

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

APPEAL SUIT NO.1269 OF 1997

JUDGMENT:

The defendant in O.S.No.6 of 1984 on the file of the Court of the Subordinate Judge, Vijayawada, filed this appeal challenging the decree and judgment dated 26.08.1993, wherein the suit filed by the plaintiff was decreed in part directing the defendant to pay Rs.93,870/- after deducting Rs.30,500/- together with interest at the rate of 6% per annum on the principal amount of Rs.93,870/- from the date of suit till the date of realization of Rs.30,500/- and thereafter, on the balance amount.

2. For convenience of reference, ranks given to the parties before the trial court will be adopted throughout the judgment.

3. The plaintiff filed suit for relief of specific performance of agreement of sale dated 16.07.1981 seeking direction against the defendant to pay Rs.93,870/- and together with interest at the rate of 24% per annum from the date of suit till date of realization and in the alternative for delivery of lorry bearing No. ADM 3168 of the defendant in good condition within the time fixed by the court, alleging that the plaintiff is the owner of the lorry bearing No.ADM 3168, 1978 model, on 16.07.1981, the defendant agreed to purchase the same for Rs.1,90,000/-, entered into agreement. On the date of agreement, the defendant paid a sum of Rs.5,760/- and took delivery of lorry from the plaintiff. The defendant agreed to pay balance of sale consideration in installments, however, he paid Rs.10,000/- to the plaintiff and obtained agreement of sale in writing from the plaintiff. As per the terms of agreement, an amount of Rs.30,000/- out of balance of Rs.1,74,240/- was agreed to be paid in 30 monthly installments at the rate of Rs.4,808/- each payable before 16th of every month. The defendant also agreed to redeliver lorry to the plaintiff in case of his failure to pay

balance of sale consideration as agreed and transfer by registration, after performance of part of the agreement i.e., payment of entire sale consideration.

4. The defendant also executed the counter agreement dated 30.07.1982 in favour of the plaintiff, but failed to perform part of his obligation under agreement and committed default in payment of installments.

5. The defendant paid total a sum of Rs.80,370/- by 12.06.1983 but in irregular intervals. The payments made by the defendant were endorsed on the reverse of agreement but not on the counter agreement. Thus, the defendant paid only Rs.96,130/- out of total consideration of Rs.1,90,000/-.

6. Though the plaintiff has always been ready and willing to perform his part of obligation under agreement, due to default committed by the defendant, the plaintiff was put to heavy loss, whereas, the defendant has earned huge profit by plying the vehicle on hire etc. The plaintiff through her representatives and her husband demanded the defendant to pay, balance of sale consideration and to perform part of his obligation, but no purpose was served. On the otherhand, substituted the old and worn out tyres and removed material parts of the lorry. Suspecting the defendant, the plaintiff got issued a registered notice, dated 30.09.1983, demanding the defendant to pay balance of sale consideration or redeliver the lorry in a good condition, but the notice was returned. On coming to know that the defendant is plying the vehicle in remote areas, the plaintiff got issued another notice dated 13.12.1983. Acknowledging the receipt of the said notice, the defendant sent a reply after a month contending that he paid Rs.44,000/- in advance towards interest and other incidental expenses, but the same was not endorsed on the agreement. On the assurance of plaintiff's husband, the defendant did not consider endorsement of the said amount on the plaint. He also

raised several contentions which are not based on any material but failed to pay balance of sale consideration performing part of his obligation under the agreement. However, the defendant filed criminal complaint against the plaintiff before the IV Additional Judicial First Class Magistrate, Vijayawada, alleging that the petitioner committed theft of lorry with all false allegations, but the complaint was dismissed. Having no other alternative, the plaintiff filed the present suit for the aforesaid reliefs.

7. The defendant while admitting purchase of lorry from the plaintiff for Rs.1,90,000/-, contended that the defendant is not liable to pay Rs.93,870/- as claimed in the plaint. The defendant admitted that he entered into an agreement of sale for purchase of lorry bearing No.ADM 3168 and he paid Rs.5,750/- on 16.07.1981, Rs.10,000/- and Rs.44,000/- on 30.07.1981 to the plaintiff. But Rs.44,000/- was paid towards interest in advance and the husband of the plaintiff did not get the same endorsed on the agreement of sale and insisted that he could believe him in this regard. The lorry was agreed to be sold for consideration of Rs.1,90,000/-. Subsequently, the defendant paid Rs.80,370/- on different dates between 16.08.1981 to 12.06.1982. Thus, the defendant in all paid Rs.1,41,350/- out of which Rs.97,350/- only endorsed on the agreement of sale. Thus, the defendant is liable to pay Rs.48,650/- only to the plaintiff towards balance of sale consideration and not liable to pay Rs.93,670/-.

8. It is further contended that as the vehicle was taken away forcibly by the plaintiff without transferring the vehicle in the name of the plaintiff, he could not pay balance of installments due to loss in the business and that the plaintiff committed theft of the vehicle from the 'Latha Mechanical Works shop' at Vijayawada and thereupon the petitioner filed a complaint before the IV Additional Judicial First Class Magistrate and Advocate Commissioner was appointed entrusting the search warrant to Sri Sreepathi Rao, Advocate, Vijayawada, and on enquiry, the defendant came to know that chasis and engine numbers

were altered by the husband and brother of the plaintiff with the help of some other mechanics and that they obtained another registration for the vehicle as AAK 2853. Thereafter, the defendant could not get any information that the vehicle was kept in Chinaparupudi and has found it there personally. The defendant earlier gave report to Station House Officer, Pamarru, on 27.12.1983, about commission of theft, however, no action was taken, but filed a private complaint before the VI Additional Judicial First Class Magistrate, Vijayawada, for the offences committed under Section 292 IPC read with Section 156(3) Cr.P.C. and the same is pending. After filing of the complaint, the magistrate referred the matter to the police with a direction to conduct investigation, seize the lorry bearing No.ADM 3168 now plying under the disguised No.AAK 2853. Accordingly, VIII Town Police Station, registered a crime and issued FIR. On coming to know about the alleged complaint, the plaintiff and her husband filed the present suit with false allegations.

9. The plaintiff also filed a petition for appointment of Commissioner to take custody of the lorry from the out-skirts of Vijayawada with a view to stage manage, the whole affair and in fact, the plaintiff himself shown the vehicle, as the vehicle was stealthily taken away by the plaintiff herself. The Commissioner appointed by the court found the vehicle in the out-skirts of Yenganarayanapuram Village, Nandigama Taluk. Later the vehicle was auctioned and realised meager amount and therefore, the defendant was put to much inconvenience, as such, the plaintiff is not entitled to recover the amount and prayed to dismiss the suit.

10. On the strength of the above pleadings, the trial court framed the following issues:

1. Whether defendant in all paid Rs.1,35,000/- and only Rs.97,350/- was endorsed by plaintiff on the agreement of sale?

2. Whether defendant committed breach of contract?
3. Whether husband of plaintiff robbed the lorry ADM 3168 and changed its number to AAK 2853?
4. Whether lorry was in possession of plaintiff or defendant till it was seized?
5. Whether plaintiff is not entitled for relief prayed for?
6. To what relief?

11. During the trial, P.Ws.1 and 2 were examined, marked Exs. A1 to A15 and on behalf of defendants DWs.1 to 6 were examined and marked Exs. B1 to B9.

12. Upon hearing argument of both counsel, considering oral and documentary evidence, the trial court passed a decree for recovery of Rs.93,870/- from the defendant after deducting Rs.30,500/-, which was realised by sale, together with interest at 6% per annum on the principal sum of Rs.93,870/- from the date of suit till the date of realisation of Rs.30,500/- and thereafter on the balance amount at the same rate of interest.

13. Aggrieved by the decree and judgment of the trial court, the present appeal is filed by the defendant therein raising specific contention that the defendant paid Rs.44,000/- on 13.07.1981 towards interest in advance along with other charges but believing the representation of husband of the plaintiff, the defendant did not get the same endorsed on the agreement of sale and no financier would lend the amount without any interest. Therefore, the conclusions arrived by the trial court disbelieving payment of Rs.44,000/- on 30.07.1981 are baseless and improbable to natural conduct of any financier.

14. The defendant further contended that when the defendant raised a plea of discharge, the court has to take into consideration all surrounding circumstances to believe or disbelieve the plea of discharge, but the trial court ignored the surrounding circumstances.

15. Voluminous evidence on record probablises the contention that the defendant paid Rs.44,000/- but the trial court did not look into the probabilities of the case, which is a basic requirement in appreciation of evidence in Civil cases and committed error in disbelieving the payment of Rs.44,000/-.

16. During hearing, learned counsel for the appellant while reiterating the contentions raised in the grounds of appeal regarding payment of Rs.44,000/- and circumstances under which he has not endorsed on the agreement, raised an additional contention that the agreement was not produced before the court and on this ground, the suit is liable to be dismissed placed reliance on the judgment of the Hon'ble Apex Court in **Church of Christ Charitable Trust and Educational Charitable Society** ^[1], prayed to dismiss the suit filed by the plaintiff by setting aside the decree and judgment passed by the trial court.

17. Per contrary, the counsel for the plaintiffs/respondent herein supported the decree and judgment under challenge in all respects and prayed to dismiss the appeal by confirming the decree and judgment passed by the trial court in O.s.No.6 of O.S.No.6 of 1984 on the file of the Court of the Subordinate Judge, Vijayawada.

18. Considering rival contentions, perusing the oral and documentary evidence including the decree and judgment under challenge, the points that arose for consideration are as follows:

1. Whether payment of Rs.44,000/- made by the defendant to discharge the obligation under the agreement of sale is true, if not, the defendant is liable to pay the suit amount?
2. Whether non production of agreement pleaded by the plaintiff is a ground to dismiss the suit?

19. **Point No.1:**

Though the defendant raised several contentions before the trial court regarding payment of Rs.44,000/- towards interest in advance and other incidental charges, besides, raising a contention that the lorry was stealthily taken away by the plaintiff/ respondent from the mechanical shop and filing of criminal case etc, in the grounds of appeal, the sole contention raised by the defendant is limited to payment of Rs.44,000/- towards interest in advance and other incidental charges.

20. The trial court disbelieved the payment of Rs.44,000/- towards interest and other incidental expenses in advance, since it was not endorsed on the agreement of sale or no receipt was obtained from the plaintiff or her representative evidencing payment of Rs.44,000/-. But the counsel for the defendant before this court would contend that the plaintiff is a financier and no financier would allow the purchaser to pay balance of sale consideration without interest and it is the usual practice of the financiers. Therefore, payment of Rs.44,000/- towards interest and other incidental expenses in advance is probable to the natural circumstances, more particularly in the finance business in and around Vijayawada area. No doubt, if the plaintiff is financier, certainly, the financier in normal circumstances will collect interest on the balance of sale consideration. But here, the plaintiff is the owner of the lorry, who entered into an agreement with the defendant, for sale of lorry under Ex.A.1. The agreement and later counter agreement executed by the plaintiff in favour of the defendant were marked as Ex.A.1. The only contention raised before this court is that the original agreement pleaded by the plaintiff was not produced, but this will be considered at appropriate stage, while deciding Point No.2. In any event, the defendant purchased lorry for consideration of Rs.1,90,000/- and paid part of the consideration as agreed under the agreement besides the alleged payment of Rs.44,000/- on 30.07.1981, which was admittedly not endorsed either on the counter agreement or alleged agreement with the plaintiff. When the defendant pleaded discharge by

paying Rs.44,000/-, it is the duty of the defendant to produce cogent and satisfactory evidence to prove that he paid Rs.44,000/- as interest and other incidental expenses in advance.

21. According to the plaintiff, the interest agreed to be paid was at 17% before the trial court, but there is no clause for payment of interest in the agreement or counter agreement - Ex.A.1. As per the evidence of P.W.1, the value of the lorry was fixed at Rs.1,90,000/- and there was no understanding regarding payment of interest, but the plaintiff agreed to receive the consideration in installments, though the defendant is not related to P.W.1 and he had no dealings earlier. Even to contention of the defendant is accepted for providing finance with interest at 9% per annum only the interest comes to Rs.42,400 as calculated by the trial court besides finance charges Rs.1,000/- and other charges Rs.500/-, which comes to Rs.44,000/- . This contention is not supported by any evidence and that to P.W.1 categorically stated there is no understanding for payment of interest, in such case, question of payment of Rs.44,000/- in advance on 30.07.1981 is not acceptable. If the rate of interest at 17% on Rs.1,00,000/- for a period of 30 months plus insurance and agreement charges in a sum of Rs.15,000/- comes to Rs.44,000/- and the same was collected from the defendant. If that is so, the total consideration payable would be Rs.1,41,650/-, if not paid Rs.44,000/-. Even otherwise, in the cross examination to D.W.1, he made an admission that he is maintaining account with the bank and no transaction was made on 30.07.1981 to show the withdrawal of Rs.44,000/- and he further admitted that there is no documentary evidence in writing to prove that he paid Rs.44,000/- to the plaintiff. In the further cross-examination, he admitted that terms of Exs.A.1 and B.1 were mutually agreed upon. From the evidence of D.W.1, it is clear that no documentary evidence is available to substantiate his contention that he paid Rs.44,000/- on 30.07.1981.

22. In fact, there was registered correspondence with the plaintiff

and defendant, Ex.A.4 is the reply notice wherein the plaintiff raised a contention that he paid Rs.44,000/- on 30.07.1981 at the earliest point of time towards interest. But actually, the sale of the lorry was effected splitting the amount Rs.44,000/- into different heads i.e., advance interest, insurance charges, finance charges and other incidental charges which comes to Rs.44,000/- and it was not his contention either in the written statement or at the earliest reply notice. Therefore, the evidence to substantiate the contention that he paid Rs.44,000/- to the plaintiff is not substantiated by cogent and satisfactory evidence and no other person was examined in whose presence the amount was allegedly paid to prove the factum of payment of Rs.44,000/- on 30.07.1981.

23. Even according to the evidence of D.W.1, one Musunuru Venkata Narsaiah was present at the time of payment of Rs.44,000/-, but for the reasons best known to him, the said person was not examined to prove the alleged payment of Rs.44,000/- on 30.07.1981. In the evidence of P.w.1, he specifically denied payment of Rs.44,000/- towards interest, insurance charges etc., in advance and failed to endorse the same on the reverse of the agreement and the value of the lorry is Rs.1,90,000/-. Normally, any purchaser requests his vendor to endorse Rs.44,000/- which was a huge amount during those days but the conduct of the defendant is not consistent to the natural circumstances. Therefore, it is difficult to accept the payment of Rs.44,000/- on 30.07.1981, since it was not substantiated by any satisfactory and cogent evidence. Therefore, the trial court disbelieved the subject payment.

24. Even before this court, there is nothing to improve the case of the defendant to prove payment of Rs.44,000/- on 30.07.1981, towards interest insurance amount etc as contended by him. On the otherhand, the consistent evidence available on record would show that there was no agreement for payment of interest on the installments due or the balance of sale consideration payable to the plaintiff. In such case, it is

difficult for me to accept the contention that the plaintiff paid advance of Rs.44,000/- towards interest, insurance charges etc. Assuming for a moment that the defendant has to pay interest, insurance charges etc., it is only in addition to the amount agreed under Ex.A.1. and it would not form part of the sale consideration under Ex.A.1. Therefore, such payment, if any proved, does not amount to discharge of the installments agreed to be paid under Ex.A.1 towards value of the lorry. Hence, I find no substance in the contention of the defendant regarding payment of Rs.44,000/- in advance and it would not amount to discharge of part of the installments due under Ex.A.1, even if, there is any separate payment of interest, insurance charges etc. Hence, finding of the trial court is free from any illegalities and does not call for interference of this court. Hence, this point is held in favour of plaintiff and against the defendant.

25. Point No.2:

One of the major contention raised before this court is that the agreement pleaded in the plaint was not produced though it was reduced in writing and non-production of the agreement disentitled the plaintiff to claim a decree and the plaint shall be rejected by exercising the power under Order VII Rule 11 of CPC and drawn the judgment of the Hon'ble Apex Court in **Church of Christ Charitable Trust and Educational Charitable Society**, referred supra. The Apex Court while dealing similar circumstances in Para 30 of the Judgment held as follows:

"In the light of the above discussion, in view of the shortfall in the plaint averments and statutory provisions, namely, Order 7 Rule 11, Rule 14(1) and Rule 14(2), Forms 47 and 48 in Appendix A of the Code which are statutory in nature, we hold that the learned Single Judge of the High Court has correctly concluded that in the absence of any cause of action shown as against the first defendant, the suit cannot be proceeded either for specific performance or for the recovery of money

advanced which according to the plaintiff was given to the second defendant in the suit and rightly rejected the plaint as against the first defendant. Unfortunately, the Division Bench failed to consider all those relevant aspects and erroneously reversed the decision of the learned Single Judge. We are unable to agree with the reasoning of the Division Bench of the High Court, and finally upheld the judgment of the Single Judge of the High Court in rejected the plaint as the cause of action was not pleaded in the plaint was not substantiated.”

26. Placing reliance on the above judgment, the counsel for the defendant has drawn attention of this court to certain contents of the plaint more particularly about entering in an agreement on 16.07.1981, which is admittedly not produced before the trial court. Whereas the counsel for the plaintiff contended that it is only an oral agreement and it was not reduced into writing, therefore, non-production of the document is not fatal and on this ground, the plaint cannot be rejected. The plaint is silent whether the agreement dated 16.07.1981 was reduced in writing or oral, but the cause of action for the suit arise on 16.07.1981, on which the plaintiff and defendant entered into agreement, the same was not produced, if it is reduced in writing. Therefore, non production of the agreement dated 16.07.1981 before the trial court, which is the basis for cause of action for filing the suit is fatal according to the counsel for the defendant.

27. No doubt, the law declared by the Apex Court in the judgment referred supra is totally in support of the contention of the counsel for the defendant, but before the trial court no other plea was raised in the written statement except denying the agreement dated 16.07.1981. But the trial court did not insisted the plaintiff to produce the agreement dated 16.07.1981, if reduced into writing and not even recorded any finding whether the said agreement is oral or written. Strangely in the grounds of appeal filed under Order XLI Rule 1 of CPC, no such ground was raised about non-production of agreement dated 16.07.1981. Order XLI Rule 1 of CPC contemplates that every appeal

shall be preferred in the form of a memorandum, signed by the plaintiff or his pleader and presented to the Court or to such officer as appointed in this behalf. The memorandum shall be accompanied by a copy of the judgment. Sub-Rule 2 says that memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and such grounds shall be numbered consecutively.

28. Order XLI Rule 2 says that the appellant shall not, except by leave of the court, urge or be heard in support of any ground or objection not set forth in the memorandum of appeal, but the appellate court in disposing the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this Rule provided that the court shall not rest its decision on the said grounds unless the party should get effected, thereby has had a sufficient opportunity of contesting the case on that ground. Thus, it is clear from Order XLI Rules 1 and 2 that the appellant has to set forth his objections precisely in the grounds of appeal or in the memorandum and the appellant cannot be permitted to raise any additional ground without the leave of the court and court shall not rest its decision on such ground which was not raised without affording any opportunity to the other counsel. In the present case, the appellant did not obtain leave of this court to raise additional ground to rest its decision on any other ground, other than raised in the memorandum of appeal by way of objection to the decree and judgment. A similar question came up before Full Bench of Madras High Court in **Ramachandra Naidu And Ors. vs Vengama Naidu And Ors**^[2], wherein Madras High Court held that when the appellate court wants to decide the case on any other ground, concerned party must be given an opportunity to contest his case. But, here no leave was obtained by the counsel for defendant/appellant to raise new plea other than the objections set out in the memorandum of appeal. Therefore, such ground urged by the counsel for the defendant for the

first time during agreement cannot be accepted, since no leave was obtained from this court by the counsel for the appellant. At this stage, the learned counsel for the defendant/appellant in support of his contention drawn the attention of this court to the judgment of the Hon'ble Apex Court in **Rachakonda Narayana Vs. Ponthala Parvathamma and Another**^[3], wherein the Hon'ble Apex Court in Para No.9 and 10 held that the plea regarding inability to pay the consideration in a suit for specific performance can be entertained by the First Appellate Court since it is a continuation of suit under Section 96 of CPC. It appears from the facts of the above judgment a specific objection was raised in the memorandum of appeal under Order XLI Rule 1 of CPC, but here it is a different situation where no such objection was raised before this court in the memorandum of objections to the decree and judgment under challenge and no leave was obtained under Order XLI Rule 2 of CPC to raise such contention before this court. Therefore, the law declared by the Apex Court in the above two decisions would not assist the defendant to get any relief in this appeal.

29. In view of my foregoing discussion, it is not open to the defendant to raise such contention that the plaint is liable to be rejected under Order VII Rule 11 of CPC for non-production of the agreement pleaded in the plaint, dated 16.07.1981, for the first time during agreement without raising such contention either before the trial court or in the memorandum of objections to the decree and judgment under Order XLI Rule 1 of CPC. Hence the contention of the counsel for the defendant is devoid of merits in view of Order XLI Rule 2 of CPC and the same cannot be accepted to reverse the decree and judgment of the trial court. Accordingly, point is held in favour of the plaintiff and against the defendant.

30. In view of the findings on the point Nos. 1 and 2, the appeal is devoid of merits and deserves to be dismissed.

31. In the result, the appeal is dismissed, confirming the decree and judgment of the trial court in O.S.No.6 of 1984 on the file of the Court of the Subordinate Judge, Vijayawada, but without costs in the circumstances. Miscellaneous petitions, if any, pending in this appeal shall stand closed. No costs.

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M.SATYANARAYANA MURTHY, J

Date: 23.09.2015

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[\[1\]](#) (2012) 8 SCC 706

[\[2\]](#) AIR 1938 Mad 357

[\[3\]](#) (2001) 8 SCC 173