THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

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SECOND APPEAL No.386 of 2015

JUDGMENT:

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This appeal under Section 100 of the Code of Civil Procedure, 1908 by the unsuccessful plaintiffs is directed against the decree and judgment dated 18.01.2010 of the learned Principal District Judge, holding Full Additional Charge of II Additional District Judge, Ongole passed in AS.No.1 of 2008. The learned Principal District Judge while allowing the said appeal filed by the defendants had set aside the decree and judgment dated 18.12.2007 of the learned Principal Senior Civil Judge, Ongole passed in OS.No.71 of 2005 and had dismissed the said suit filed for specific performance of an agreement for sale dated 03.09.1994 executed by the defendants.

2. I have heard the submissions of the learned counsel for the appellants/plaintiffs ('the plaintiffs, for brevity) and the learned senior counsel for the respondents/defendants ('the defendants', for brevity). I have perused the material record.

3. At the time of admission of this second appeal, the following substantial question of law was formulated.

> 'Whether the decree and judgment of the Court below are vitiated for reversing the judgment and decree of the trial court on the ground of delay in seeking specific performance, though there was no delay in seeking specific performance in the facts and circumstances of the case and when the delay, if any, has not caused any prejudice to the defendants and when the plaintiffs are otherwise entitled to the equitable relief of specific performance being always ready and willing to perform their part of the contract.'

4. To adjudicate the *lis* and answer the above-said substantial question of law, it is necessary to refer to the pleadings of the parties and the facts that lead to the filing of this second appeal by the plaintiffs.

4.1 The case of the plaintiffs, in brief, is this:

The 1st defendant is a firm represented by its managing partner, who is the 2nd defendant. The 3rd defendant is the other partner of the said firm. The defendants had purchased the suit schedule land and plotted the land into house plots as per a plan prepared. Having sold some of the plots, they had felt that it is better to sell away the total land with the rest of the plots at random. Having come to know of the inclination of the defendants, the plaintiffs had approached the defendants to purchase the rest of the plots which remained unsold with the defendants. Both the parties had entered into an agreement for sale dated 03.09.1994 agreeing that one acre of land shall be sold at the rate of Rs.1,23,500/-. The plaintiffs had paid an advance of Rs.1,00,000/- and the same was received by the defendants on the date of the agreement for sale. Both the parties had agreed to get the land measured and have the balance of sale consideration determined after ascertaining the extent of land. The plaintiffs and the defendants had further agreed to sell away the plots, plot by plot and appropriate the balance of sale consideration step by step. The plaintiffs had agreed to pay and the defendants had agreed to receive interest on the balance of sale consideration as and when the plots are sold step by step. The defendants have agreed to induct the plaintiffs into possession of the plots and had in-fact inducted the plaintiffs into possession of the plots. The plaintiffs had demanded the defendants to register the plots whenever sold by the plaintiffs and whenever occasions arose for execution of the registered documents in favour of the purchasers. As per the agreement, the defendants are obliged to come to the Registrar's Office and register the documents in favour of 3rd party purchasers and receive proportionate balance of sale consideration and endorse the same on the back of the suit agreement for sale. That practice went on for a long time and accordingly sales took place and registrations of plots were completed to some extent and the plaintiffs had paid to the defendants the balance of sale consideration and had obtained endorsements on the reverse of the agreement for sale for the payments made respectively as under: 'Rs.1,00,000/- on 12.08.1995; Rs.20,000/- on 14.08.1995; Rs.14,000/- on 14.08.1995; Rs.36,000/- on 30.09.1995; Rs.70,000/- on 18.05.1996; Rs.45,000/- on 21.01.2000; however for Rs.57,000/- no endorsement was made; these payments are apart from Rs.1,00,000/- which was paid as advance.' Thus, the defendants, in all, had received Rs.4,32,000/-. The defendants had intended to appropriate the payment made on 14.08.1995 towards interest and the same was made a mention on the reverse of the agreement by an endorsement.

The plaintiffs, who are having a responsibility to pay interest, had accepted for the same. The plaintiffs were and are always ready and willing to perform their part of the contract. The burden was on the defendants to get the land measured and have the total extent ascertained in order to determine or arrive at the total sale consideration and to receive the balance of sale consideration with interest after deducting the amounts paid and endorsed on the reverse of the agreement for sale dated 03.09.1994. However, on one pretext or the other, the defendants had postponed the measuring of the land whenever requested by the plaintiffs. Hence, the plaintiffs could not get the sale deeds registered in their names. Therefore, the plaintiffs had got issued a notice calling upon the defendants to come forward and execute registered sale deeds in the names of the plaintiffs after receiving the balance of sale consideration with interest. The defendants having received the notice got issued reply through their counsel with false and frivolous allegations. They had denied the last payment of Rs.57,000/- as there was no endorsement. The plaintiffs, who are always ready and willing to perform their part of the contract, are ready to forego the above payment and make the said payment once again without prejudice to their rights and contentions to recover the same through other proceedings. Hence, the suit is filed.

4.2 The written statement filed by the 2nd defendant was adopted by the defendants 1 and 3. In the written statement while denying the averments in the plaint, the defendants had *inter alia* contended as follows:

They had originally purchased Ac.18.93 cents of land and had got prepared a lay out. By the year 1994, they had sold away 222 plots. Therefore, 48 plots had remained unsold with plot numbers 223 to 270. At that time, the plaintiffs had approached the defendants for sale of the remaining land, which is about Ac.4.00 cents. The agreement for sale covers the said Ac.4.00 cents of land besides a portion of site on the North-West corner. The plaintiffs had agreed to pay Rs.1,23,500/- per acre and had paid an advance sale consideration of Rs.1,00,000/- under the agreement for sale. It was agreed that within 3 months from the date of the agreement, the land should be measured and the total extent of the land should be ascertained and that the balance sale consideration at the rate of Rs.1,23,500/- per acre should be paid by the plaintiffs after deducting the advance and that the regular registered sale deeds shall be obtained in the names of the plaintiffs or their nominees. On measurement, the total extent of the land was ascertained as Ac.3.94

cetns. Subsequently, the North-West corner of the land was also plotted into 12 plots. Therefore, the total plots became 60 in number. The plaintiffs never came forward to pay the entire balance of sale consideration within 3 months and on the other hand, from 08.07.1995 onwards, the plaintiffs had started making part payments from time to time and obtaining the sale deeds in favour of 3rd parties in respect of individual plots. The defendants had executed the sale deeds as and when the plaintiffs had requested them. On 27.01.2000 the defendants had registered six plots at the instance of plaintiffs and received a payment of Rs.57,000/- but the same was not endorsed on the reverse of the agreement. In all the defendants had executed sale deeds for 30 plots out of 60 plots, at the instance of the plaintiffs. After 27.01.2000 the plaintiffs did not come forward to pay the balance of sale consideration with interest and obtain regular registered sale deeds in respect of the remaining 30 plots. The schedule land under the agreement was never given possession to the plaintiffs. The claim for specific performance of the agreement is barred by law of limitation since after 27.01.2000 the plaintiffs had never come forward to pay the balance of sale consideration and perform their part of the contract and had allowed the agreement to be barred by law of limitation. The notice got issued by the plaintiffs is only a futile attempt. The measurement of the land was completed admittedly after the execution of the agreement. The suit may be dismissed.

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

1. Who is at fault for performing their part of contract?
2. Whether the suit is barred by limitation?
3. Whether the plaintiff is entitled for specific performance of contract?
4. To what relief?

4.4 At trial, the 2nd plaintiff and his supporting witnesses were examined as PWs1 to 3 and exhibits A1 to A11 were marked on the side of the plaintiffs. On the side of the defendants, the 3rd defendant was examined as DW1 and exhibits B1 to B5 were marked.

4.5 After full fledged trial, the trial Court had answered all the issues in favour of the plaintiffs and against the defendants and directed the defendants to execute the registered sale deeds pursuant to the suit agreement for sale dated 03.09.1994 under exhibit A1 in favour of the plaintiffs or their nominees at the expenses of the plaintiffs after receiving the balance of sale consideration amounts from them. However, as already noted, the Court below having allowed the appeal had set aside the decree and judgment of the trial Court. The operative portion of the judgment of the Court of first appeal reads as under:

> **'In the result, the appeal is allowed in part with no costs while setting aside the decree and judgment of the trial court dated 18.12.2007 passed in OS.No.71/2005 on the file of Prl.Senior Civil Judge's Court, Ongole in decreeing the suit for the relief of specific performance by dismissing the suit in OS.No.71/2005 on the file of Prl.Senior Civil Judge's Court, Ongole holding that the plaintiffs are not entitled for the equitable relief of specific performance of contract for sale for remaining 30 plots out of the total 60 plots they purchased under the contract for sale dated 3.9.1994 from the defendants but for entitled to get back the excess amount, if any, paid by the plaintiffs to the defendants over and above value of the 30 plots already sold, the extent of which to be ascertained and thereby the parties have to file their respective calculation memos with respective objections within one month from today to determine the exact refundable amount from defendants to plaintiffs to be determined with interest thereon from the respective dates at 12% pa., till realisation, with charge over the plaint schedule property.'**

[Reproduced verbatim]

Therefore, the aggrieved plaintiffs are before this Court.

5. The learned counsel for the plaintiffs had contended as follows:

Under the suit agreement for sale, possession of the land was delivered to the plaintiffs by the defendants. There is a recital in the agreement that the land was delivered by the defendants to the plaintiffs. The defendants, having received the consideration, had executed registered sale deeds in favour of the plaintiffs' nominees in respect of 30 plots. Even after the time of three months fixed under the agreement, the defendants had received parts of consideration with interest and executed certain sale deeds. Therefore, admittedly time is not the essence of the contract. The defendants had agreed for sale of property plot wise and received consideration along with interest as and when sale deeds were executed and registered plot wise in favour of the nominees of the plaintiffs. Therefore, the defendants cannot go back from the commitment as the cost of the property in the locality has increased. The conduct of the defendants in refusing to execute and register the sale deeds in respect of 30 plots caused irreparable loss to the plaintiffs. The defendants had received the entire sale consideration besides interest. The defendants cannot take advantage of the situation and are bound to perform their part of the contract as the entire sale consideration was paid and the plaintiffs are put in possession of the land. The trial Court having considered the facts correctly and the evidence in the right perspective had answered the issues in favour of the plaintiffs. The Court below has misconstrued the facts and evidence and based its findings on assumptions and presumptions. So long as the time is not the essence of the contract as held by the Court below and when the suit is not barred by law of limitation, the Court of equity should exercise the discretion in favour of the plaintiffs more particularly when registered sale deeds were executed in respect of 30 plots and part of the agreement was executed and the remaining part of the agreement for the remaining 30 plots had remained unexecuted. It is inequitable to deny the relief to the plaintiffs insofar as the remaining 30 plots. There are no grounds to interfere with the well considered judgment of the trial Court. However, without assigning valid reasons, the Court below had held that possession of the land was not delivered to the plaintiffs and that the plaintiffs did not come to court within a reasonable time and that the long delay from 27.01.2000 till exhibit A2 notice dated 01.10.2004 is sufficient to deny the equitable relief of specific performance to the plaintiffs. The Court below ought to have seen that the plaintiffs who paid the consideration in full and being in possession of the land have no obligation on their part to further perform any part under the contract and it is only the defendants who are required to perform their part of the contract and execute registered sale deeds in favour of the plaintiffs or their nominees, as and when demanded by the plaintiffs. The judgment of the appellate Court being against facts and evidence brought on record is unsustainable.

6. The learned senior counsel for the defendants while supporting the decree and judgment of the Court below had contended as follows:

The plaintiffs have come to Court by taking false pleas not only in regard to delivery of possession but also in regard to readiness and willingness. The sale deeds executed contain recitals that the property was delivered by the executants to the purchasers. It was admitted by the plaintiffs in their evidence that property was not delivered to the plaintiffs and it was recited in the various sale deeds including exhibits B1 to B5 that the property under respective sale deeds was delivered by the defendants to the purchasers as the defendants were in possession and not the plaintiffs. The sale consideration was fixed at the rate of Rs.1,23,500/- per acre. A time of three months was fixed under the contract. Though it was falsely contended that the defendants did not come forward for measuring the land, it was admitted by the plaintiffs in their evidence that measurements were taken and the extent of total land came to Ac.3.94 cents. It is also borne out by evidence that the North-Western site which was unplotted was also plotted into 12 plots making the total plots 60 in number. It was borne out by record that though the balance of sale consideration was agreed to be paid within 3 months it was not so paid as stipulated but was paid in instalments. After 27.01.2000 there was a long delay of nearly 3 years 10 months till the notice under exhibit A2 dated 01.10.2004 was issued. The defendants sold 222 plots. Unable to sell the remaining plots the transaction was entered into with the plaintiffs. The intendment was to sell the plots at the earliest and make money. Therefore, in the facts and circumstances of the case, the plaintiffs ought not to have unduly delayed in getting the plots sold. 30 plots were sold step by step and consideration was received piece meal though consideration was fixed at a rate payable per acre of land. The plaintiffs were never ready and willing to perform their part of the contract having been unable to get purchasers for plots step by step for 3 years 10 months as per the oral arrangement pleaded by them. Hence, they have come forward with false pleas that they are ready and willing to purchase the remaining plots. Their very conduct would show that they have deviated from the written agreement and the pleaded oral arrangement and had taken false pleas. The Court below properly analysed the facts in juxtaposition with the evidence and had recorded a finding of fact that for taking false pleas and for the inordinate delay on the part of the plaintiffs they are disentitled to the equitable relief of specific performance. When such a view is probable and plausible and when such a finding of fact was recorded supported by valid and cogent reasons, this Court while exercising jurisdiction under Section 100 of the Code shall not interfere with the same. The questions raised are not pure questions of law and there is no substance in the alleged substantial questions of law.

7. I have carefully gone through the pleadings and the oral and the documentary evidence. The execution of exhibit A1-agreement for sale is admitted. The defendants having originally purchased Ac.18.93 cents of land had laid out the same into plots (say about 270 plots) while leaving some site towards North-West corner without laying out the same. Even by the date 03.09.1994 of exhibit A1 the defendants had sold 222 plots. The defendants 2 and 3 who are the partners of 1st defendant firm found that the sale of plots is not lucrative and, therefore, they had intended to sell the remaining unsold plots to the plaintiffs at the rate of Rs.1,23,500/- per acre after ascertaining the exact extent on measurement; and the defendants had received Rs.1,00,000/- as advance. Subsequently, the land was measured and the extent was ascertained as Ac.3.94 cents as borne out by the evidence on record though the plaintiffs had taken a plea that the defendants did not come forward for measuring the land. It is also borne out by record that the North-Western site was also plotted into 12 plots and the total number of plots swelled from 48 to 60. The total consideration for Ac.3.94 cents of land comes to Rs.4,86,500/-. Commencing from 08.05.1995, the part payments were made though the time fixed for balance of sale consideration is three months. As per mutual understanding whenever the plaintiffs could secure the purchasers for plots, the defendants had executed sale deeds step by step for 30 plots at the instance of plaintiffs from 1995 to 2000 and received considerations in part as endorsed on the reverse of exhibit A1 besides interest which the plaintiffs had agreed to pay. The balance 30 plots had remained unsold. The plaintiffs pleaded that possession of the property was delivered to them. But, the evidence brought on record would show that possession of the land was not delivered under the agreement as by that date even the extent was not ascertained. It is also borne out by record that as and when sale deeds were executed for plots step by step the respective plots were delivered to the purchasers by the defendants. Therefore, as rightly held by the Court below, the evidence brought on record would show that the possession remained with the defendants and was not delivered to the plaintiffs as contended by them. The plaintiffs had contended in the plaint that in all Rs.4,32,000/- was paid whereas the consideration on measurement arrived at is much more. In-fact, the payments made inclusive of interest for 30 plots sold from 08.05.1995 to 27.10.2000 works out to Rs.4,81,500/-. Further though the defendants had admitted receipt of Rs.57,000/- which was not endorsed on the reverse of the agreement and had not disputed the said payment, the plaintiffs had strangely contended that the defendants had denied the said payment as it was not endorsed on the reverse of exhibit A1 and that, therefore, they are prepared to forego the said payment and again make the said payment. Why such a plea was taken is unexplained when the part payment is not at all disputed. Subsequent to 27.01.2000, the plaintiffs had kept quiet and did not make any demand whatsoever for registering the unsold plots either in their names or in the names of their nominees/purchasers. Suddenly, the plaintiffs had got issued a notice under exhibit A2 dated 01.10.2004 about 4 years 10 months later without giving any reasons for the delayed demand. The defendants having found that selling plots is not lucrative had entered into exhibit A1 agreement with the plaintiffs with a view to sell away the land at a rate fixed per acre of land. Contrary to that agreement, the plaintiffs had started obtaining the sale deeds for the plots in favour of the purchasers by making part payments step by step and the plaintiffs had also paid interest; and, even that arrangement was violated by not affecting any sales of plots through the defendants for nearly 4 years 10 months; and, during that long period of time no demand was made and finally a notice under exhibit A2 was got issued. Therefore, there is also unexplained delay even in getting the remaining plots sold step by step. Therefore, the plaintiffs cannot be said to be ready and willing all through. In **Narinderjit Singh v. North Star Estate Promoters Limited** it was held as follows:

> **Further Section 16(c) of the Act envisages that the plaintiff must plead and prove that he had performed or that he is always ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the Court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the Court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with the other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The Court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract.**

Having regard to the reasons, the conduct of the plaintiffs and the attending facts and circumstances, this Court finds that the court below is justified in holding that the plaintiffs have taken a false plea of delivery of possession of property and that the plaintiffs were not ready and willing to perform their part of the contract and that in the absence of continuous readiness and willingness on the part of the plaintiffs, they are not entitled to the equitable relief of specific performance.

8. Before parting with the case it is necessary to mention that the learned counsel for the plaintiffs/appellants had placed reliance upon the following decisions: (1) **Zarina Siddiqui v. A. Ramalinga @ R. Amarnathan; (2) Durga Prasad and others v. Kanhiyalal and others; and (3) Taja Singh v. Ram Parkash Talwar and others.** The first cited decision is relied upon in support of the proposition that the remedy for specific performance is an equitable remedy and while granting the decree for specific performance the Court has to exercise its discretionary jurisdiction in accordance with sound and reasonable judicial principles but not arbitrarily and that the equitable discretion to grant or not to grant a relief depends upon the conduct of the parties and that even if the defendant suppresses material facts and make distorted versions, the discretion cannot be exercised in favour of the defendant. The decision 2nd cited of the Rajasthan High court is relied upon in support of the proposition that in regard to grant of relief under Section 53-A of the Transfer of Property Act the question whether a contract is specifically enforceable or not has no bearing at all. In the decision 3rd cited the necessary conditions for application of Section 53-A of the Transfer of Property Act are stated. In the well considered view of this Court, the decisions are not helpful to the plaintiffs as in the peculiar facts of the instant case, for the reasons assigned supra, this Court finds that the Court below was justified in holding that it is not a fit case to exercise the equitable discretion in favour of the plaintiffs.

9. Having regard to the reasons, this Court finds no reasons calling for interference with the well considered findings of the Court below, which are supported by valid and cogent reasons. Hence, this Court holds that the judgment and decree of the Court below do not suffer from any infirmities calling for interference. Accordingly, this Court holds that there is no substance in the substantial questions of law and that second appeal is devoid of merit and is liable to be dismissed.

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

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

M. SEETHARAMA MURTI, J

28th October, 2015

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