

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 30TH DAY OF SEPTEMBER, 2022

BEFORE

THE HON'BLE MR. JUSTICE SACHIN SHANKAR MAGADUM

R.S.A. NO. 766 OF 2015 (RES)

BETWEEN:

SMT. SHOBHA C N
AGED ABOUT 50 YEARS
W/O RAMESH K D
R/O NO. L21/B, NEW NO. 4828
II CROSS, KANIYARA RAMA
MANDIRA ROAD, MYSORE - 570 007

...APPELLANT

(BY SRI.VARDHAMAN V GUNJAL, ADVOCATE)

AND:

SMT. DHANA LAKSHMI NAGARAJ
SINCE DECEASED

1. SRI S M NAGARAJ
AGED ABOUT 64 YEARS
D/O 4823, PENSIONERS BLOCK
II CROSS, N R MOHALLA
MYSORE - 570 007
S/O MADANAYAK

1A). SMT. POORNIMA
AGED ABOUT 40 YEARS,
W/O SANTHOSH,
NO.4823, PENSIONERS MOHALLA,

2ND CROSS, RAJENDRA NAGAR,
MYSORE-577007
(AMENDED V/O DTD: 13.03.2020)

2. SMT. BASAMMA
AGED ABOUT 80 YEARS
W/O LATE CHANNAMALLEGOWDA

3. SRI R SHIVAMURTHY
AGED ABOUT 69 YEARS
S/O LATE CHANNAMALLEGOWDA

4. SMT GAYATHRI
AGED ABOUT 62 YEARS
D/O LATE CHANNAMALLEGOWDA

5. SMT. SOWBHAGYA
AGED ABOUT 59 YEARS
BOTH D/O LATE CHANNAMALLEGOWDA

RESPONDENTS 2 TO 4 ARE ALL
R/AT #D1-21, KANIYARA RAMA MANDIRA ROAD
MYSORE - 570 007

...RESPONDENTS

(BY SRI T.P.VIVEKANANDA, ADVOCATE FOR C/R1 AND ALSO
PROPOSED LR_s OF R1(A);
SRI.G.BALAKRISHNA SHASTRY, ADVOCATE FOR R2-5)

THIS RSA IS FILED U/S.100 OF CPC., AGAINST THE
JUDGEMENT & DECREE DTD 10.4.2015 PASSED IN
R.A.NO.565/2014 ON THE FILE OF THE VI ADDL. DISTRICT &
SPECIAL JUDGE, MYSURU, DISMISSING THE APPEAL AND
CONFIRMING THE ORDER DATED 30.10.2014 PASSED ON IA NO.III
IN EX.NO.182/2008 ON THE FILE OF THE PRL. JUDGE, COURT OF
SMALL CAUSES, MYSORE, DISMISSING THE APPLICATION FILED
UNDER ORDER XXI RULE 97, 98, 100, 101, 103 AND 104 R/W
SEC.151 OF CPC.,

THIS APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 29.09.2022, COMING ON FOR PRONOUNCEMENT OF JUDGMENT THIS DAY, THE COURT DELIVERED THE FOLLOWING:

JUDGMENT

The captioned second appeal is filed by the unsuccessful third party obstructor wherein both the Courts have rejected the application filed under Order 21 Rule 97 of CPC.

2. The facts leading to the case are as under:

The respondent/decree holder filed a suit for specific performance of contract based on an agreement to sell dated 23.10.1986. The decree holder was compelled to file a suit for specific performance in O.S.No.73/1987. Pending suit, the respondent/decree holder herein secured an order of attachment before judgment. The Trial Court on examining the material on record partly decreed the suit ordering for refund of advance sale consideration. The decree holder preferred an appeal in RFA.No.408/1991. This Court allowed the appeal and set aside the judgment and decree of the Trial

Court and consequently, granted discretionary relief of specific performance. While the connected appeal filed by the original judgment debtor in RFA.No.38/1992 was dismissed. The respondent/decreed holder initiated execution proceedings in Ex.P.No.169/2000. The original decree holder obtained sale deed through Court Commissioner.

3. The present third party applicant filed an application in Ex.P.No.169/2000 and thereby resisted the execution proceedings. The third party application was dealt with by the Executing Court and the same was rejected. Having suffered an order at the hands of the Court, the present third party applicant filed suit for specific performance on 27.11.2002 in O.S.No.478/2002. The suit was filed against two legal representatives of original judgment debtor. The said suit was not contested and the suit for specific performance filed by third party applicant was decreed. The third party applicant based on exparte decree passed in O.S.No.478/2002, it appears the legal representatives of

original judgment debtor have executed sale deed on 16.07.2008 in terms of exparte decree.

4. The present execution petition is filed by the legal heirs of deceased decree holder seeking possession of the schedule premises which was the subject matter of suit for specific performance filed by the original decree holder. The present third party applicant again filed a third party application asserting title over the property in question based on exparte decree passed in O.S.No.478/2002 and consequent sale deed dated 16.07.2008. The said application was strongly resisted by the legal heirs of original decree holder. The legal heirs of original decree holder contended that similar application filed under Order 21 Rule 97 of CPC was rejected in earlier Execution Petition No.169/2000 and therefore, contended that the present application is hit by principles of *res judicata*. The decree holder also contended that the third party applicant was aware of the decree passed in favour of the decree holder in O.S.No.73/1987 has secured a collusive

decree by filing a collusive suit in 2002. Therefore, the decree holders claimed that the third party applicant cannot resist the handing over of possession and therefore, prayed for dismissal of the third party application.

5. The Executing Court having examined the evidence let in by both the rival parties declined to entertain the third party application and consequently, the same was rejected.

6. Feeling aggrieved by the order passed by the Executing Court, the third party applicant preferred appeal in R.A.No.565/2014.

7. The Appellate Court having examined the material on record independently found that third party applicant has not placed any material indicating that he has got independent title over the property. The Appellate Court was of the view that since third party applicant is claiming through the original judgment debtor Nos.2 and 3 who have suffered a decree in O.S.No.73/1987, the third party applicant has no locus to

obstruct the execution proceedings. On these set of reasonings, the Appellate Court has proceeded to concur with the reasonings assigned by the Executing Court. Consequently, appeal is dismissed.

8. Learned counsel appearing for the third party applicant would vehemently argue and contend that both the Courts have not properly dealt with the pleadings and documentary evidence as well as oral evidence let in by the third party applicant. He would also contend that the orders stand vitiated on account of misreading of evidence on record and also for non-consideration of crucial evidence which is ignored while adjudicating the right of the applicant herein. Placing reliance on the agreement dated 04.06.1985, he would contend that Section 48 of the Transfer of Property Act, 1882 would bind the decree holder who is relying on a subsequent agreement to sell as the original owner had already entered into a prior agreement to sell in favour of third party applicant and therefore, the decree granted in his favour would relate

back to the agreement to sell dated 04.06.1985 and therefore, the third party applicant being a prior transferee is entitled to enforce his rights based on agreement dated 04.06.1985 and consequent exparte decree passed in O.S.No.478/2002. He would further contend that Section 48 determines the priority when there are successive transfers and therefore, the subsequent decree passed in O.S.No.73/1987 cannot prejudice the rights of the applicant herein. Therefore, he would contend that the agreement to sell being a prior agreement prevails over the subsequent agreement dated 10.07.1986 alleged to have been executed by the original owner in favour of the decree holder. He would also vehemently argue and contend that the attachment order passed in O.S.No.478/2002 is based on a subsequent agreement to sell and would prevail over the attachment. Therefore, he would contend that the concurrent orders rendered by both the Courts below suffers from perversity and therefore appeal needs to be examined to

consider the substantial questions of law formulated in the appeal memo.

9. To buttress his arguments, he has placed reliance on the following judgments:

1. AIR 1970 MADRAS 226 – S.Arunachalam Asari Vs. Sivan Perumal Asari.

2. AIR 1973 MYSORE 276 – Azeez Sheraiff Vs. Bhabhutimu.

3. ILR 2003 KAR 3042 – Veerabhadrappe and Anr. Vs. Jadgish Gouda.

4. AIR 1991 KERALA 152 – Narayana Nilar Vs Zacharaia Kurikose.

5. (1991) 1 SCC 715 – Hamda Ammal Vs. Avadiappa Pathar and Ors.

6. (2008) 12 SCC 796 - Kashmir Singh Vs. Harnam Singh.

7. (2006) 5 SCC 545 – Hero Vinith Vs. Seshammal.

8. AIR 1965 SC 1856 – S Chattan Karayalar Vs. Central Bank of India.

9. Civil Appeal No.6595/2015 (SC) - LC Hanumanthappa Vs. H.B.Shivkumar.

10. 2011-LW 940 MADRAS HC – Kalavathi Vs. P.Balsundaram.

11. C.A No.2001/2008 – K.Lakshminaryana Vs. Mattaparthi Syamala.

12. WP No.15686/2013 – Kum Bhoomika Vs. N.S.Gangadhar.

13. 1945 (1) MLJ 425 – Doreswamy Reddy Vs. Angappa Reddy.”

10. Referring to the principles laid down by the Hon’ble Apex Court in the case of ***Hamda Ammal vs. Avadiappa Pathar and 3 Others***¹, he would contend that the decree passed in O.S.No.478/2002 would relate back to the date of execution of agreement to sell and therefore, agreement to sell which is executed much prior to passing of an attachment order can be enforced and therefore, he has acquired right based on the exparte decree passed in O.S.No.478/2002. Referring to the judgment rendered by the Hon’ble Apex Court in the case of ***Lala Durga Prasad and Another vs. Lala***

¹ (1991) 1 SCC 715

Deep Chand and Others², he would contend that the plaintiff is the subsequent purchaser and therefore, third party applicant was justified in not impleading the original decree holder in O.S.No.478/2002. Reliance is also placed on the judgment rendered by the Bombay High Court in the case of ***Prataprai Trambaklal Mehta vs. Jayant Nemchand Shah and Others***³. He would further vehemently argue and contend that the plaintiff has nowhere claimed to be the bonafide purchaser for valuable consideration. On these set of grounds, he would contend that the appeal needs to be admitted on the substantial questions of law formulated in the appeal memo.

11. Learned counsel appearing for the decree holder repelling the contentions urged by the counsel appearing for the third party applicant would contend that the alleged agreement to sell set up by the third party applicant is dated 04.06.1985. The time stipulated under the agreement is

² AIR 1954 SC 75

³ AIR 1996 Bombay 296

twelve months. It is after expiry of twelve months, the original owner has entered into a fresh agreement on 10.07.1986. The plaintiff's suit though dismissed in the first instance insofar as larger relief of specific performance of contract is concerned, this Court has allowed the appeal and has decreed the suit granting specific performance of agreement while the original owners appeal questioning the decree for refund was dismissed. He would further highlight the significant details to demonstrate the conduct of the third party applicant. The original decree holder who filed Execution Petition No.169/2002 obtained sale deed through Court Commissioner on 20.06.2001. The third party applicant comes out with an application on 15.06.2002 which was rightly rejected. After rejection, he files a collusive suit in O.S.No.478/2002. This suit is filed only against the widow and one son and ex parte decree is obtained. Therefore, the Executing Court and Appellate Court have meticulously dealt with the material on record and were justified in not

entertaining the third party application filed by the applicant herein. He would conclude his arguments by contending that the very act of applicant in obtaining the exparte decree by filing a suit in 2002 enforcing the alleged agreement dated 04.06.1985 is nothing short of abuse of process.

12. Heard learned counsel appearing for the third party applicant and learned counsel appearing for the decree holder. I have given my anxious consideration to the findings recorded by both the Courts while rejecting the third party application. I have also given my anxious consideration to the citations relied on by the third party applicant.

13. Though this Court has absolutely no cavil to the propositions laid down by the Coordinate Bench and also the propositions laid down by the Hon'ble Apex Court in the judgments cited supra which binds this Court but, however, I am of the view that the judgments cited by the third party applicant are not at all applicable to the present case on hand.

This is a classic case where third party applicant has succeeded in virtually stalling the execution proceedings.

14. Before I advert to the facts, it would be useful for this Court to examine the law relating to right of a third party applicant. It is trite law that in an enquiry under Rule 97, the person obstructing delivery of property has to prove not only his possession but has to establish further that his possession was not obtained from or under the judgment debtor. Where an obstructionist or third party is asserting to be an agreement holder under judgment debtor, he is one claiming under the judgment debtor and once it is found that the obstructionist or third party is unable to put forward the claim under Order 21 Rule 35, then it would be impossible for the Court to consider the claim of the third party. Therefore, the obstructor to succeed in defeating execution of decree must establish (1) that he is in actual physical possession of suit premises, (2) that he does have an independent title to the property.

15. Now coming to the present case on hand, the third party applicant is virtually claiming under original judgment debtors and traces his right under agreement to sell alleged to have been executed on 04.06.1985. It is quite shocking to note that he files a suit only in 2002 to enforce the agreement which is of the year 1985. The judgment debtors do not contest the proceedings and allow third party applicant to secure an ex parte decree. The judgment debtors readily come forward to execute the sale deed in their favour. The decree holder by then had executed the decree for specific performance and if sale deed was already obtained by decree holder through the court Process, suit filed by the third party applicant supports inference that it is a collusive suit.

16. If these significant details are looked into, then this Court would find that the entire action initiated by the third party applicant is found to be in collusion with the judgment debtors. The original decree holder's suit was decreed by this

Court in RFA.No.408/1991 by judgment and decree dated 18.02.1999. The sale deed is executed by the Court Commissioner on 20.06.2001, while suit for specific performance is filed by the third party applicant on 27.11.2002 and suit is decreed on 06.11.2006.

17. The contention of the third party applicant that his agreement being prior in point of time, his rights stands protected under Section 48 of Transfer of Property Act, is found to be misconceived and the said contention has to be out-rightly rejected. His agreement becomes unenforceable the moment the original owner executes an agreement in favour of original decree holder on 10.07.1986. This agreement was executed after expiry of twelve months stipulated under the alleged agreement dated 04.06.1985 in favour of third party applicant. The suit for specific performance filed by third party applicant is decreed in 2006, while decree holder Dhanalakshmi has succeeded in getting

the sale deed in the execution proceedings through court process. This sale deed is dated 20.06.2001.

18. Therefore, the alleged exparte decree passed in O.S.No.478/2002 in favour of third party applicant does not create any right in favour of third party applicant. The moment the sale deed is executed based on a decree for specific performance, the agreement in favour of original decree holder dated 10.07.1986 stood concluded.

19. In the light of the above said discussions, the material on record clearly indicates that third party applicant has failed to prove that he has got independent title. He is claiming under the judgment debtors and if judgment debtors have suffered a decree for specific performance and if the same has attained finality, all subsequent events and orders/decrees in favour of third party applicant are of no consequence. Both the Courts have rightly dealt with the said

issue. Therefore, no substantial question of law arises for consideration.

20. For the foregoing reasons, I pass the following:

ORDER

The second appeal is dismissed.

Sd/-
JUDGE

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