BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 28.03.2022

CORAM:

THE HON'BLE MR.JUSTICE G.R.SWAMINATHAN

S.A.(MD) No.80 of 2010
and
M.P.(MD) No.1 of 2010

B.Amudha ... Appellant

-vs-

1. K.Rajendran (Died)

2. G.Amsavalli

3. The Sub Registrar,
O/o. Sub Registrar, Cutcherry Road,
Thiruvidaimaruthur Taluk,
Thanjavur District.

4. The District Collector,
O/o. District Collector, Panagal Building,
Thanjavur Town & District.

(Respondent 3 & 4 are exonerated from
the suit and in lower appellate court).

5. K.Pattu

6. R.Rajam

7. R.Ramesh

8. R.Ragu ... Respondents

[RR-5 to 8 are brought on record as LRs of deceased 1st respondent vide Court order dated 22.10.2019 made in CMP(MD) Nos. 7015 to 7017/2018 in SA(MD) No.80/2010]

Prayer :- Second Appeal filed under Section 100 of Civil Procedure Code to set aside the Judgment and Decree dated 11.09.2009 passed in A.S.No.79 of 2008 by the Additional Sub-Judge of Kumbakonam modifying the Judgment and Decree dated 23.01.2008 in O.S.No.89 of 2006 on the file of Principal District Munsif of Valangiman at Kumbakonam and set aside the same, consequently confirm the decree and judgment of the trial court dated 23.01.2008 in O.S.No.89 of 2006.

For Appellant : Mr.G.Prabhu Rajadurai
for Mr.R.Narayanan

For R5 to R8 : Mr.V.Karthikeyan
for Mr.V.Perumal

JUDGMENT

"Were you not once prosecuted and punished?"-to this blunt question during cross-examination, the witness tried to give an explanation. He was cut short with a firm "Say, yes or no". The poor witness meekly replied "yes sir". The cross examining counsel after a

few more questions sat down with a victorious smirk. The other side counsel was alert and with the leave of the court to re-examine his witness, put a question "can you tell the Hon'ble Court as to why you were prosecuted and what was the punishment you received?". The witness explained with a sense of relief "I was charged for a traffic violation and paid a small amount as fine".

2.This story highlights the importance of re-examination. If the counsel had failed to elicit this explanation, the judge would have carried an impression that the witness is an ex-convict. Failure to re-examine a witness can sometimes turn out to be fatal. The case on hand is a good illustration.

3.This second appeal arises out of a suit for specific performance of the sale agreement dated 25.02.2006 entered into between the plaintiff (K.Rajendran) and the first defendant (G.Amsavalli). The appellant purchased the suit property from the first defendant on 28.05.2006 under Ex.B2. While the trial court dismissed the suit, the first appellate court granted the relief of specific performance.

4.The substantial questions of law formulated for consideration were whether the case of the appellant will fall under the exception set out in Section 19 (b) of the Specific Relief Act, 1963 and whether the impugned decree goes beyond the suit agreement.

5.The plaintiff filed O.S No.89 of 2006 on the file of the Principal District Munsif Court, Valangiman, Kumbakonam for specific performance of the sale agreement which he entered into with the 1st defendant on 25.02.2006. The appellant herein was impleaded as the fourth defendant. The 1st defendant remained ex parte after filing written statement. The appellant alone contested the proceedings. Based on the divergent pleadings, the trial court framed the necessary issues. The plaintiff examined himself as P.W.1. Ex.A1 to Ex.A4 were marked. The appellant examined herself as D.W.1. Ex.B1 to Ex.B4 were marked. After consideration of the evidence on record, the trial court by judgment and decree dated 23.01.2008 denied specific performance but ordered refund of the advance amount. Questioning the same, the plaintiff filed A.S.No.79 of 2008 before the Additional Sub Court, Kumbakonam. By the impugned judgment and decree dated

11.09.2009, the first appellate court granted the relief of specific performance. Challenging the same, the subsequent purchaser/4th defendant filed this second appeal.

6.Heard the learned counsel on either side.

7.There is no dispute that the suit property originally belonged to the 1st defendant. That the plaintiff entered into Ex.A1-Sale Agreement, dated 25.02.2006 with the 1st defendant is also beyond any pale of controversy. The 1st defendant had agreed to sell the property covered under Ex.A1 in favour of the plaintiff for a sum of Rs.73,500/- The 1st defendant also received a sum of Rs.10,000/- as advance amount. The period for concluding the sale was fixed as three months. Since the 1st defendant did not come forward for concluding the sale transaction, the plaintiff issued notice dated 15.05.2006 (Ex.A2). The 1st defendant issued reply dated 25.05.2006 (Ex.A4) claiming that the plaintiff had taken her signatures in blank stamp papers and that he had fabricated a sale agreement. Since the 1st defendant repudiated her liability under the agreement, the plaintiff filed O.S.No.89 of 2006 before the trial

court on 08.06.2006. In the meanwhile, the appellant herein had purchased the suit property from the 1st defendant on 28.05.2006 (Ex.B2).

8.The primary contention of the learned counsel appearing for the appellant is that the appellant is a transferee for value who had paid her money in good faith and without notice of the agreement between the plaintiff and the 1st defendant ; immediately behind the suit property, the appellant is owning a garden ; since she has to access the same only through the suit property, she purchased it. The suit agreement is not a registered one and therefore, the appellant cannot be said to have had constructive notice ; the appellant was unaware of the transaction between the plaintiff and the 1st defendant ; the appellant had marked the parent title deed as Ex.B1 ; this would show that the transaction between the 1st defendant and herself was genuine and not sham and nominal. The learned counsel would also contend that the first appellate court had misconstrued the answers given by the appellant during cross-examination. He relied on the decision reported in ***1979 (2) MLJ 466 [Manohara Chetty vs. Coomaraswamy Naidu]***

wherein it has been held that an answer to be taken as admission must be unequivocal and comprehensive and must go the whole-hog on the point in issue.

9.Section 19 of the Specific Relief Act is as follows:-

"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) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant;

(d)when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;

(e)when the promoters of a company have, before its incorporation, entered into a contract for the purpose of the company and such contract is warranted

by the terms of the incorporation, the company: Provided that the company has accepted the contract and communicated such acceptance to the other party to the contract."

The question arising for consideration is whether the case on hand will fall under the exception set out in Section 19(b) of the Act. This provision was comprehensively interpreted by the Division Bench of the Madras High Court in ***Arunachala Thevar v. Govindarajan Chettiar (1977) 90 LW 543***. It was noted that the following four elements have to be proved to successfully claim the benefit of the exception viz.,

1. that the transfer is for value ;
2. that the consideration has been paid ;
3. that the subsequent transferee has taken the transfer in good faith; and
4. that both the purchase and the payment of the consideration had been made without notice of the prior contract.

The first two elements are positive and the rest are negative in character.

The manner in which the expressions "paid his money", "good faith" etc., have to be understood was laid down in the said decision.

Coming to the expression "without notice" and the onus of proof, the Hon'ble Division Bench held as follows :

> "15."Without notice" : The word 'notice' is defined in Section 3 of the Transfer of Property Act thus:
>
> A person is said to have notice of a fact when he actually knows that fact, or when, but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it.
>
> This definition includes both actual and constructive notice. A bona fide contract, whether oral or written, prevails against a subsequent registered conveyance if the transferee had notice of the prior contract. The legal presumption of knowledge or notice arises from:
>
> 1. willful abstention from an enquiry or search;
>
> 2. gross negligence;
>
> 3.registration, omission to search the register kept under the Registration Act, may amount to gross negligence so as to attract the consequences which result from notice;
>
> 4. actual possession; and
>
> 5. notice to an agent.

A purchaser is deemed to have notice of anything which he has failed to discover either because he did not investigate the title properly or because he did not enquire for deeds relating to the property. The onus of proof lies upon the party seeking to defeat the prior contract, to adduce prima facie evidence that he is a bona fide transferee for value without notice. But, the burden is light and he may discharge it by merely denying the factum of notice on oath. In any case, very little evidence is required on his part to prove this fact which is negative. However, each case will have to be examined on its own facts, to find out whether the onus has been fully and satisfactorily discharged or not. If A enters into a contract of sale with B and finds that C is in possession of the property to be sold, then it is incumbent on A to make an enquiry on what terms C is in possession of the property so as to find out whether there is any prior agreement between B and C for transfer of the property in C's favour. In Veeramalai Vanniar v. Thadikara Fenkayya MANU/TN/0225/1968 : AIR1968Mad383 , a Division Bench of this Court, relying on Durga Prwad v. Deepchand MANU/SC/0008/1953 : [1954]1SCR360 has observed that it is also the duty of the subsequent purchaser to enquire from the person in possession as to the precise character in which he was

in possession at the time when the subsequent sale transaction was entered into.

16.Onus of Proof : It is one of the recognised canons of jurisprudence and an accepted principle that ordinarily when a party claims exemption from a general provision of law, the onus lies upon him to prove that he comes within the exception. Section 19(b) lays down a general rule that the original contract maybe specifically enforced against a subsequent transferee, but allows an exception to that general rule not to the transferor, but to the transferee, and, therefore, it is clearly for the transferee to establish the circumstances which would allow him to retain the benefit of the transfer which prima facie he had no right to get. Thus, it is clear that the onus is upon the subsequent purchaser to prove that he is a transferee for value who had paid his money in good faith and without notice of the earlier contract so as to bring himself within the exception provided under Clause (b) of Section 19. In Bhup Narain Singh v. Gokulchand MANU/PR/0059/1933, Lord Thankerton, who spoke for the Board, while dealing with Section 27of the old Act corresponding to Section 19 of the new Act, has observed

"It is clearly for the transferee to establish the circumstances, which will allow him to retain the benefit of transfer which prima facie he had no right to get. Further, the subsequent transferee is the person within whose knowledge the facts as to whether he has paid and whether he had notice of the original contract lie and the provisions of Sections 103 and 106 of the Evidence Act, 1872, have a bearing on the question."

....

A Bench of this Court in Veeramdai Vamniyar v. Thadikara Venkayya MANU/TN/0225/1968 : AIR1968Mad383 , has held that the burden of proof is upon the subsequent purchaser to establish the conditions laid down under Clause (b) of Section 27 of the old Act, in order that his rights may prevail over the prior agreement of Sale. Therefore, in our view, when a subsequent transferee claims the protection under Section 19(b) of the new Act, as a person who has paid money in good faith and without notice of the original contract, the burden of establishing the conditions enumerated in the said section lies upon him. But, he has only to establish this burden by leading a negative evidence. Very little evidence, and in certain circumstances a mere denial, regarding want of knowledge of the prior contract would discharge this

onus which is negative in character. Then, the onus would shift on the person who seeks to defeat the sale in his favour. In other words, this burden is ambulatory, and so, when once the initial burden cast on the subsequent transferee (defendant) is satisfactorily discharged, the burden shifts on the other party (plaintiff) to prove that the defendant had notice of the earlier agreement."

10.Now let me apply the aforesaid principles to the facts on hand. I am more than satisfied that the appellant is a transferee for value. She has paid her money in good faith. Yet he suffered decree because the first appellate court has rendered a finding that she did have prior knowledge of the suit agreement. The appellate court had referred the following answers given by the appellant during the course of her cross-examination :

"I purchased the suit property under Ex.B2. I purchased the same on the basis that it belongs to the 1st defendant Amsavalli. The plaintiff Rajendran also belongs to the same place and I know him. There was an agreement between the plaintiff and the first defendant regarding the suit property. The first defendant had

agreed to sell the property to the plaintiff. The plaintiff had agreed to purchase the property for Rs.73,500/-. The plaintiff had paid a sum of Rs.10,000/- as advance..... Since the suit property is adjacent to his property, the plaintiff wanted to purchase the property. ”

The learned counsel appearing for the appellant submitted that the aforesaid affirmative answers given by the appellant/purchaser should be contextually understood. The appellant entered the witness box after the plaintiff side was concluded. By then, all these had become matters of record. The appellant merely confirmed what had already transpired by then. According to the learned counsel, the appellant became aware of these facts during the course of trial and that she never admitted having known the aforesaid facts before she paid the sale consideration to the first defendant.

11.It is quite possible that the learned counsel for the appellant is right. By filing proof affidavit denying knowledge about the suit agreement, the appellant had discharged her initial onus. As held by the Hon'ble Division Bench in ***Arunachala Thevar*** as regards want of knowledge of the prior contract, the purchaser can discharge the

burden in certain circumstances by a mere denial. This is because the onus is negative in character. The onus in this case thereafter shifted to the plaintiff. The plaintiff by eliciting the aforesaid answers in the cross-examination of the transferee once again shifted the burden back to the purchaser. This is a classic instance of the ambulatory nature of the onus of proof. There is a game involving passing the ball and when the music stops the person holding the ball is declared out. The ambulatory nature of onus of proof plays out likewise. The burden keeps shifting back and forth. In this case, the onus shifted from the appellant to the plaintiff who passed it back to her. If only re-examination had been done and the appellant had clarified that she became aware of the facts relating to the agreement only during trial and had reiterated her lack of knowledge about the prior contract before she paid her money to the first defendant, the burden would have once again shifted to the plaintiff.

12.Section 138 of the Indian Evidence Act, 1872 is as follows :

> "**Order of examinations**. — Witnesses shall be first examined-in-chief, then (if the adverse party so

desires) cross-examined, then (if the party calling him so desires) re-examined. The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination. — The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter."

In ***Chanan Singh v. State of Haryana (1971) 3 SCC 466***, it was observed that the purpose of re-examination is explaining any part of the cross-examination which is capable of being construed unfavourably to the party for whom he has given evidence in chief. In Rammi v. State of M.P ***(1999) 8 SCC 649***, it was observed as follows :

"16. The very purpose of re-examination is to explain matters which have been brought down in cross-examination. Section 138 of the Evidence Act outlines the amplitude of re-examination. It reads thus:

Direction of re-examination. - The re-examination shall be directed to the explanation of matters referred to in

cross- examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

17.There is an erroneous impression that re-examination should be confined to clarification of ambiguities which have been brought down in cross-examination. No doubt, ambiguities can be resolved through re-examination. But that is not the only function of the re-examiner. If the party who called the witness feels that explanation is required for any matter referred to in cross-examination he has the liberty to put any question in re-examination to get the explanation. The Public Prosecutor should formulate his questions for that purpose. Explanation may be required either when ambiguity remains regarding any answer elicited during cross-examination or even otherwise. If the Public Prosecutor feels that certain answers require more elucidation from the witness he has the freedom and the right to put such questions as he deems necessary for that purpose, subject of course to the control of the Court in accordance with the other provisions. But the Court cannot direct him to confine his questions to ambiguities alone which arose in cross-examination.

18.Even if the Public Prosecutor feels that new matters should be elicited from the witness he can do so, in which case the only requirement is that he must secure permission of the Court. If the Court thinks that such new matters are necessary for proving any material fact, courts must be liberal in granting permission to put necessary questions.

19.A Public Prosecutor who is attentive during cross-examination can not but be sensitive to discern which answer in cross- examination requires explanation. An efficient Public Prosecutor would gather up such answers falling from the mouth of a witness during cross-examination and formulaic necessary questions to be put in re-examination. There is no warrant that re-examination should be limited to one or two questions. If the exigency requires any number of questions can be asked in re-examination."

Rammi had been referred to and followed in a catena of subsequent decisions.

13.In text books as well as judgments, the scope and limits of re-examination have been dealt with. Of course, in ***Rammi***, the Hon'ble

Supreme Court commented that the Additional Public Prosecutor in the trial court seemed oblivious of the right of re-examination. I would add that counsel have a professional duty to exercise this right for upholding the cause of their clients.

14.In ***Ramsewak v. State of M.P (2004) 11 SCC 259***, the Hon'ble Supreme Court held that if there is some doubt as to the interpretation of a particular part of the evidence of the prosecution witness which was not clarified by the prosecution by way of re-examination, the benefit of doubt should go to the defence. Applying the said principle by way of analogy, if there is some doubt as to the interpretation of the evidence given by the subsequent purchaser during cross-examination which was not clarified by way of re-examination, the benefit of doubt should go to the person seeking specific performance. This is because the purchaser seeks refuge behind a statutory exception and wants to defeat the prior contract.

15.Steve Uglow in his "Evidence-Text and Materials" quotes Lord Tenterden's judgment in Queen Caroline's Case (1820) 2 Brod.Bing.284 at 297 :

> "I think counsel has a right, on re-examination, to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful and also of the motive by which the witness was induced to use those expressions....."

In this case, the sense and meaning of the answers given by the appellant must have been brought out by re-examination. It was not done and that is why, the first appellate court came to the conclusion that the appellant had knowledge of the suit agreement before she finalized her transaction with the first defendant. This finding of fact cannot be said to be an erroneous inference warranting interference in exercise of jurisdiction under Section 100 of Civil Procedure Code. I therefore answer the first substantial question of law against the appellant and sustain the finding of the first appellate court that the appellant had knowingly entered into the offending transaction.

16.But the matter cannot end with this. It is obvious that Amsavalli under Ex.B1 owned 45 kuzhis of land. She agreed to sell 42 kuzhis to the plaintiff. In other words, she retained 3 kuzhis. The

plaintiff however sought specific performance for the entire 45 kuzhis. The first appellate court failed to note that Ex.A1 pertained only to 42 kuzhis and not 45 kuzhis. Therefore, I answer the second substantial question of law in favour of the appellant. The Second Appeal is partly allowed. The impugned judgment and decree passed by the first appellate court are accordingly modified. The appellant/4th defendant is directed to execute sale deed conveying 42 Kuzhis of land in the suit property in favour of the legal heirs of the deceased plaintiff/respondents 5 to 8 herein as per Ex.A1 sale agreement. In default, the learned Judicial Magistrate-cum-District Munsif, Thiruvidaimaruthur shall execute a sale deed as directed above. The balance sale price deposited by the plaintiff can be withdrawn by the appellant together with accrued interest. Time for execution of the sale deed is eight weeks from the date of receipt of copy of this judgment. No costs. Connected miscellaneous petition is closed.

28.03.2022

Index : Yes/No
Speaking/Non-Speaking Order
skm

Note:- In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the Advocate / litigant concerned.

To

1. The Additional Sub-Judge,
   Kumbakonam.

2. The Principal District Munsif,
   Valangiman, Kumbakonam.

3. The Sub Registrar,
   O/o. Sub Registrar, Cutcherry Road,
   Thiruvidaimaruthur Taluk, Thanjavur District.

4. The District Collector,
   O/o. District Collector, Panagal Building,
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G.R.SWAMINATHAN, J.

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