THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

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A.S.No. 1506 OF 1997

JUDGMENT:

The 1st defendant in O.S.No. 406 of 1992 on the file of the Court of III Additional Subordinate Judge, Visakhapatnam (for short, 'the trial Court'), preferred this appeal challenging the decree and judgment dated 15-09-1997, whereunder a decree was passed against the defendants making them jointly liable for payment of Rs.60,000/- together with interest.

2. The appellant was the 1st defendant, respondent Nos. 1 to 4 were the plaintiffs and the 5th respondent was the 2nd defendant before the trial Court and they will hereinafter be referred as arrayed before the trial Court for convenience of reference.

3. The plaintiffs filed the suit for specific performance of oral agreement of sale dated 22-04-1989 and for recovery of possession of schedule property, in the alternative, for recovery of amount paid as advance alleging that the 1st plaintiff is wife and plaintiff Nos. 2 to 4 are children of late Dr. Dhavala Durga Prasad Rao who entered into an agreement of sale with the defendants, paid advance of Rs.60,000/- out of the agreed sale consideration of Rs.90,000/- and receipt of the same was acknowledged by the 1st defendant by issuing a receipt to that effect. In pursuance of paper publication in Enadu Daily dated 10-04-1989 under the caption 'House Site for Sale' with phone No. 54732, Dhavala Durga Prasad Rao along with his brother contacted the 2nd defendant by phone. The 2nd defendant, in turn, replied that he is the power of attorney and agreed to produce power of attorney within three days. After three 3 days, when Dhavala Durga Prasad Rao, along with his brother, contacted the 2nd defendant, he stated that the 1st defendant is the original owner and he will

be available on 22-04-1989. On 22-04-1989, the said Dhavala Durga Prasad Rao entered into an agreement for Rs.90,000/- and paid advance of Rs.60,000/- while agreeing to pay balance of sale consideration at the time of registration. Accordingly, on 22-04-1989, the 2nd defendant scribed a receipt for Rs.60,000/- duly signed by the 1st defendant towards advance sale consideration for sale of plot No. 1 measuring 300 square yards in S.No. 1/1 of Waltair Ward and passed it to Dhavala Durga Prasad Rao. Later, the said Dhavala Durga Prasad Rao, by phone, contacted the defendants expressing his readiness and willingness to pay balance of sale consideration but the defendants did not perform their part of obligation. However, the said Dhavala Durga Prasad Rao got issued legal notice dated 19-01-1990 calling upon the defendants to receive balance of sale consideration and execute registered sale deed in his favour but the 2nd defendant issued a contentious reply on 07-05-1990 with frivolous allegations contending that one Ammoru is the owner of schedule property; at the request of the 1st defendant, he was permitted to use his telephone number in the advertisement. On enquiry, Dhavala Durga Prasad Rao came to know that neither of the defendants are owners of schedule property and they are not competent to execute sale deed but both the defendants, with dishonest intention, agreed to sell the property, received advance of Rs.60,000/- and passed a receipt in favour of Dhavala Durga Prasad Rao but failed to execute registered sale deed. Hence, the suit.

4. The 1st defendant filed written statement denying material allegations of the plaint *inter alia* contending that either the deceased Dhavala Durga Prasad Rao or the plaintiffs are not known to him; he is the owner of schedule property; he never issued any publication offering sale of house site and never received Rs.60,000/- as advance at any time from Dhavala Durga Prasad Rao passing receipt dated 22-04-1989. The 1st defendant, a

builder, had acquaintance with the 2nd defendant, who is a bank employee, in connection with purchase of a plot. During the course of sale transaction, the 1st defendant issued a receipt to the 2nd defendant. Taking advantage of the receipt, the sale transaction is created and got filed the suit by the plaintiffs and the 2nd defendant. Therefore, the 1st defendant is not liable to perform his part of obligation. Consequently, he is not liable for any of the reliefs claimed in the plaint. The suit claim is barred and prayed for dismissal of the suit.

5. The 2nd defendant filed separate written statement but the contentions raised by him are not relevant for deciding the present appeal since he did not prefer any appeal.

6. On the strength of the above pleadings, the trial Court framed the following issues (extracted):

Issues:

1) *Whether there is a privity of contract either between the plaintiffs and the defendants or between the late husband of the 1st plaintiff and the defendants?*

2) *Whether the receipt dated 22-04-1989 is true, valid and binding the first defendant?*

3) *Whether the suit is within time?*

4) *Whether the plaintiffs are entitled for specific performance of oral agreement of sale dated 22-04-1989 or in the alternative whether the plaintiffs are entitled for recovery of Rs.1,40,000/- towards the refund of advance with interest thereon and damages?*

5) *To what relief?*

7. During the course of trial, on behalf of the plaintiffs, P.Ws.1 and 2 were examined and got marked Exs.A1 to A12. On behalf of the defendants, D.W.1 was examined but no documents were marked.

8. The trial Court, upon hearing both counsel and considering oral and documentary evidence, while declining to pass decree for specific

performance, passed decree for alternative relief of refund of advance amount together with interest.

9. Aggrieved by the decree and judgment, the 1st defendant alone preferred the present appeal raising several contentions almost reiterating the grounds raised in the written statement. The main contention of the 1st defendant is that there is no privity of contract between Dhavala Durga Prasad Rao and him but the receipt issued by him to the 2nd defendant, in connection with sale transaction between them, was misused and created the suit transaction under Ex.A2. Therefore, the 1st defendant is not liable to pay any amount but the trial Court, on erroneous appreciation, passed decree and finally prayed to set aside the same.

10. During the course of argument, learned counsel for the 1st defendant, reiterated the grounds raised in the appeal while contending that the trial Court did not appreciate the specific pleas raised in the pleadings. Though the plaintiffs failed to prove the privity of contract between them and the defendants, the trial Court erroneously passed decree. In fact, the 2nd defendant alone is the person responsible for creation of receipt; therefore, at best, the 2nd defendant alone is liable to pay decretal amount and finally prayed to exonerate him from payment of decretal amount.

11. *Per contra*, learned counsel for the plaintiffs argued totally in support of the findings recorded by the trial Court while submitting that the 1st defendant, though raised several contentions, did not adduce any evidence in support of his contentions. In the absence of any evidence, the Court cannot dismiss the suit basing on the unsubstantiated pleas raised in the written statement and prayed to dismiss the appeal confirming the decree and judgment of the trial Court.

12. Considering rival contentions, perusing oral and documentary

evidence and the decree and judgment under challenge, the only point that arises for consideration is as follows:

> "*Whether the 1st defendant, along with the 2nd defendant, is liable to pay Rs.60,000/- together with interest which the 1st defendant allegedly received along with the 2nd defendant as advance of sale consideration, if not, whether the decree and judgment passed by the trial Court be sustained?*"

13. **In Re. Point:**

The plaintiffs filed the suit for specific performance of oral agreement of sale alleging that late Dhavala Durga Prasad Rao, husband of the 1st plaintiff and father of plaintiff Nos. 2 to 4, purchased schedule property under oral agreement of sale for Rs.90,000/- and paid advance of Rs.60,000/-. The trial Court, declining to pass decree for primary relief of specific performance, granted decree for recovery of Rs.60,000/- together with interest, which is alternative relief, believing the oral agreement of sale between Dhavala Durga Prasad Rao and the defendants. However, the said finding is now under challenge before this Court. In the present case, the plaintiffs got examined P.Ws.1 and 2. P.W.1, brother of Dhavala Durga Prasad Rao, accompanied him and was present at the time of settlement, bargaining and passing of Ex.A2 receipt by the 1st defendant which is in the handwriting of the 2nd defendant. Therefore, the plaintiffs proved execution of Ex.A2 acknowledging receipt of Rs.60,000/- as advance of sale consideration. Ex.A2, though styled as receipt acknowledging receipt of Rs.60,000/-, contained all the terms of agreement of sale of an immovable property. Even if it is treated as receipt, the 1st defendant received Rs.60,000/- from Dhavala Durga Prasad Rao. Except suggesting that no amount was paid in cross-examination of P.W.1, nothing was elicited to rebut the evidence of P.W.1 with regard to payment of advance of sale consideration of Rs.60,000/- under

Ex.A2. The evidence of P.W.1 is corroborated by P.W.2. Therefore, the evidence of P.Ws.1 and 2 is consistent with regard to passing of consideration under Ex.A2 to the 1st defendant and they are wholly reliable witnesses since nothing was elicited to impeach the trustworthiness of P.Ws.1 and 2 in the entire cross-examination.

14. Though the 1st defendant raised several contentions disputing the very transaction attributing *mala fides* to the 2nd defendant, nothing was elicited in the cross-examination of P.Ws.1 and 2 and not substantiated the plea of the 1st defendant adducing any oral evidence. In the absence of any evidence, the plea whatever raised in the written statement is of no avail and, on the strength of such plea, the suit cannot be dismissed. According to the settled principle of law that a fact in issue is to be proved by adducing direct evidence or by producing secondary evidence. Here, the plea of the defendants is not substantiated by any evidence and obviously, for different reasons, the 1st defendant did not enter into witness box to prove the specific contention raised in the written statement. In fact, the 1st defendant is the best person to speak about the circumstances under which Ex.A2 was passed to the 2nd defendant allegedly. Hence, the trial Court, having no other alternative, believed the evidence of P.Ws.1 and 2 and, disbelieving the plea of the defendants as it is not supported by any evidence, passed decree in favour of the plaintiffs making both the defendants liable for payment of decretal amount.

15. Though several contentions were raised before this Court in this appeal basing on pleadings, those contentions need no further examination as the 1st defendant miserably failed to substantiate his contention by adducing any evidence. Hence, I find no illegality in the decree and judgment passed by the trial Court against the defendants jointly. As I find no

illegality or irregularity in the finding recorded by the trial Court warranting interference of this Court, I have no hesitation to hold that both the defendants are jointly liable to pay the amount due to the plaintiffs. Accordingly, I hold that there is an oral agreement between Dhavala Durga Prasad Rao and the defendants, and Dhavala Durga Prasad Rao paid advance of sale consideration of Rs.60,000/- under Ex.A2 but the defendants failed to perform their part of obligation *i.e.* to execute registered sale deed. However, as the defendants are not the owners, they cannot be compelled to execute registered sale deed as it cannot be enforced under Section 17 of the Specific Relief Act, 1963 (for short, 'the Act of 1963'). Even otherwise, Section 13 (1) (d) of the Act of 1963 permits purchaser to recover amount when his vendor has no title to the property. Therefore, the decree and judgment of the trial Court directing both the defendants to pay the decretal amount is free from any illegality. Hence, the finding of the trial Court is hereby confirmed holding this point in favour of the plaintiffs and against the defendants.

16. In view of my foregoing discussion, I find no merits in the appeal and it deserves to be dismissed.

17. In the result, the appeal is dismissed confirming the decree and judgment dated 15-09-1997 passed in O.S.No. 406 of 1992 on the file of the Court of III Additional Subordinate Judge, Visakhapatnam. Pending miscellaneous petitions in this appeal, if any, shall stand dismissed in consequence. No order as to costs.

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M.SATYANARAYANA

MURTHY, J.

Date: 04-09-2015.

JSK