

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

SECOND APPEAL No.182 of 1990

JUDGMENT:-

The unsuccessful sole plaintiff had brought this Second Appeal under Section 100 of the Code of Civil Procedure, 1908 assailing the decree and judgment dated 29.08.1989 of the learned Additional District Judge, Ranga Reddy District passed in AS.No.122 of 1982. The learned Additional District Judge while allowing the said first appeal had set aside the decree and judgment dated 31.07.1982 of the learned Principal District Munsif, Hyderabad East and North passed in OS.No.52 of 1966 and dismissed the said suit.

2. I have heard the submissions of the learned counsel for the appellants. None appeared for the respondents. I have perused the material record including the brief note submitted by the learned counsel for the appellants.

3. At the time of the admission of this appeal, this Court had taken note of the substantial questions of law mentioned in grounds nos.4 and 5 of the memorandum of grounds of appeal and the said substantial questions of law read as follows:

4. **Whether in the absence of specific pleading that the plaintiff is not ready and willing to perform his part of contract, can the Court record the finding to that effect against the plaintiff?**
5. **Whether the court is disabled to award damages, even though not claimed for in the event of holding that the specific performance cannot be granted?**

[Reproduced verbatim]

4. To adjudicate the *lis* and answer the substantial questions of law, it is necessary to refer to the cases of the parties and the facts that lead to the filing of this second appeal.

4.1 The case of the sole plaintiff (since died) is this:

The sole defendant (since died) is the joint pattadar of the lands in S.Nos.101, 102, 103 and 104 admeasuring Ac.13.13 guntas situate at Turkayamjal village, Hyderabad East. On 10.08.1963, the defendant had entered into an agreement of sale with the plaintiff in respect of the plaint schedule lands, i.e., to the extent of his half share in the above said lands.

The defendant having thus agreed to sell the same for a consideration of Rs.3,500/- had received Rs.650/- under the agreement as part of sale consideration. Subsequently, the defendant had received Rs.2,565/- towards the balance of sale consideration on different dates. The payment of Rs.1,800/- was held to have been proved by the court of District Munsif, Hyderabad in OS.No.5 of 1965 and the said finding was upheld by the Court of first appeal in AS.No.39 of 1969 and as such the judgment in the said former proceeding operates as *res judicata*. Subsequently, the defendant had been promising that he would submit an application for permission and would execute a sale deed. But, he had failed to do so. The plaintiff and his brother are in possession of the entire land in the suit survey numbers as tenants and from the date of the agreement, the plaintiff has been enjoying the possession of the suit land to the extent of the half area of the entire land in the above said survey numbers as *bona fide* purchaser. While so, the defendant had changed his mind and had filed a suit-OS.No.5 of 1965 on the file of the Court of the District Munsif, Hyderabad and had tried to dispossess the plaintiff and his brother from the lands under the garb of injunction orders obtained in the said suit and had denied to execute the sale deed in favour of the plaintiff. Having filed a false suit he had later filed an application for permission to alienate the land in favour of one Babiah. The plaintiff is prepared to pay the balance sale consideration amount and obtain a regular registered sale deed. Hence the suit is filed for specific performance of agreement of sale dated 10.08.1963.

4.2. The defence of the sole defendant (since died), in brief, is this:

The material allegations in the plaint are false. It is true that the defendant had entered into an agreement of sale dated 10.08.1963 with the plaintiff and had agreed to sell his half share in the lands as mentioned in the plaint for a consideration of Rs.3,500/- and had received Rs.650/- as earnest money. But, the allegation that the defendant had received further sums of money on different dates as alleged in the plaint is false. The defendant never agreed to obtain any permission for alienating the subject land to the plaintiff. This defendant never agreed to register the sale deed within one month by receiving the balance of sale consideration. The plaintiff had agreed to get the sale deed registered within one month by paying the balance of sale consideration. As the plaintiff had failed to pay the balance of sale consideration, the agreement of sale stood cancelled. The plaintiff having agreed to take back the advance amount paid by him had surrendered the possession of the suit lands to the defendant on 14.12.1964 in the presence of witnesses. Subsequent to the said act of the plaintiff, the plaintiff and his brother were in unauthorized possession of the subject land. When the defendant demanded them to vacate the lands, the plaintiff had dodged the issue by agreeing to purchase half share of the defendant. In-fact, the defendant *bona fide* believed that the plaintiff would purchase the half share of the suit land and, therefore, had allowed him to continue in possession. But, when the plaintiff had failed to fulfill his obligations as per the said agreement to sell and as the said agreement to sell stood cancelled and as the plaintiff had accepted the said cancellation and had further accepted to receive back the money paid by him, the defendant had filed OS.No.5 of 1965 with true facts. The defendant is not under any legal obligation to execute any sale deed in favour of the plaintiff and the plaintiff had never demanded the defendant to execute the sale deed prior to the filing of the suit. The defendant, who is the owner of the suit lands, is at liberty to sell his share to any person after 14.12.1964. Before instituting the suit, the plaintiff had not issued any notice. There is no enforceable agreement to sell. The findings in the former suit do not operate as *res judicata* as it is only a simple suit for perpetual injunction. Hence, the suit is liable to be dismissed.

4.3. Taking into consideration the above pleadings, the trial Court had framed the following issues for trial.

1. Whether the defendant received Rs.2,565/- towards the sale amount subsequent to 10.08.1963?
2. Whether the plaintiff agreed to take back the advance from the defendant consequent to the cancellation of the agreement of sale?
3. Whether the plaintiff surrendered possession of the suit land to the defendant on 14.12.1964 and executed a document in proof of surrender of possession?
4. Whether the agreement of sale is unenforceable?
5. Whether the valuation is correctly made and sufficient court fee paid?
6. To what relief the plaintiff is entitled to?

[Reproduced verbatim]

4.4 At trial, the plaintiff was examined as PW3 and his supporting witnesses were examined as PWs1 and 2. Exhibits A1 to A8 were marked on the side of the plaintiff. The defendant was examined as DW1. However, no documentary evidence was adduced on the side of the defendant.

4.5 After full fledged trial and on merits, the trial Court had decreed the suit of the plaintiff. The operative portion of the decree reads as follows:

- “1. That the plaintiff shall deposit a sum of Rs.1,050/- in the court on or before 16.08.1982 being the balance sale consideration and shall give notice to the defendant or his counsel about the said deposit failing which the suit shall stands dismissed;**
- 2. that on such deposit the defendant shall execute and register a proper sale deed in favour of the plaintiff in respect of the lands mentioned in the agreement of sale dated 10.08.1963 and as shown in the schedule below within one month from the date of knowledge of deposit of the said amount mentioned supra failing which the plaintiff shall be entitled to get the sale deed registered through court in his favour in respect of half of the lands mentioned in the schedule and as per exhibit A1;**

- 3. this court doth further order that the plaintiff bear the necessary expenses and charges for the registration of the sale deed;**
- 4. this court doth further order that the defendant do pay Rs.809/- 50- to the plaintiff towards costs of this suit.”**

[Reproduced verbatim]

4.6 As already noted, the aggrieved defendant had preferred the first appeal and the same was allowed by the learned Additional District Judge. Therefore, the sole plaintiff (since died) had preferred this second appeal. Since, the sole plaintiff/appellant had died during the pendency of this appeal, his legal representatives were brought on record as appellants 2 to 4; and, they are prosecuting this second appeal. It is also pertinent to note that the sole defendant also had died during the pendency of this second appeal and his legal representatives were brought on record.

5. The learned counsel for the appellants would contend as follows:

The Court below had erroneously set aside and reversed the decree and judgment of the trial Court without properly appreciating the facts and the evidence brought on record. The Court below ought to have seen that there is no specific plea raised by the defendant that the plaintiff was not ready and willing to perform his part of the contract. The Court of first appeal while reversing the decree and judgment of the trial Court and while setting aside the decree for specific performance did not even grant the relief of refund of advance amount admittedly paid by the plaintiff to the defendant. The Court below was in error in not granting a decree for the refund of the advance amount paid by the plaintiff to the defendant. In any view of the matter, the plaintiff is entitled to award of damages. Not awarding damages and not granting the relief of refund of the amount paid by the plaintiff towards part of the sale consideration would result in unjust enrichment of the defendant. The court below was in error in holding that the plaintiff had set up a false plea of payment of balance of sale consideration and as such he is not entitled to the relief of specific performance. The court below ought to have

seen that the trial Court had considered this aspect and had categorically held in favour of the plaintiff and that there are no reasons calling for interference with the said well reasoned findings of the trial Court. The court below misconstrued the oral and documentary evidence and came to a wrong conclusion.

6. None appeared for the legal representatives of the deceased sole respondent/defendant and no submissions were made on their behalf.

7. Though a contention was raised in the defence of the deceased sole defendant that in view of the provision of Section 147 of the A.P (TA) Tenancy and Agricultural Lands Act, which was in force by then, the suit is not maintainable as no permission was obtained from the Tahasildar before alienating the property, the Court below had held that the suit for specific performance based on an agreement for sale is maintainable as the document executed is only an agreement for sale and not an out and out sale deed.

8. Now the first contention to be examined is – ‘Whether the plaintiff is always ready and willing to perform his part of the contract?’ Among the reciprocal promises, the obligation on the part of the plaintiff to pay the balance of sale consideration within the stipulated time is not dependant upon the other promises which the defendant has to perform. It is undisputed that as per the agreement for sale, the entire balance sale consideration has to be paid within one month from the date of the agreement. The onus of proof is upon the plaintiff to plead and prove readiness and willingness at all relevant times to perform his part of the contract and show that he has performed his part of the contract as per the terms agreed to between the parties. As per the provision of Section 16 of the Specific Relief Act unless the plaintiff establishes to the satisfaction of the Court that he has fulfilled the requirements of clause (c) of Section 16, he would not be entitled to the relief of specific performance. No doubt on a reading of the pleadings in the plaint, the Court below has expressed a view that though it is not specifically mentioned in so many terms in the plaint that the plaintiff is ready and willing

to pay the purchase money, still the said aspect is not fatal to the case of the plaintiff since in the plaint the plaintiff had alleged that he is prepared to pay the balance sale consideration amount and obtain a regular registered sale deed. The Court below held that the pleading of the plaintiff is sufficient obviously for the reason that no specific phraseology is required to show readiness and willingness of the plaintiff and it is enough if the plaintiff in substance shows in pleading the readiness and willingness to perform his part of the contract. The above findings on the adequacy of the pleadings of the plaintiff apart, in regard to the findings against the plaintiff on the aspect of proof of readiness and willingness to perform the essential terms of the contract, which are to be performed by the plaintiff as per the agreement other than the terms whose performance has been prevented by the defendant, what is to be noted is that indisputably the balance of sale consideration amount is payable under the agreement for sale within one month from the date of the agreement i.e., 10.08.1963. Admittedly, the plaintiff had paid Rs.300/- and Rs.1,500/- respectively under exhibit A6 dated 14.10.1963 and exhibit A7 dated 23.10.1963. Therefore, the failure of the plaintiff to fulfill the foremost among the reciprocal promises in regard to payment of the entire balance of sale consideration within one month from the date of the agreement discloses that the plaintiff is not ready and willing to perform his part of the contract. The plaintiff as PW3 had deposed that he had, in all, paid Rs.2,450/- to the defendant and that he had paid further amounts also to the defendant but did not say anything about his readiness and willingness to pay the balance of sale consideration. For the first time in his evidence he had also stated that in case the Court disbelieves the payments made by him, he is prepared to pay to the defendant the amount as may be found due by the Court. This evidence would lay bare that the plaintiff is himself not sure of the payments made by him, but, he has taken a stand that he had paid Rs.2,565/- to the defendant. The said payment as alleged by the plaintiff was denied by the defendant specifically. The Court below had found that there is no evidence much less documentary evidence to substantiate the plea of the plaintiff that further payments were made apart from Rs.2,450/-. The plaintiff had paid Rs.650/- under the agreement to sell besides Rs.300/- and

Rs.1,500/- under exhibits A6 and A7. Therefore, the contention of the plaintiff that Rs.2,565/- was paid is found to be incorrect and not established. In the plaint, the plaintiff had specifically pleaded as follows: - 'Subsequently, he (defendant) obtained Rs.2,565/- towards the sale amount on different dates.....' Therefore, though the plaintiff had pleaded that a further sum of Rs.2,565/- was paid by the plaintiff to the defendant, the evidence on record only would go to establish that he had paid in all Rs.2,450/-. Therefore, the Court below having analyzed the evidence in the correct perspective had held that the plaintiff had set up a false plea in regard to payment of consideration. The law is well settled that if a plaintiff who seeks specific performance of an agreement for sale sets up a false plea of payment he would not be entitled to the equitable relief of specific performance.

9. The learned counsel for the appellants had vehemently contended that the finding of the Court below that the plaintiff had taken a false plea of payment is erroneous as on this aspect the trial Court had expressly held in its judgment as follows: - 'The plaintiff had paid only Rs.2,450/- and not Rs.2,565/- as alleged in the plaint. The plaintiff had miscalculated the total amount paid to the defendant and this fact alone is not sufficient to dislodge the claim of the plaintiff who had already parted with major part of the total sale consideration of Rs.3,500/- in the circumstances of the case. The evidence of the plaintiff must be given weight. Merely because the PWs2 and 3 had deposed that they had paid more than Rs.1,800/-, it cannot be said that they have not paid even Rs.1,800/- under exhibits A6 and A7. The plaintiff had handed over the receipts to his counsel. It is the duty of the counsel to show correct total amount in the plaint. In the circumstances of the case, the mistake committed by the counsel in making calculation cannot be a ground to brush aside the contention of the plaintiff that he had paid certain amount after execution of the suit agreement.' In view of the above findings recorded to the above effect in the judgment of the trial Court, it was forcefully contended that the Court below was in error in holding that the plaintiff has set up a false plea of payment of consideration. This Court finds no acceptable merit in this contention for the following among other reasons:

‘The plaintiff did not specifically state in his evidence that there is a mistake in calculation and that mistake was committed by the counsel and had thus failed to explain the discrepancy in the amount of balance sale consideration that was allegedly paid and that on the other hand, he had specifically stated in his evidence that in case the Court disbelieves the payments made by him, he is prepared to pay to the defendant the amount as may be found due by the Court. Thus, when the material record does not show that such an explanation as was mentioned in the judgment of the trial court was offered by the plaintiff in his evidence and when there is no material brought on record to arrive at such a finding, which was recorded by the trial Court, it follows that the trial court was in error in holding that there is a miscalculation of the amount of consideration paid and that the said mistake was committed by the counsel. As a sequel, it must be held that the findings of the trial Court, which are extracted supra, are based on no pleading and evidence and obviously are based on surmises and conjectures. The law is well settled that a Court cannot go outside the pleadings and evidence and make out a case for a party, which is not pleaded and established.’ Therefore, the contention of the learned counsel for the appellants deserves no countenance. In **Jugrat Singh v. Raj Singh**^[1], the Supreme Court held that continuous readiness and willingness on the part of the plaintiff must be pleaded and proved at all stages from the date of the agreement to the date of the decree. In **C.Panduranga Rao v. C.Syamala Rao**^[2], it was held that where the plea of the plaintiff that he had paid the balance of sale consideration has been found to be not proved, such circumstances can be relied upon to conclude that the plaintiff was not ready and willing to perform his part of the contract. The above proposition is reiterated in **Krovvidi Kameswaramma v. Kudapa Balaramaiah**^[3]. In this case, a plea of payment of balance of sale consideration was found to be false. The settled legal position also supports the view of the Court below that the plaintiff is not ready and willing to perform his part of the contract and that the plea of payment of consideration, which is found to be false, disentitles the plaintiff to the equitable relief of specific performance. Therefore, the findings of the

Court below which find positive support from the reasons assigned and the applicable principles of law do not call for any interference.

10. Having regard to the above reasons, this Court finds that the Court below is justified in holding that the plaintiff who had set up a false plea of payment of consideration is not entitled to the equitable relief of specific performance and that the plaintiff, who is not ready and willing to perform his part of the contract by not paying the balance sale consideration within one month i.e., before 10.09.1963 is not entitled to the relief. In view of the narrow compass of the two substantial questions of law raised in the second appeal, the contentions raised by the learned counsel for the appellants do not merit consideration. Even otherwise, no valid and sufficient grounds as required under law are made out to over turn the well reasoned findings of fact recorded by the court below.

11. One of the grounds raised is that the Court below has not granted a decree for refund of the earnest money and part of sale consideration, which was admittedly paid by the plaintiff to the defendant, and that non granting of the said relief and the failure to award damages resulted in pecuniary loss to the plaintiff and consequential unjust enrichment of the defendant and that in any view of the matter, the Court below ought to have granted a decree for refund of earnest money and part of sale consideration which was admittedly paid by the plaintiff to the defendant. The fact remains that the plaintiff had only claimed the relief of specific performance of the suit agreement for sale and had consciously omitted to claim the relief of refund of the part of sale consideration including earnest money paid. Section 22 (1) (b) of the Specific Relief Act which starts with a non obstante clause mandates that notwithstanding anything to the contrary contained in the Code, any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case ask for any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or made by him, in case his claim for specific performance is refused. Sub-section (2) of Section 22 expressly states that no relief under clause (a) or clause (b) of sub-section (1) shall be granted by the Court unless it has been

specifically claimed. In view of the provision of law, the Court below is right in not granting the relief of refund of earnest money and part of sale consideration paid as no relief alternatively for refund of the said amounts was claimed by the plaintiff. The plaintiff did not also make an attempt even during the pendency of the first appeal to seek an amendment of the plaint; the plaintiff had thus failed to seek the alternative relief. This Court accordingly holds that the plaintiff is not entitled to the aforementioned alternative relief.

12. Viewed thus, this Court finds that there is no merit in the second appeal and that there is no substance in the substantial questions of law and hence, the second appeal is liable to be dismissed.

13. In the result, the Second Appeal is dismissed. There shall be no order as to costs.

Miscellaneous petitions pending, if any, in this appeal, shall stand closed.

M. Seetharama Murti, J

23rd September, 2015

Note: LR Copy to be marked.

(B/o)

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[\[1\]](#) AIR 1995 SC 945

[\[2\]](#) 1994 (4) ALT 270 (D.B)

[\[3\]](#) 1998(5) ALD page 68 (D.B)