Order 1 Rule 10(4)/(5)

(4) Where defendant added, plaint to be amended-When a defendant is added, the plaint shall, unless court otherwise directs, be amended in such manner as may be necessary and amended copies of the summons and of the plaint shall be served on the new defendant and if the court thinks fit, on the original defendant.

(5) Subject to the provisions of the Indian Limitation Act, 1877 (15 of 1877). Section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons."

Section 52 of the Act

"Sec.52. During the pendency in any court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the central Government, of any suit or proceedings which is not collusive and in which any right of immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or orders which may be made therein except under the authority of the court and on such terms as it may impose."

6. The crucial expression in Order 1 Rule 10 is "only on the

service of the summons". It is abundantly clear that if any dependant is impleaded subsequently proceedings as against him shall be deemed to have begun only from the date of services of summons. Same of course is subject to the provisions of Section 22 of the Indian Limitation Act, 1877 (in short 'Limitation Act').

7. In sub-rule (5), words "Indian Limitation Act, 1877" are substituted by Legislature as "Limitation Act, 1963" and "Section 22" by "Section 21". Said provision does not in any way dilute the significance of the expression "shall be deemed to have begun only on the service of the summons".

8. In *Durga Prasad & Anr. v. Deep Chand & Ors.* (AIR 1954 SC 75) it was held as follows:

"First, we reach the position that the title to the property has validly passed from the vendor and the resides in the subsequent transferee. The sale to him is not void but only voidable at the option of the earlier "contractor". As the title no longer rests in the vendor it would be illogical from a convincing point of view to compel him to convey to the plaintiff unless steps are taken to re vest the title in him either by cancellation of the subsequent sale or by reconveyance from the subsequent purchaser to him. We do not know of any case in which a reconveyance to the vendor was ordered but Sulaiman C.J. adopted the other course in *Kali Charan v. Janak Deo* (A.I.R. 1932 All. 694.). He directed cancellation of the subsequent sale and conveyance to the plaintiff by the vendor in accordance with the contract of sale of which the plaintiff sought specific performance. But though this sounds logical the objection to it is that it might bring in its train complication between the vendor and the subsequent purchaser. There may be covenants in the deed between them which it would be inequitable to disturb by cancellation of their deed. Accordingly, we do not think that is a desirable solution.

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In our opinion, the proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff. This was the course followed by the Calcutta High Court in *Kafiladdin v. Samiraddin* (A.I.R. 1931 Cal. 67.), and appears to be the English practice. See *Fry on Specific Performance*, 6th edition, page 90, paragraph 207; also *Potter v. Sanders* (67 E.R. 1057.). We direct accordingly."

9. Above being the position, the High Court was right in its view. Though strong reliance was placed on a decision of this Court in *Ramprasad Dagaduram v. Vijaykumar Motilal Hirakhanwala & Ors.* [1967 (2) SCJ 805], the same has no application because that related to a case of plaintiff. In the instant case, it relates to the defendant and Order 1, Rule 10(5)

statutorily specifies the date on which the impleadment takes effect. Order 1 Rule 10(5) is a deeming provision.

10. That being so, the High Court's impugned judgment suffers from no infirmity to warrant interference.

11. Appeal is dismissed with no order as to costs.

JUDIS