THE HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

SECOND APPEAL No.1082 OF 1999

JUDGMENT:

The instant Second Appeal is preferred by the plaintiff,
who was successful before the trial Court i.e., District Munsiff, Palakol, by the judgment and decree dated 21.04.1995, in O.S. No.149 of 1988, and unsuccessful before the lower appellate Court i.e., Senior Civil Judge, Narsapur, by the judgment and decree, dated 24-08-1999,
in A.S. No.34 of 1995. The sole respondent herein is the defendant in the original suit and appellant in the appeal suit.

2. For the sake of convenience, the parties are referred to as arrayed before the trial Court.

3 (a) The fact-situation occurring in the instant case for the purpose of disposal of the instant second appeal, in a nutshell, is that the plaintiff said to have entered into an agreement of sale with the defendant on 27.05.1985 for a total sale consideration of Rs.6,000/- for purchasing Ac.0-30 cents of wet land situated in R.S. No.163/5 of Tillapudi Village, Palakol Mandalam, Veeravaram Sub-District and paid Rs.5,000/- towards advance and the defendant said to have executed the agreement of sale

on the very same day mentioning therein that the balance shall be payable within six months and in case of failure to charge interest on the balance amount. It is according to the plaintiff that he made ready the balance amount and issued a telegraphic notice on 02.05.1988 requiring the defendant to execute a regular sale deed by receiving the balance sale consideration, but the defendant did not comply with it, and, therefore, he filed the suit in O.S. No.149 of 1998 on the file of the District Munsiff, Palakol.

(b) The defendant filed written statement traversing the averments made in the plaint. She has denied the very execution of the agreement of sale. A plea was also taken that the suit was barred by time. According to the defendant, she purchased the plaint schedule property with her Sthreedhana. She averred that the plaintiff is a stranger to her and she never offered to sell the property and since she was living with her husband, there was no question of directly dealing with the plaintiff to sell the property and to execute a sale agreement. Thus, she pleaded that the suit agreement of sale is a forged document and she was not obliged to execute registered sale deed by receiving the balance sale consideration as urged by the plaintiff. It is also pleaded that the property was worth Rs.20,000/- to 25,000/- and that there was no need for her to sell the plaint schedule property.

4. The trial Court framed the following five (5) issues

for consideration:

> "i. Whether the suit sale agreement dated 27-5-85 is true, valid and binding on the defendant?
>
> ii. Whether there is any privity of contract between the plaintiff and defendant for sale of the plaint schedule property and if so whether the plaintiff is entitled to the relief of specific performance of sale of the plaint schedule property?
>
> iii. Whether the plaintiff is entitled to the alternative relief of the refund of the advance amount of Rs.5000/- with an equitable damages of Rs.883-35 ps and for charge over the plaint schedule property?
>
> iv. Whether the defendant is entitled to compensatory costs?
>
> v. To what relief?"

5. To substantiate their respective cases, the plaintiff, besides examining himself as PW.1 also examined one of the attestors to the agreement of sale, dated 27-05-1985 (Ex.A-1) as PW.2 and its scribe as PW.3 and marked Exs.A-1 and A-2, agreement of sale and true copy of the telegraphic notice, respectively. The defendant examined herself as DW.1 but no documentary evidence was adduced.

6 (a) The trial Court on appraisal of evidence believed the agreement of sale basing on the answers

given by the defendant in denying her signature on her *vakalatnama* and keeping in view the definite answer as to whether her signature occurring on Ex.A-1 does belong to her or not and further deriving the probabilities that she failed to examine her husband though, she answered to a question in her cross-examination that her husband never attested Ex.A-1 sale agreement and the inconsistency in the evidence of PWs.1 to 3 as to the place of execution of Ex.A-1, was ignored by the trial Court by assigning reasons therefor and thereby held issue No.1 in favour of the plaintiff.

(b) On issue No.2, since the trial Court believed the execution of Ex.A-1 and the husband of the defendant standing as an attestor to it and also basing on the evidence of PW.1 that the husband of the defendant has negotiated the transaction, held it in favour of the plaintiff observing that there is privity of contract between the plaintiff and the defendant.

(c) On issue No.3, since the trial Court recorded finding on issue Nos.1 and 2 in favour of the plaintiff, opining that the said issue cannot be decided in favour of the plaintiff and, thus, held it against the plaintiff and similar finding was tendered on issue No.4. Concerning issue No.5, basing on the findings recorded on issue Nos.1 and 2, decreed the suit directing the defendant to receive balance sale consideration with interest and to execute a regular sale deed in favour of the plaintiff.

7. Aggrieved by the aforesaid judgment and decree of the trail Court, the defendant preferred A.S. No.34 of 1995.

8. The lower appellate Court having narrated the respective stands taken by the plaintiff and the defendant, formulated the following three points for consideration:

> "1) Whether the suit agreement of sale is true, valid and binding on the defendant?
>
> 2) Whether the plaintiff is entitled to the relief of specific performance of (*Sic.* or) for the alternative relief?
>
> 3) To what relief?"

9 (a) Concerning point No.1, as to the validity of agreement of sale, the lower appellate Court on reappraisal of evidence, opined that Ex.A-1 appears to have been written at Tillapudi or at least describes the scribe as resident of Tillapudi and considering the inconsistency in the evidence of PWs.1 and 3 as regards place of execution of Ex.A-1 doubted its genuinity. The lower appellate Court also derived a probability observing, the circumstance that the plaintiff althrough keeping quite got issued a telegraphic notice after expiry of two years eleven months without allowing the defendant to send reply notice and, thus, it gives any amount of doubt and,

thereby, held that the same was done by the plaintiff with ulterior motive. The lower appellate Court also referred to the discussion made by the trial Court and observing that the learned District Munsiff was taken over by the evidence of DW.1 in denying her signature on the *vakalatnama* and her failure to identify her signature on the written statement and further observing that the learned District Munsiff went wrong in holding that the contention of the defendant that her signature on Ex.A-1 does not belong to her cannot be accepted and, thereby, held that the said reasoning is improper. Thus, on point No.1, the lower appellate Court holding that the plaintiff failed to establish the genuinity of Ex.A-1, decided it in favour of the defendant.

(b) On point No.2, acceding to the submission of the learned counsel for the defendant, who relied on the decision of a Division Bench of this Court in **Krovidi Kameswaramma and others v. Kudapa Balaramayya and another** [1998 (5) ALT 69] laying down the proposition that the plaintiff who approaches the Court with unclean hands is not entitled to the equitable relief of specific performance and also another decision of a Division Bench of this Court in **Sardar Amarjeet Singh v. Nandu Bai and others** [1998 (5) ALT 412] that the plaintiff must prove that he has been ready and willing to perform his part of contract and applying the analogy in the said decision to the fact-situation occurring in the instant case, held that the plaintiff failed to prove his case that he was ready and willing to perform his part of contract. Concerning alternative relief pleaded by the plaintiff, the lower appellate Court held that since Ex.A-1 itself is not proved, he is not entitled to the alternative relief and, thus, allowed the appeal setting aside the judgment and decree of the trial Court.

10. Aggrieved of the aforesaid judgment and decree, the plaintiff preferred the instant appeal raising the following substantial questions of law:

> "a) Whether lower Appellate Court is justified in allowing the appeal ignoring the conduct of the Defendant, denying her signature not only on Ex.A-1, but also on written statement and vakalat, which go to show the falsehood of the claim of the Defendant was writ large on the face of it?
>
> b) Whether the lower Appellate Court is justified in allowing the appeal ignoring the settled proposition of law that once defendant denies signature on written statement and vakalat, the Court should have decreed the suit without subjecting the parties to the protracted trail (*Sic.* trial).
>
> c) Whether the lower Appellate Court is justified in not drawing adverse inference against the Defendant U/s.114(g) of Indian Evidence Act, who in her examination admitted that she wanted to examine her husband on her behalf, who is an attestor, and did not do so. The Hon'ble Supreme Court in AIR 1968 SC 1413 held that a person who is

> in possession of best evidence, if that person withholds it, Court ought to draw adverse inference against that person not withstanding that onus of proof doesn’t lie on that person.
>
> d) Whether Lower Appellate Court is justified in attributing ulterior motive to the Plaintiff/Appellant when the suit is filed within time.”

11. Heard Sri P. Prabhakar, learned counsel for the appellant (plaintiff). Though notice was served on the sole respondent (defendant), none appears for her.

12. Learned counsel for the plaintiff would submit that the lower appellate Court went wrong in setting aside the judgment and decree passed by the trial Court which was a well reasoned judgment based on appreciation of evidence on record and also based on the probabilities derived by it from the proved facts. He would submit that the lower appellate Court went wrong in ignoring the categorical answers given by the defendant as DW.1 in her cross-examination in denying her signature occurring on *vakalatnama* and not giving definite answer as to her signature occurring on her written statement. He submits that in a similar situation, the Hon’ble Supreme Court in the decision of **K.S. Satyanarayana v. V.R. Narayana Rao**[1] held that denial of signature of a party on written statement and *vakalatnama*, basing on which dismissal of suit by the trial Court on a protracted trial as illegal. He

would also submit that the very reasoning adopted by the trial Court in drawing an adverse inference for non-examination of the husband of the defendant despite the fact the defendant answering in her cross-examination that she would examine her husband, who according to the plaintiff is one of the attestors to Ex.A-1, ought not to have withheld, and, in the said context, he placed reliance on a decision of the Hon'ble Supreme Court in **Gopala Krishnaji Ketkar v. Mohamed Haji Latif and others**[2] for the proposition that when a party in possession of best evidence which would throw light on the issue in controversy withholds it, the Court ought to draw an adverse inference against him notwithstanding that onus of proof does not lie on him and that party cannot rely on abstract doctrine of 'onus of proof' or on the fact that he was not called upon to produce it. It is, therefore, his submission that the lower appellate Court went wrong in drawing adverse inference and raising doubt on the genuinity of Ex.A-1 without there being process of reasoning based on appreciation of evidence, and, therefore, sought to set aside the judgment and decree passed by the lower appellate Court and to restore the judgment and decree passed by the trial Court.

13. Perused the judgments rendered by both the Courts below and the evidence on record.

14. The lower appellate Court doubted the genuinity of Ex.A-1 on two grounds. The first being, inconsistency among the witnesses as regards place of execution of Ex.A-1. PWs.1 and 3 have stated that Ex.A-1 was executed at Narsapur, whereas PW.2 stated that it was executed at Palakol. The lower appellate Court also drawn an inference in the context of conduct of the plaintiff in sending a telegraphic notice for the first time after expiry of two years eleven months from the date of Ex.A-1 without allowing the defendant to give any reply accounting for creating any amount of doubt in execution of Ex.A-1 by the defendant and overturned the findings of the trial Court on issue Nos.1 and 2.

15. The trial Court has dealt with elaborately said inconsistency and held that the said inconsistency is not that serious in nature to create doubt in taking place of the suit transaction, more particularly, when PWs.1 and 3 have asserted that Ex.A-1 was executed at the house of PW.3 at Narsapur. It is not although the trial Court was carried away by the evidence of PWs.1 and 3, but the trial Court mainly based on the denial of defendant as to her signature occurring on *vakalatnama* and not identifying her signature on the written statement. It is no doubt true, the defendant denied her signature on Ex.A-1, but there was no reason for the defendant to deny her signature occurring on *vakalatnama* filed on her behalf and also to

admit her signature occurring on the written statement, more particularly, when she has given a positive answer that she is a signatory. That conduct of the defendant exemplifies that she, somehow, or the other making an attempt to wriggle herself out from such a situation and in that process she has denied her signature on the *vakalatnama* and did not specifically deny her signature on the written statement. This Court has an occasion to look at the signature occurring on Ex.A-1 purported to be that of the defendant with that of the signature occurring on the written statement and her deposition. The signature on Ex.A-1 is in Telugu and when her signature occurring in the written statement is compared with the signature occurring on Ex.A-1, they appear to be identical and similar.

Coming to her deposition, strangely she signed on it in English language. The *vakalatnama* of the defendant is not placed on record since the same is treated as an 'immaterial paper' for the purpose of deciding the instant second appeal and that has been the reason the trial Court or the lower appellate Court has not sent the immaterial papers.

16. Be that as it may, the very conduct of the defendant in signing on the written statement in Telugu language and when she examined herself as DW.1 on 27-03-1995, which was more than six and half years after

the written statement was filed, since the written statement was filed on 22-08-1988, signing in English language in her deposition, is sufficient enough to cull out that the defendant deliberately signed in English to avoid the decree that would be passed to enforce Ex.A-1. Certainly, this conduct of the defendant cannot be sidelined.

17. Turning to the decision in **K.S. Satyanarayana's Case** (Supra 1), it would be apt to refer to the observations of the Hon'ble Supreme Court contained in paragraph No.7, thus:

> "7. A piquant situation had developed before the trial Court when the 1st defendant denied his signatures on the written statement and Vakalatnama in favour of his counsel. Trial court should have immediately probed into the matter. It should have recorded statement of the counsel for the 1st defendant to find out if Vakalatnama in his favour and written statement were not signed by the 1st defendant whom he represented. <u>It was apparent that the 1st defendant was trying to get out of the situation when confronted with his signatures on the Vakalatnama and the written statement and his having earlier denied his signatures on Exh. P. 1 and Exh. P. 2 in order to defeat the claim of the plaintiff. Falsehood of the claim of the 1st defendant was writ large on the face of it. Trial Court could have also compared the signatures of the 1st defendant as provided in Section 73 of the Indian Evidence Act. Section 73 is reproduced as under:-</u>
> "Comparison of signature, writing or seal with other admitted or proved."

> 73. In order to ascertain whether a signature, writing, or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose.
> The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.
> This section applies also, with any necessary modifications, to finger impressions."

18. The reasoning adopted by the lower appellate Court in doubting the genuinity of Ex.A-1 merely on the circumstance that Ex.A-2 notice was given two years eleven months after the execution of Ex.A-1 without allowing to give reply by the defendant is not convincing as the said circumstance would not give rise to any suspicion in regard to the sale agreement transaction.

19. It is no doubt true, Ex.A-2 was issued on 02-05-1988 and the plaint was presented on 06-05-1998, but, on that ground, the genuinity of Ex.A-2 cannot be doubted when the evidence of PWs.1 and 3 was consistent with the case of the plaintiff.

20. As to non-examination of the husband of the

defendant as a witness on her behalf by her despite answering in her cross-examination that she would examine him, accounts for withholding the best evidence falling within the ambit of illustration (g) of Section 114 of the Evidence Act, 1872. It is not as though non-examination of the husband of the defendant is of no consequence for the reason that the entire case of the plaintiff is to the effect that the husband of the defendant negotiated the transaction under Ex.A-1 and signed therein as one of the attestors. Thus, it has to be construed that non-examination of her husband by the defendant in the said circumstances would give rise to an adverse inference as in case he stepped into witness box, truth of the transaction under Ex.A-1 would have been unravelled. Thus, it attains greater significance in the context of assessing the genuinity of Ex.A-1 which the lower appellate Court has completely ignored.

21. Thus, it has to be held that the lower appellate Court went wrong in setting aside the judgment and decree passed by the trial Court as the reasoning adopted by it is not based on proper appreciation of evidence, and, therefore, it is liable to be set aside holding that the questions of law agitated by the plaintiff stood substantiated.

22. Therefore, the Second Appeal is allowed setting aside the judgment and decree passed by the lower

appellate Court and restoring the judgment and decree passed by the trial Court. No order as to costs.

23. Consequently, Miscellaneous Applications, if any, pending in the appeal, stand closed.

A. SHANKAR NARAYANA, J

October 30, 2015.
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[1] AIR 1999 SC 2544
[2] AIR 1968 SC 1413