



IN THE HIGH COURT OF KARNATAKA, DHARWAD BENCH

DATED THIS THE 20TH DAY OF NOVEMBER, 2024

PRESENT
THE HON'BLE MR. JUSTICE SREENIVAS HARISH KUMAR
AND
THE HON'BLE MR. JUSTICE T. G. SHIVASHANKARE GOWDA

REGULAR FIRST APPEAL NO.100201 OF 2018 (SP)

BETWEEN:

SRI. DATTATRAY S/O BHARMAJI PATIL
SINCE DECEASED, BY HIS LRS.

- 1A. SMT. SUNANDA DATTATRAY PATIL
AGE. 65 YEARS, HOUSEHOLD WORK,
R/O. KALLEHOL, TQ & DIST: BELAGAVI,
PRESENTLY RESIDING AT DURGA RESIDENCY,
FLAT NO.501, MAHATMA FULE ROAD,
BELAGAVI-590011.
- 1B. PRAVEEN DATTATRAY PATIL
AGE. 27 YEARS, OCC. SERVICE,
R/O. KALLEHOL, TQ & DIST: BELAGAVI,
PRESENTLY RESIDING AT DURGA RESIDENCY,
FLAT NO.501, MAHATMA FULE ROAD,
BELAGAVI-590011.
- 1C. SWATI SANTOSH PATIL
AGE. 35 YEARS, OCC. SERVICE,
R/O. CTS NO.161, BLOCK NO.206,
SHREYAS APARTMENT, BUDHWAR PETH,
TILAKWADI, BELAGAVI-590006.
(R/BY. HER GPA HOLDER NAMELY)
- 1D. MS. JAYANTHI D/O. DATTATRAYA PATIL
AFTER THE MARRIAGE HER NAME IS
MAYA SANJAYKUMAR PATIL
AGE. 30 YEARS, OCC. HOUSEHOLD WORK,
R/O. CTS NO.161, BLOCK NO.206,
SHREYAS APARTMENT, BUDHWAR PETH,
TILAKWADI BELAGAVI-590006.

- APPELLANTS

(BY SRI H.R. DESHPANDE, ADV.)



AND:

1. SRI. NARAYAN S/O TAMMANNA JANGALE,
AGE: 64 YEARS, OCC: AGRICULTURE,
R/O: MAHATHMA PHULE ROAD,
BELAGAVI-590003.
2. SRI. DURGA CONSTRUCTIONS
REPRESENTED BY ITS PARTNERS,
RESPONDENT NO.3 AND 4.
3. SRI. P.B. PONNAPPA
AGE: 49 YEARS, OCC: BUSINESS,
R/O: SHOP NO.49, GOAVES,
SHOPPING COMPLEX, BELAGAVI-590006.
4. SRI. KRISHNAYYA SHIVARAMA HEGEDE
AGE: 52 YEARS, OCC: BUILDING CONTRACTOR,
R/O: SHOP NO.49, GOAVES,
SHOPPING COMPLEX, BELAGAVI-590006.

- RESPONDENTS

(BY SMT. V. VIDYA, ADV. FOR R1;
SRI SHREEVATSA S. HEGDE, ADV. FOR R2 TO R4)

THIS REGULAR FIRST APPEAL IS FILED UNDER SEC. 96 R/W ORDER XLI RULE 1 OF CPC., 1908, AGAINST THE JUDGMENT AND DECREE DTD:26.02.2018 PASSED IN O.S.NO.364/2013 ON THE FILE OF THE I ADDITIONAL SENIOR CIVIL JUDGE AND CJM, BELAGAVI, PARTLY DECREETING THE SUIT FILED FOR SPECIFIC PERFORMANCE OF CONTRACT.

THIS REGULAR FIRST APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 05.11.2024 COMING ON FOR PRONOUNCEMENT OF JUDGMENT, THIS DAY, **SREENIVAS HARISH KUMAR J.**, DELIVERED THE FOLLOWING:

CORAM: THE HON'BLE MR. JUSTICE SREENIVAS HARISH KUMAR
AND
THE HON'BLE MR. JUSTICE T. G. SHIVASHANKARE GOWDA



CAV JUDGMENT

(PER: THE HON'BLE MR. JUSTICE SREENIVAS HARISH KUMAR)

This is plaintiff's appeal; although the trial court granted him decree of specific performance, he is grieved by direction to him by the trial court that he should make payment of Rs.8,00,000/- to the defendants 2 to 4 for obtaining sale deed from them.

2. The substance of the pleadings is as below:

Second defendant is a partnership firm involved in the activity of construction of apartments. In the land bearing CTS No.5283/B1 situate at Mahatma Pule Road, Belagavi, belonging to the first defendant, second defendant undertook construction of an apartment called Durga Residency. Defendants 3 and 4 are the partners of defendant no.2. The plaintiff entered into contract with second defendant to buy a flat bearing no.501 for a sale consideration of Rs.20,00,000/-. Agreement in this regard came into existence on 25.12.2008. As stipulated in the agreement, the plaintiff made payments on different dates in installments. He was put in possession also. The sale deed was supposed to be executed within ten months from the date



of agreement. When the defendants postponed the execution of sale deed inspite of his repeated requests, he issued a notice dated 25.09.2013 to defendant no.2. According to the plaintiff, defendant no.2 approached him after receiving the notice and assured of executing the sale deed but demanded some more money because of increase in the cost of construction. Under the garb of compromise, defendant no.2 asked the plaintiff to return the original agreement to it. The plaintiff gave original agreement to defendant no.2 in good faith but instead of compromising the matter, the second defendant removed the last page of the agreement containing the endorsement of receipt of Rs.8,00,000/-, returned the original agreement and then replied to the plaintiff's notice through its partner, i.e., defendant no.3. Noticing the mischief played by the defendants, the plaintiff issued one more notice demanding specific performance and then brought the suit.

3. The first defendant filed his written statement pleading ignorance about the agreement between the plaintiff and defendant no.2. Defendants 2 and 3, in their written statement admitted the agreement dated 25.12.2008 and disputed payment of Rs.8,00,000/- by the plaintiff to them on



04.11.2010. They stated that though possession was handed over to the plaintiff but they did not execute the sale deed because plaintiff was due in a sum of Rs.8,00,000/-.

4. The trial court framed six issues of which the first issue related to plaintiff's proving payment of Rs.8,00,000/- to defendant no.2 on 04.11.2010. Though issue no.2 related to plaintiff's readiness and willingness, the deciding issue for the suit was issue no.1.

5. The plaintiff adduced evidence as PW1 and also examined the Notary Public as PW2. Plaintiff got marked five documents. Ex.P.1 is the original agreement and Ex.P.2 is notarized photostat copy of the agreement. Exs.P.3 and P.4 are the legal notices issued by the plaintiff in the first instance. Ex.P.5 is the reply given by defendant no.2. The last notice issued by the plaintiff before institution of the suit was marked as Ex.P.5(a). The corresponding postal receipts and acknowledgements were also marked as sub documents to Exs.P.3 to P.5(a).

6. DW1 is defendant no.1. DW2 is a power of attorney holder of defendants 3 and 4, but he did not appear for cross



examination after he filed his affidavit in lieu of examination in chief.

7. The actual conclusions drawn by the trial court will be dealt with later but having held that the plaintiff was due in a sum of Rs.8,00,000/- and that he was ready to perform his part of the contract, the trial court directed the plaintiff to make payment of Rs.8,00,000/- to defendants 2 to 4 within three months but without interest to obtain sale deed from the latter. The trial court also directed that in case the plaintiff did not make payment of Rs.8,00,000/-, defendants 2 to 4 should refund a sum of Rs.12,00,000/- to the plaintiff without interest. In this context the plaintiff has preferred this appeal.

8. We have heard the argument of Sri H.R. Deshpande, learned counsel for the appellant/plaintiff, Sri Shreevatsa S. Hegde, learned counsel for respondents 2 to 4/ defendants 2 to 4 and Smt. V. Vidya, learned counsel for respondent no.1/ defendant no.1.

9. It was the argument of Sri H.R. Deshpande that the whole issue centered around payment of Rs.8,00,000/- by plaintiff to defendant no.2 which is represented by defendants 3



and 4 as its partners. Defendants do not dispute the agreement and also do not dispute payment of Rs.12,00,000/-. Ex.P.1 is the original agreement and Ex.P.2 is notarized photostat copy of Ex.P.1. The specific plea of the plaintiff is that after he got issued legal notice to defendant no.2 as per Ex.P.3, representative of defendant no.2 met the plaintiff and took back the original agreement assuring of settlement. When the original was returned to the plaintiff, he found that the last page of the agreement had been removed. In the last page there is an endorsement by defendant no.4 for having received Rs.8,00,000/- on 04.11.2010. The plaintiff was to produce the photostat copy to prove that he had made payment of Rs.8,00,000/- to defendant no.4 and there was nothing due from him. Instead of reading Exs.P.1 and P.2 together to find out the truth, the trial court has misconstrued the evidence. PW2 is the Notary before whom Ex.P.2 was attested. He has given clear evidence to have attested the photostat copy after verifying the original. The effect of the evidence of PW2 has not at all been considered by the trial court, instead it has given perverted reasons that there is no proof for payment of Rs.8,00,000/- by the plaintiff. Had the evidence been properly



appreciated, the plaintiff should not have been directed to make payment of Rs.8,00,000/-. Therefore the findings of the trial court are unsustainable and they are to be set aside, Sri H.R.Deshpande argued.

10. Smt. Vidya fairly submitted that first defendant is not a contesting party. But it was the argument of Sri Shreevatsa Hegde that Ex.P.2 is rightly disbelieved by the trial court in as much as it is a photostat copy and the evidence of PW2 clearly shows that he attested it without verifying the original. If according to plaintiff he made payment of Rs.8,00,000/-, which being a huge sum, he should have obtained receipt from defendant no.2. Mere oral statement of the plaintiff regarding payment cannot be believed at all. In fact the plaintiff was put in possession of the flat on the assurance made by him that he would clear of the dues. Removal of the last page of agreement is a story concocted by the plaintiff which is rightly disbelieved by the trial court. He argued further that other payments made by the plaintiff was not in accordance with payment schedule as stipulated in the agreement and even now if the plaintiff would make payment of balance of Rs.8,00,000/-



with interest, defendants 2 to 4 would execute the sale deed. In this view, he submitted that appeal is devoid of merits.

11. The point that arises for discussion is:

Has the trial court failed to correctly apply its mind to Exs.P.1 and P.2 to draw a conclusion that plaintiff was due in a sum of Rs.8,00,000/- to defendants 2 to 4?

12. Reappreciation of evidence leads to these conclusions:

Ex.P.1 is the original agreement dated 25.12.2008, execution of which is not in dispute. On the date of agreement plaintiff made payment of Rs. 3,01,000/- to defendant no.2 and this payment is also not disputed. Condition no. 4 of the agreement indicates percentage of payments to be made by plaintiff to second defendant depending on progress in construction of building. In the agreement there are handwritten endorsements with regard to payments made by the plaintiff towards sale consideration. There was a payment of Rs.1,50,000/- on 10.06.2009, Rs.2,00,000/- on 14.04.2010 Rs.3,00,000/- on 15.07.2010 and Rs.2,50,000/- on 30.10.2010. These payments are not disputed by defendants 2 to 4. The signatures of the 4th defendant for having received



these amounts are forthcoming. The disputed payment is Rs.8,00,000/- on 04.11.2010. The plaintiff states that the last page of the agreement containing endorsement by defendant no.4 for having received Rs.8,00,000/- was removed and of course this is disputed by defendants 2 to 4. To prove that such a payment was made on 04.11.2010, the plaintiff produced the photostat copy as per Ex.P.2, the perusal of which clearly shows that there was a payment of Rs.8,00,000/- to 4th defendant on 04.11.2010. On comparison of Ex.P.2 with Ex.P.1 a clear inference can be drawn that the former is the photostat copy of the latter, only exception is last page containing payment dated 04.11.2010 is not found in Ex.P.1.

13. When the plaintiff issued notices to defendants 1 and 2 as per Ex.P.3 and P.4 on 25.09.2013 he clearly stated about all payments made by him including payment of Rs.8,00,000/- on 04.11.2010. Of course the last payment was denied in the reply notice issued on behalf of the second defendant. Now the denial of payment of Rs.8,00,000/- can be accepted or not is the question.



14. The plaintiff i.e., PW1 asserted to have made entire payment of sale consideration. When he was subjected to cross examination by the counsel for defendants 2 and 3, in the first instance he stated that he had made payment of major portion of amount and when he was specifically suggested that he was due in a sum of Rs.8,00,000/-, he stuck to his stand that he had made entire payment. Further he was suggested about any document being available in proof of payment of Rs.8,00,000/- and it was here that PW1 appears to have stumbled by giving answer that he had with him whatever the documents that defendants 2 to 4 gave him. The oral testimony of PW1 is to be appreciated in the light of Ex.P.1 and P.2 and with reference to evidence given by PW2.

15. PW2 was examined only to establish that Ex.P.2 was attested by him as a Notary Public. In his examination in chief he clearly stated that he attested the xerox copy after verifying the original. He identified his signature and seal on Ex.P.2. If the cross examination of PW2 is seen what appears is that he was not suggested that at least that Ex.P.2 is not the copy of Ex.P.1, the suggestion given to him that he had not certified on



Ex.P.2 that he verified the original. He denied the other suggestions.

16. Ex.P.2 contains the seal and signature of PW2. As a Notary Public he can only attest on the copy of the original endorsing it as a true copy. This requirement is forthcoming on Ex.P.2. He could have certified that he verified the copy with the original, but absence of such an endorsement is not fatal. Even without the evidence of PW2, if both Ex.P.1 and P.2 are compared a clear inference can be drawn that both are same, in other words, Ex.P.2 is the copy of Ex.P.1. Except that last page where endorsement with regard to payment of Rs.8,00,000/- is missing in Ex.P.1 otherwise it cannot be said that Ex.P.2 is not the copy of Ex.P.1.

17. Although the plaintiff's statement that defendant no.2 removed the last page containing endorsement of payment of Rs.8,00,000/- is somewhat difficult to be believed, his stand that he had made full payment of the consideration amount cannot be disbelieved. This inference can be drawn from condition no. 4 which contains payment schedule. Defendants do not dispute that possession of the flat was delivered to the



plaintiff. The payment schedule shows that last payment of 5% of the consideration amount should be made at the time of delivering possession or registration. That means unless last payment is made possession will not be delivered. Now if the plaintiff is in possession of the flat agreed to be sold to him, the obvious inference is that he should have made the last payment. Neither of defendants 3 and 4 entered witness box. Actually defendant no.4 should have adduced evidence to rebut the plaintiff's case because it was his signatures that are found below the endorsements in regard to payments made by the plaintiff. DW2 is the power of attorney holder of defendants 3 and 4. He was not a party to the agreement. He did not appear for cross examination after filing his affidavit in lieu of examination in chief and therefore his evidence was discarded. Though first defendant adduced evidence as DW1, he was not the contesting defendant and in his affidavit he just stated that defendants 2 to 4 constructed the fifth floor in violation of permission granted by the competent authorities. Evidence of DW1 has no consequence on the suit at all. There is no probability in the version of the defendants 2 to 4 that possession was delivered to the plaintiff on his request.



Defendant no.2 is a partnership firm involved in the business of constructing and selling the buildings. Unless entire payment is made, it is highly impossible to believe that they delivered possession of the flat to the plaintiff without receiving the entire consideration amount.

18. In Ex.P.2 the signature of defendant no.4 is found below all the endorsements made on different dates after having received the consideration amount in installments. Now if the last endorsement dated 04.11.2010 is seen, it was to defendant no.4 Rs.8,00,000/- was paid. Signature found below this endorsement clearly tallies with his other signatures found below the other endorsements in regard to payments of consideration amount on different dates. Therefore Ex.P.2 has got evidentiary value and it cannot be discarded. These being the factual aspects it is highly improbable to accept the specific stand of defendants 2 to 4 that the plaintiff was due in a sum of Rs.8,00,000/- and that was the reason for withholding of execution and registration of sale deed.



19. If the findings of the trial court are seen, as has been rightly argued by the appellant's counsel, they are not only pervert but also demonstrate total non application of mind to the evidence brought on record. The trial court has held that neither in the plaint nor in Ex.P.5, the plaintiff stated about notarization of original agreement, that PW2 did not verify whether there were signatures on each page of the original and this only indicated his dereliction of duty as a notary, that every payment made by the plaintiff before 04.11.2010 did not exceed Rs.3,00,000/-, then how he could make heavy amount of Rs.8,00,000/- at a time within four days from 30.10.2010 on which date he made payment of Rs.2,50,000/-. Referring to one answer of PW1 in the cross examination it is held by the trial court that at one stage he stated that he had made major portion of the amount and again he would cleverly say that he had paid the entire amount. These reasons recorded by the trial court only indicate the perfunctory way of appreciation of evidence in utter disregard to principles of appreciation of evidence in civil cases. These reasons therefore are wholly unsustainable. There is probability in the plaintiff's case that entire payment of consideration was made by him.



20. Defendant no.2, is a business firm. Its activity is construction and selling of buildings and flats. When there is ample evidence indicating payment of full consideration amount it has to execute the sale deed and get it registered. It is true that payments are not made by the plaintiff in accordance with the payment schedule forthcoming in condition no. 4 of the agreement. But defendants 2 to 4 having received the amounts on different dates, cannot go back upon other terms of the agreement. The finding on issue no.2 is in favour of plaintiff. For these reasons the judgment of the trial court deserves to be interfered with and now the following order:

ORDER

- i. The appeal is allowed with costs.
- ii. The judgment of the I Addl. Sr. Civil Judge, Belagavi in O.S. No. 364/2013 is modified.
- iii. The suit is decreed as prayed for by the plaintiff.
- iv. Defendants 2 to 4 are hereby directed to execute and register the sale deed in favour of the plaintiff within a period of three months from the date of this judgment.



- v. If the defendants 2 to 4 fail to execute the sale deed, the plaintiff can apply to the trial court for execution and registration of the sale deed.

The other part of the operative portion of the judgment of the trial court which directs defendants 2 to 4 to refund a sum of Rs.12,00,000/- to the plaintiff is set aside.

**Sd/-
(SREENIVAS HARISH KUMAR)
JUDGE**

**Sd/-
(T. G. SHIVASHANKARE GOWDA)
JUDGE**

BVV
LIST NO.: 1 SL NO.: 1