

HON' BLE DR. JUSTICE B. SIVA SANKARA RAO

C.C.C.A.Nos.139 of 2009 & 13 of 2016

COMMON JUDGMENT:

Impugning the legality and correctness of the decree and judgment in favour of the plaintiff passed by the IV Senior Civil Judge, City Civil Court, Hyderabad, dated 29.06.2009 in O.S.No.733 of 2001, the suit filed by the plaintiff Smt. Zareena Sultana, against the original two defendants by name M/s. Remax Constructions, represented by its Proprietor Sri Mohd. Noorul Haq and Dr. Mrs. Sangeeta Jha and subsequently defendant Nos.3 to 5 were impleaded as per order in I.A.No.24 of 2005 dated 08.02.2005, of whom the 3rd defendant, Dr. Pathan Jah, is no other than husband of 2nd defendant, and defendant Nos.4 and 5, Smt. Salma Sultana and Smt. Shameem Sultana, are no other than own sisters of the plaintiff, the 1st defendant maintained CCCA.No.139 of 2009 and defendant Nos.2 & 3 maintained CCCA.No.13 of 2016. The plaintiff and other defendants are the respective respondents in the two appeals.

2. The plaint schedule property is described as flat bearing No.101 (first floor), which is now being called by defendants as in flat No.201 in the 2nd floor. The same is located in fact above stilt and one more floor. It is admeasuring 1590 square feet, with 44 square yards undivided land bearing municipal No.10-2-289/ 19, Shantinagar, Hyderabad and bounded by North-40 feet wide road, East-municipal door No.10-2-289/ 20, South-flat No.B/ 87 and West-flat municipal No.10-2-289/ 18.

3. The prayer in the suit was to direct 1st defendant to deliver vacant and peaceful possession of the plaint schedule property supra, by evicting the defendant Nos.2 & 3 and any others claiming through or under them therefrom, with a consequential direction to the defendants

to vacate and handover the same and failing which to evict and deliver vacant possession and also to direct 1st defendant to pay Rs.20,000/- towards arrears of rent from November 2000 to February 2001 with interest @ 12% per annum till realization, to further direct defendant Nos.1 to 5 including defendant No.3 to pay Rs.10,000/- as mesne profits from 01.03.2001 till date of delivery of vacant possession of the plaint schedule property supra and to declare Ex.B6 sale deed No.861 of 2002 executed by defendant Nos.4 and 5 in favour of 3rd defendant dated 22.03.2002 before Sub Registrar, Nizamshahi road, Hyderabad, as null and void, unenforceable in law and not binding on plaintiff and for such other just reliefs. The plaint and prayers supra are the outcome from amendments sought were allowed and carried out time to time, vide orders in I.A.Nos.37/ 2002 dated 07.04.2003; 37/ 2003, dated 07.04.2003; 24/ 2005, dated 08.02.2005; 270/ 2002, dated 22.03.2005 and 397/ 2008 dated 11.02.2008.

4. The defendants by denying the plaint and amended plaint averments and disputing the suit claim filed written statements i.e., by 1st defendant originally dated 12.09.2002, again additional written statement from plaint amended averments respectively dated 17.09.2004 and 5th defendant filed separate written statement and additional written statement in June 2005, leave about others adopting the same, if any.

5. From the pleadings, the trial Court framed 7 issues originally and later from the amended pleadings, after hearing, ultimately on 09.09.2009 framed 2 more additional issues. It is from the pleadings and issues before the trial Court, on behalf of plaintiff, PWs.1 to 4 were examined including the plaintiff as PW.1 and Exs.A.1 to A.15 were marked; and on behalf of defendants, 1st defendant Mohd. Noorul Haq of

the proprietary entity was examined as DW.1 and Exs.B.1 to B.6 were marked.

6. It is from said evidence on the issues with reference to the pleadings and rival contentions and after hearing arguments ultimately the trial Court decreed the suit partly with proportionate costs by directing defendant Nos.1 to 3 to deliver vacant possession of the plaint schedule property, which is flat No.101, 1st floor called by defendants as flat No.201 in the 2nd floor of 1590 square feet with 44 square yards undivided land as described in the plaint schedule, also by directing the 1st defendant to pay Rs.20,000/- with interest @ 12% per annum from date of suit till realization, with further direction that defendant Nos.1 to 5 shall pay Rs.7,500/- per month from 01.03.2002 till delivery of vacant possession of the schedule property to the plaintiff and the Ex.B6-document No.861 of 2002, executed by defendant No.1,4 and 5 in favour of 2nd defendant is also declared as null and void and unenforceable by dismissing the rest of suit claims.

7. It is impugning the same, as referred supra the 1st defendant filed CCCA.No.139 of 2009 and defendant Nos.2 and 3 filed appeal with delay condonation application and the same is allowed condoning the delay vide CCCA.No.13 of 2016.

8. The contentions in the grounds of appeal CCCA.No.139 of 2009 filed by 1st defendant vis-à-vis the oral submissions during hearing of the appeal are that the trial Court's decree and judgment are contrary to law and facts, the trial Court erred in decreeing the suit for delivery of possession and payment of arrears of rent as well as damages by ignoring the admissions in the evidence of plaintiff's witness which establishes that the development agreement was adhered to by defendants. It is

also contended that trial Court ought to have seen that as on date of suit, plaintiff being aware of the allotment of flat numbers, filed the present suit for delivery of flat No.101 which was admittedly delivered to the plaintiff during pendency of the suit and the trial court thereby erred in coming to the conclusion of 1st defendant with malafide intention numbered flat No.101 as 201 and said finding of trial Court is contrary to the material and evidence on record and the trial Court also went wrong in shifting burden of proof on the defendants to disprove plaintiffs case, though it is for the plaintiff to prove her case and also went wrong in decreeing the suit from the alleged discrepancies in the evidence of defendants with no strength in the case of plaintiff and pleadings also with improvements by amending the plaint as many as 5 times. The trial Court also failed to notice that, plaintiff played fraud upon the court by adding several reliefs which were abandoned by her initially and erred in ignoring to decide the issue of Court fee while rendering judgment and also went wrong in relying on the evidence of PW.4, ignoring the report of commissioner appointed by the Court, also erred in cancelling the sale deed executed by defendant Nos.1, 4 and 5 in favour of the 2nd defendant and also erred in trying the suit with no pecuniary jurisdiction from the change in the value of amendment of plaint. The trial court should have seen that plaintiff is estopped from claiming flat No.201, when she claimed only flat No.101 that was delivered to her pending suit and trial court also failed to notice that the 1st defendant delivered 50%of the constructed area to the landlords and the landlords jointly executed the sale deed for flat No.201 that fell to the share of the 1st defendant developer towards his 50% of the constructed area and trial Court failed to notice that 50%of constructed area pleaded by plaintiff as being share of plaintiff and defendant Nos.4

and 5 have been handed over by 1st defendant and thereby plaintiff is estopped from claiming flat No.201 as her claim is for flat No.101 and the 50% of the constructed area in accordance with the plaint when delivered to the landlords i.e., plaintiff and defendant Nos.4 and 5 as per the development agreement and the commissioner's report also speaks the same.

9. The contentions in the grounds of appeal maintained by the defendant Nos.2 and 3 in CCCA.No.13 of 2016, are similar to those covered in the grounds of appeal of 1st defendant supra, and further that the trial court gravely erred in holding that plaintiff is entitled to possession of flat No.201 by cancelling the sale deed for the same executed in favour of defendant Nos.2 and 3 by defendant Nos.1, 4 and 5 and in directing possession to handover to the plaintiff, without appreciating that plaintiff had no vested right in the suit property being flat No.201 for the reasons every document creating right, title and interest in immovable property for registration of Rs.100 above, must be registered under Section 17 of the Registration Act and without registration it will not effect any immovable property or will not be received as evidence of any transaction effecting such property and the supplementary agreement dated 13.02.2000 relied on by the plaintiff for claiming interest in flat No.201 is not only unregistered but also unstamped whereby cannot be received in evidence, however it forms the very basis of the suit claim and thereby plaintiff has no vested right to claim flat No.201 and the trial Court gravely erred in not appreciating the same and of the fact of same is a tentative one, subject to actual development for construction of the property, as municipal sanctioned plan was not in accordance with the terms of the development agreement, thereby trial court should not have been relied on the terms

of the same in decreeing the suit in favour of the plaintiff. It is also contended that plaintiff is entitled to 2nd flat of 1590 square feet subject to paying costs of excess built up area of 116 square feet that was not paid by the plaintiff and there is no averment made by her to show her willingness to make such payment and thereby the trial court should have been rejected the suit claim and instead erred in holding defendant Nos.2 and 3 have been set up by the 1st defendant and they were even absent and were set ex parte during hearing and the trial court went wrong in holding therefrom alleged collusion between defendants *inter se*. It is also the contention that the suit claim originally made was in respect of flat No.101 as per the plaint schedule and thereby when defendant Nos.2 and 3 did not acquire any interest therein of flat No.101, they did not choose to contest and secondly defendant Nos.2 and 3 purchased flat No.201 under the registered sale deed 23.02.2002 for consideration of Rs.7.5 lakhs and the impleadment of 3rd defendant purchaser in the suit long later on 08.02.2005 then amended with a change of flat No.101 to flat No.201 though the purchase by the 3rd defendant of flat No.201 was in March 2002 and till such amendment in 2005 by plaintiff of the suit of 2001, there is no litigation in respect of flat No.201 for 2nd defendant to contest the suit, but for the 1st defendant who contested and made assurance to the 2nd defendant for her title and along with other defendants to look after the litigation by the 1st defendant and thereby defendant Nos.2 and 3 are bonafide purchasers for value and there is no question of collusion between them with defendant Nos.4 and 5 or defendant No.1, and defendant Nos.4 and 5 are no other than own sisters of plaintiff even, and the flat No.201 in fact was earmarked to the plaintiff's elder sister among plaintiff and defendant Nos.4 and 5 and the trial judge thereby

should have seen that plaintiff is not entitled to the suit property as if flat No.201, but for if at all to 101 of 1st floor and thereby not entitled to any profits or rent for the flat No.201 much less to fix Rs.10,000/- per month up to February 2002 and later at Rs.7,500/- per month to fix or directing to pay as rent or profits making the defendant Nos.2 and 3 as if liable though defendant No.3 is bonafide purchaser for value by registered sale. It is therefrom sought for setting aside the trial court's decree and judgment and to allow the appeal by dismissing the suit as per the respective appeal grounds of defendant Nos.1, 2 and 3.

10. In this context, it is necessary to state herein the facts born by record for more clarity of the events taken place after the filing of the suit till numbering of C.C.C.A.No.13 of 2016 among the two appeals supra including C.C.C.A.No.139 of 2009, that in the trial Court defendant Nos.2 and 3 (appellants in CCCA.No.13/ 2016 supra) were set exparte. Only the 1st defendant (developer) and defendant Nos.4 and 5 (sisters of plaintiff) contested, which is subsequent to impleadment of defendant Nos.3 to 5 even for original defendant Nos.1 and 2 against whom the suit filed. As can be seen from the record, the suit was decreed as referred supra on 29.06.2009 before the trial Court. It is subsequent to the decree and judgment supra of the trial Court, the 1st defendant maintained the appeal C.C.C.A.No.139 of 2009 and defendant Nos.2 and 3 filed an application before the trial Court to set aside the exparte decree in so far as against them supra in I.A(SR).No.4679 of 2009 under Order IX Rule 13 CPC. In the appeal of the 1st defendant against plaintiff and other defendant Nos.2 to 5 in C.C.C.A.No.139 of 2009, there was an application C.C.C.A.M.P.No.477/ 2009 to stay eviction of the defendants pursuant to the trial Court's decree, pending disposal of the Order IX Rule 13 CPC

petition and there was an interim stay of eviction dated 24.09.2009 and as per another petition in C.C.C.A.M.P.No.485/ 2009 on the next day dated 25.09.2009, there was an order of stay modified from stay of eviction to stay of execution of the decree for three weeks, that was later extended time to time and ultimately by order dated 04.11.2009, the order was clarified and extended till disposal of the Order IX Rule 13 CPC petition supra or for four weeks and there was later a direction for expeditious disposal of that application filed under Order IX Rule 13 in CCCAMP.No.485/ 2009, that was extended from time to time again and there was ultimately an order dated 17.03.2010 extending till disposal of said Order IX Rule 13 CPC petition with a direction for expeditious disposal. The Order IX Rule 13 CPC petition was later allowed by the lower court and having been aggrieved, the plaintiff of the lower Court filed C.M.A.No.1037/2010 and also C.R.P.No.93 of 2011 in the High Court. An application to convert the C.M.A.No.1037/2010 into revision was also filed and allowed. Consequently, there are two revisions i.e., C.R.P.Nos.93 of 2011 & 2357 of 2015 against the orders in I.A.No.608 of 2009 (Section 5 of Limitation) and I.A(SR).No.4512 of 2009 in O.S.No.733 of 2001. The two revision applications were allowed by setting aside the exparte decree by condonation of delay. It was thereafter on 10.09.2015, defendant Nos.2 and 3 filed CCCA.No.13 of 2016 in USR.No.10422/ 2015 as unnumbered appeal with delay condonation application for 2191 days from the date of trial Court's decree. This Court by order dated 06.01.2016 in C.C.C.A.M.P.No.574/ 2014 allowed the application condoning the delay subject to costs with the observation that from the earlier exparte decree set aside application is allowed, till the same is set aside by the order in revision supra, in filing the appeal, the period of the application to condone the delay need not

be invoked from the Three Judge Bench expression of this court in Raziuddin Mohd. Siddiqui Vs. Zaihad Khatoon¹, relying upon the decision of the Madras High Court in Peer Ammal Vs. Nallusami Pillai² with the conclusion of there was no exparte decree in subsistence from the exparte decree set aside application was when allowed and till the same is reversed by sitting in revision against to compute the period only from the date of revision in filing the appeal for any delay after excluding the period taken for applying and obtaining certified copies. Consequently, from the conditional order compliance made, the appeal was numbered as C.C.C.A.No.13/ 2016. At request of both sides, the two appeals therefrom taken up for final hearing and common disposal.

11. It is subsequently in C.C.C.A.No.139 of 2009, the plaintiff/ 1st respondent filed C.C.C.A.M.P.No.509/ 2014 to direct the respondent Nos.2 and 3 (defendant Nos.2 and 3) not to induct any third parties into possession of plaint schedule, which is presently flat No.201 at 2nd floor, pending disposal of the appeal and after hearing, by order dated 12.02.2015, there was a direction that defendants/ respondent Nos.2 and 3 can let out the flat to third parties, however subject to deposit of Rs.10,000/- per month (since per month was silent) an application to incorporate the same was filed in C.C.C.A.M.P.No.194/ 2015, since ordered, to the credit of the suit in the lower Court pending disposal of the appeal and if they are not willing to so deposit, they shall not let out the flat in question to any third parties pending disposal of the appeal and any of the above are subject to ultimate result of the pending appeal.

¹ 2004 (6) ALD 564

² AIR 1931 Madras 149

12. From the above background of facts, in the course of common hearing of both the appeals, the learned counsel appearing for the respective defendants/ appellants supra reiterated the same mentioned in their grounds of appeal respectively to allow the appeals setting aside the trial Court's decree and judgment favouring plaintiff whereas the counsel for the plaintiff/co-respondent supported the trial court's decree and judgment in seeking to dismiss both the appeals with costs. Heard both sides in both the appeals for common disposal at length and perused the material on record.

13. Now the points that arise for consideration are:

1) Whether the supplemental agreement requires registration (from objection on stamp duty also still left open for no objection raised while marking as per Sections 33 to 36 of the Indian Stamp Act) as per Section 17 of the Indian Registration Act and if so to what extent it serves the marking for any purpose under Section 49 of the Registration Act from the rival contentions i.e., of plaintiff-co-respondent as practically a suit for specific performance of the development agreement modified by supplemental agreement and as per the defendants-appellants is otherwise only to receive and mark for collateral purpose and cannot be looked into the terms of the document?

2) Whether pleadings and other oral evidence on record to what extent come within the meaning of Sections 91 & 92 read with Sections 17 & 58 of the Evidence Act?

3) Whether the decree and judgment of the trial Court are unsustainable and if so and from the above to what extent this first appellate Court (from entire matter at large for reappraisal of facts and law) can sit against and interfere with?

4) To what result?

Point Nos.1 to 3:-

14. Defendant Nos.2 and 3, who are the appellants in CCCA.No.13 of 2016, who were set exparte before the trial court, did not file a written statement and also did not adduce any evidence of their own for the above reason of remained exparte. No doubt they are claiming through defendant Nos.1, 4 & 5 from whom they obtained Ex.B6=A.13/ A.14 sale deed. Among the defendant Nos.4 and 5, of whom as referred supra there is a separate written statement and additional written statement filed by 5th defendant, but not by 4th defendant, in addition to the written statement and also additional written statement of 1st defendant after the amendments and impleadment of defendant Nos.3 to 5. Needless to say the amendments undertaken were at five times. No doubt, the amendments were allowed and carried out and both parties pursuant to it i.e., plaintiff and defendant Nos.1, 4 & 5, except defendant Nos.2 and 3 supra participated practically from the written statement and additional written statement pleadings, though defendant Nos.4 and 5 did not choose to come to witness box and adduce any separate evidence, other than relying upon that of 1st defendant-DW.1 with reference to Exs.B1 to B6. From that, it is clear that defendant Nos.2 & 3 are claiming through defendant Nos.1, 4 & 5 and that is also made clear from the sale deeds supra they obtained. Thus for none of the defendants-appellants it is not left open to question or impugn the amendments made to the plaint from their participation by filing additional written statements by submission to the amendments including in leading evidence therefrom during trial in pursuance therewith, so also on pecuniary jurisdiction or sufficiency of court fees; but for on other merits.

15. The claim of the plaintiff is based on Ex.A1-development agreement dated 03.12.1999 and Ex.A2-supplementary agreement dated 13.02.2000. So far as defendant Nos.1, 4 & 5 concerned, there was no objection to the marking of Ex.A2-supplementary agreement that was unregistered and shown not duly stamped. In the very cross-examination of PW.1 dated 22.09.2003, the Ex.B2 sanctioned plan was confronted by defendants to PW.1 and he deposed therefrom of the approval was for stilt with five floors and of which stilt is for parking. It is also confronted to PW.1 of Ex.A1 shows stilt + ground + five floors and as per Ex.B2 there is no ground floor. It does not mean plaintiff admitted to take flat No.1 of Ex.B2 to say above stilt and given up the claim for flat No.1 of Ex.A2 of above stilt and above ground floor. If on combined reading, what is above stilt and above ground called as 1st floor in Ex.A2, same when to be called as 2nd floor in Ex.B2, it is alone to be allotted and that is also the explanation of PW.1-plaintiff in the chief evidence affidavit. He stated the constructed area is 18430.17 square feet and same not properly reflected in Commissioner's report. Leave about other merits from the above so far as the stamp duty concerned, once it is marked without objection, it is not left open to the parties to say it is not duly stamped from the settled law with reference to Sections 33 to 36 of the Indian Stamp Act, for not a case of they raised any objection and even same was ignored by trial Court and even any revision filed under Section 61 of the Stamp Act or under Section 115 CPC or under Article 227 of the Constitution of India against that order. Thus in the absence of which, the concession of Section 105 CPC and Order XLI Rule 22 read with 24 and 33 CPC is not available so far as stamp duty concerned by virtue of specific statutory bar under Section 36 of the Stamp Act but for any want of registration and on admission, that is no

waiver to argue the admissibility is only for collateral purpose under Section 49 of Registration Act (for short the Act) from showing bar of Section 17 of the Act for main purpose as clarified the law by this Court CRP.No.1850 of 2015 dated 23.08.2016, needless to say even any finding adverse to the plaintiff also, she can agitate without filing cross objections by virtue of the provisions particularly of Order XLI Rule 22 CPC only in relation to the want of registration under Section 17 of the Act and extent of considering under Section 49 of the Act. Thus the only thing left open to consider is any requirement of registration under Section 17 of the Act and if so to what extent still to consider for the purposes envisaged in Section 49 of the Act.

16. The appellants in C.C.C.A.No.13 of 2016 i.e., defendant Nos.2 and 3, who remained exparte before the trial Court and whose exparte decree set aside application though allowed by the trial Court was reversed in revision and therefrom their appeal filed is admitted and they are claiming therein by virtue of the sale deed they obtained on 23.02.2002 bearing registration No.861/ 2002 after filing of the suit in O.S.No.733/ 2001 from the defendant Nos.1, 4 & 5 is in fact hit by the Doctrine of lis pendense under Section 52 of Transfer of Property Act. As such they cannot thereby get any better rights than what the defendant Nos.1, 4 & 5 got pursuant to Exs.A1 & A.2-development agreement and supplementary agreement supra and thus they cannot develop any new case for what is decided against defendant Nos.1, 4 & 5 is equally binding on them subject to the result of the two appeals on other merits in answering the common points for consideration formulated supra.

17. In this regard supra the plaintiff placed reliance on the expression of Apex Court in Dhanna Singh and Others Vs. Baljinder Kaur and

Others³, where the Division Bench of the Apex Court on the scope of Section 52 of Transfer of Property Act observed that in a suit based on permanent injunction restraining defendants from making constructions or alienations of the property, the sole defendant against whom the relief sought did not adduce any evidence and there was an order foreclosing his evidence and pending suit alienation of the suit property was made by him in favour of the subsequent purchasers, who were impleaded, since stepped into the shoes of the original defendants, whose right of evidence was forfeited as has given up, the pendent lite alienee defendants cannot lead any fresh evidence to that extent. The principle laid down speaks the alienee pendenti-lite steps into the shoes of the alienor pendenti-lite and cannot claim any better rights. Thus, from what the evidence adduced by 1st defendant on record can be availed by defendant Nos.2 and 3 also even they remained *exparte* before trial Court. No doubt their *exparte* decree set aside application initially allowed was reversed in *revision inter se* for no bonafides or merits to set aside, once the Court feels to sub serve the ends of justice of their contention of bonafide purchaser for value subject to the application of Section 52 TP Act when available and open to challenge from scope of law under Section 17 of the Registration Act, such a challenge even left open to the 1st defendant and other defendant Nos.4 & 5 though 1st defendant did not raise the same as a ground, when they all are co-respondents to the appeal filed by defendant Nos.2 & 3 to avail to contest therefrom. Same is the analogy from the other decision in Bibi Zubaida Khatoon Vs. Nabi Hassan Saheb⁴, where the Division Bench of the Apex Court observed that a transferee pendent lite cannot claim any better rights but for to claim through the pendent lite

³ AIR 1997 SC 3720

⁴ AIR 2004 SC 173

transferor and shall not make any independent contest much less to claim as necessary party to come on record against will of plaintiff. The other decision placed reliance is Sarvinder Singh Vs. Dalip Singh and Others⁵, where the Division Bench of the Apex Court laid the distinction between the necessary party and proper party for impleadment in a pending suit of the alienee pendenti lite based on the Doctrine of lis pendense. Coming to the other decision placed reliance on Usha Sinha Vs. Dina Ram and Others⁶, it was observed that a transferee from a judgment debtor as contemplated under Order XXI Rule 102 CPC is presumed to be aware of the execution proceedings and not entitled to any protection for it is the Court's duty to protect the decree holder to realise the fruits of the decree, by left open the remedies under Order XXI Rule 97 to 100 CPC for not entitled to otherwise to obstruct the execution of the decree as the execution pendenti-lite transferee has stepped into the shoes of the J. Dr. The other decision placed reliance is Kirpal Kaur Vs. Jitender Pal Singh and Others⁷, where the Division Bench of the Apex Court referring to Order XXII Rule 10 CPC and Section 52 of TP Act observed that the alleged gift pending suit obtained by the 2nd defendant from 1st defendant for plaint B Schedule was hit by Section 52 of TP Act for not even leave of the Court sought by 2nd defendant to claim as alienee pendenti-lite to come on record and from the order cannot be brought to an end as sought for, merely because interest of a party 1st defendant in the subject matter has devolved upon 2nd defendant pending suit, but for suit to be continued against person acquiring interest also since came on record with leave of court. The other decision placed reliance is Veerabathini Janardhan

⁵ (1996) 5 SCC 539

⁶ (2008) 7 SCC 144

⁷ 2015 (6) ALT 14 (SC)

Vs. Terala Rajaiah (since died) per L.R. and Others⁸, where a single Judge of this Court held that in the pending suit there was a sale transaction and merely because alienee was not added as a party to the suit for possession decree cannot be contested as un-executable against alienee. Coming to the other decision in Voona Rama Rao Vs. Sri Tankala Raghunatham and Another⁹, where a learned Single Judge of this Court held prohibition to transfer property pending suit under Section 52 of TP Act is not absolute, for such a transfer is not void or illegal, but for to say result of the suit binding on the parties where the defendants transferred pending suit. It was a suit for eviction and the transferee pending suit by the sole plaintiff as co-respondent to continue the suit proceedings and observed the defendants cannot oppose the suits in dismissing the revision from impleadment allowed by trial court. Coming to the other expression of the Apex Court in Nivatri Govind Ingale & Others Vs. Revanagouda Bhimanagouda Patil¹⁰ what was held on the scope of alienation of property to minor represented by father by third party borrower and re-conveyance executed by father of the minor to the borrower on discharge of debt from plea raised of lack of permission or leave of Court for re-conveyance, their pending suit in this regard, defendant alienated selfsame property said pending suit alienation held hit by Doctrine of lis pendens not to get better rights than said defendant in the suit. Therefrom what the alienation pending suit by defendant Nos.1, 4 & 5 to defendant Nos.2 & 3 is subject to result of the suit and they cannot have better right much less propound any independent defence in the appeal than what is the material before the trial Court to rely in deciding the appeals for their stepping into the shoes of defendant Nos.1, 4 & 5.

⁸ 2008 (1) ALT 47

⁹ 2007 (6) ALT 814

¹⁰ 1997 SAR Pg.60 (SC)

18. From the above, coming to the agreement and supplemental agreement, leave about the Ex.A1 agreement dated 03.12.1999, the controversy is on want of registration if any to the Ex.A2-supplemental agreement dated 13.02.2000. Ex.A2 agreement contains 16 terms executed on 13/ 14.02.2000, undisputedly between plaintiff and her 2 sisters/ defendant Nos.4 and 5 being the owners of the site as first party and the 1st defendant as 2nd party and clause (1) says the owners and the developer entered the Ex.A1 agreement dated 03.12.1999 for development and sale of the property municipal No.10-2-289/ 19 of the Shantinagar, Hyderabad, admeasuring 702 square yards of 587 square meters described in the schedule to the agreement. It further speaks the plans of the proposed complex have been drawn and submitted to the MCH and all parties have decided to earmark their respective plots. Thus 2 aspects referred i.e., the development agreement Ex.A1 dated 03.12.1999 and a subsequent event to it. Thereby same is no way requires registration much less to say without registration inadmissible to any bar under Section 17 read with 49 of the Registration Act, but for collateral purpose unless to admit in evidence as a contract for sale in suit for specific performance. Here the suit reliefs practically are for enforcement of the development agreement and supplemental agreement for specific performance of the terms therein and if same is the case even under Section 17 of the Act registration required, for specific performance purpose under Section 49 of the Act it can be admitted to evidence the terms of the contract and not for mere collateral purpose.

19. From the above, coming to the supplemental agreement terms 1 to 16, Clause (1) speaks that the scheme of floors are stilt floor for parking, above stilt is ground floor, then floors 1, 2, 3, 4 & 5 etc. So it is

stilt + ground + 5 floors and so on. It is crystal clear of first floor and underneath it is ground floor and stilt for parking. Clause (2) speaks that the area of each floor is expected/ exhibited to 3656 square foot and number of floors expected are stilt, ground + 5, hence total area expected is 18380 square feet and the first party is entitled to half of built up area and 2nd party remaining half of built up area to say 9190 square feet each and in the event of any increase or decrease in the built up area, to share proportionately. This is one of the terms of adjustment of increase or decrease in the built up area to be arrived. The other aspects of clause (2) even speaks of the stilt + ground floor + 5 floors supra only and measurements of stilt + ground not given. Clause (3) speaks of first party 1, 2 & 3 joint owners with equal shares shall be entitled to 1/6th built up area each and the remaining half of the built up area by builder which is nothing but repetition of above clause of development agreement dated 03.12.1999 already entered as a past transaction reference and no rights created for the first time under Ex.A2 thereunder. Now coming to clause (4) it reads that on the assumption that built up area will be as per clause (2) of the parties have divided to areas and earmarked the plots. This is not a contemporaneous transaction of creating rights but what was already effected made a mention of acknowledgment of what was happened of the parties divided the areas and ear marked the plots. Clause (5) speaks the flat No.201 of 2nd floor admeasuring about 1519 square feet including common area and flat No.203 in 2nd floor admeasuring about 1043 square feet including common area or ear marked for first party No.1 (plaintiff herein) and as per clause (6) the flat No.001 on the ground floor and 101 on the first floor admeasuring 1590 square feet each including common area earmarked for first party No.2 (defendant

No.4) and flat No.301 of 3rd floor admeasuring 1590 square feet including common area and flat No.103 on south east of 1st floor admeasuring 1043 square feet including common area earmarked for first party No.3 (defendant No.5). Clause (8) speaks the flat No.002, 003, 102, 302, 401, 402 and 403 are ear marked for the developer (1st defendant). No doubt a reading of these clauses 5 to 8 supra speaks what is earmarked that is mentioned, no doubt mentioned as hereby earmarked. The clauses 9 & 10 deals with the rights and payment of amount for the additional costs which cannot be looked into even pursuant to clauses 4 to 8 supra. Clause 11 speaks of sanction deviations and responsibility of the developer that also cannot be looked into for want of registration. Clauses 12, 13 & 14 deal with what was the payment already made on that day to the 1st party No.3, 2 and 1 as defendant Nos.5, 4 and plaintiff respectively towards rents for respective months for the delay and time of handing over the plots and the interest of deposits to be adjusted that cannot be necessary to go into for not the lis herein. Clause (15) speaks 1st party delivered vacant possession of the property to the 2nd party on that day as an acknowledgment that by itself does not require any registration from that clause. Clause (16) speaks 1st party received sale proceeds of the scrap etc., of the demolished building, that also not contemporaneous transaction creating rights on either side or effected rights and no way requires registration. Now coming to clause 4 to 8 what are the respective areas to be taken of each of the 2 plots by the 3 members i.e., plaintiff, defendant Nos.4 & 5 of 1st party and the developer (D1) of the 2nd party. It speaks earmarking done and same cause mentioned. Leave it as it is of the requirement of registration for no objection left open on stamp duty including about delivery of possession and development agreement for

no objection while marking, though required to be decided instantaneously, that was raised and decided even from the bar not left open under Section 36 read with 33 of the Stamp Act as discussed supra. Thus, the documents though not duly stamped since marked with no objection, not left open, so far as requirement of registration under A.P. amendment to Section 17 of the Act by Act No.4 of 1999, by virtue of Section 49 of the Act for no similar amendment therein, to enforce the agreements for specific performance to give the flats what agreed, even not registered the terms of the agreement can be adduced in evidence from the pleadings.

20. In addition to the above conclusion, it is also necessary to consider Sections 91 and 92 of Indian Evidence Act which deal with exclusion of oral by documentary evidence. These 2 Sections read as follows:

91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of documents.—When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.—When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence² shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained." Exception 1.—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved. Exception 2.—Wills ²[admitted to probate in ³[India]] may be proved by the probate. Explanation 1.—This section applies equally to cases in which the contracts,

grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one. Explanation. 2.—Where there are more originals than one, one original only need be proved.

Explanation 3.—The statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

Illustrations

(a) If a contract be contained in several letters, all the letters in which it is contained must be proved.

(b) If a contract is contained in a bill of exchange, the bill of exchange must be proved.

(c) If a bill of exchange is drawn in a set of three, one only need be proved.

(d) A contracts, in writing, with B, for the delivery of indigo upon certain terms. The contract mentions the fact that B had paid A the price of other indigo contracted for verbally on another occasion. Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible.

(e) A gives B receipt for money paid by B. Oral evidence is offered of the payment. The evidence is admissible.

92. Exclusion of evidence of oral agreement.—When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms: Proviso

(1).—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, 1[want or failure] of consideration, or mistake in fact or law: (1).—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, 3[want or failure] of consideration, or mistake in fact or law\:" Proviso (2).—The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document: Proviso (3).—The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or

disposition of property, may be proved: Proviso (4).—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents: Proviso (5).—Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved: Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract: Proviso (6).—Any fact may be proved which shows in what manner the language of a document is related to existing facts

21. What Section 91 says is terms of contract or grant or other dispositions of property when reduced to the form of a document and in all cases in which any matter is required by law to be reduced to the form of a document, to prove the terms of contract or grant or other disposition or such matter except the document itself or secondary evidence of its contents where admissible, no evidence shall be given in proof of the terms of such contract. If oral contract legally permissible the bar may not strictly apply. Thus once party wants to rely on a document oral evidence of terms of the document cannot be given, but for to prove the terms from the document itself. It is not a case where required by law to be reduced to form of a document. It can be said even in a case when terms of contract or grant or disposition have been reduced in a form of document, that relies no evidence shall be given in proof of the terms of the same but for exhibiting the document itself. However explanation 3 of the Section 91 speaks the statement in any document whatever of a fact other than referred in this Section, shall not be precluded the admission of oral evidence as to the same fact. So oral evidence is permissible to the extent stated in the explanation 3 of Section 91. Coming to Section 92 from what is extracted supra it speaks when terms of any contract, grant or other disposition of the property or

any matter required by law to be reduced to form of a document have been proved according to the last Section, no evidence of oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding and subtracting from its terms. There are 6 provisos to it. Here it is not a case of varying, adding or subtracting from the terms from any contest of either side to say there is prohibition by Section 92 of Indian Evidence Act.

22. The plaint and amended plaint from its reading as per Para 2 not only speaks the original development agreement dated 03.12.1999 and the terms therein under Para 2 Clause (a) to (f) but also from Para 3 speaks of entering into Ex.A2 supplemental agreement dated 13.02.2000 and speaks which floor to whom arranged, it refers to Para 3 (a) to (d) clauses 1, 2, 3, 6 and 13 of the supplemental agreement. Para 4 speaks of Ex.A1 development agreement and the amounts payable thereunder and the failure. Para 5 speaks of plaintiff's notice to the defendants demanding the 1st defendant to pay the amounts due towards rents and not to make further transaction of the flat No.101 first floor, which the defendants are calling as if flat No.201 of 2nd floor that was allotted to the plaintiff under supplemental agreement and the defendants did not choose to reply including the 1st defendant. The non giving of reply to the Ex.A4 notice of plaintiff acknowledged by Exs.A5 and A6 also substantiates the case of plaintiff. The plaintiff therefrom claims the flat No.101 of first floor now calling as flat No.201 of 2nd floor as if the defendants 1, 4 and 5 illegally sold in favour of the 3rd defendant pending suit covered by original of Ex.B6 on 23.02.2002 which the 1st defendant filed on 02.12.2004 and suppressed the same in the written statement of him about said sale transaction to 2nd defendant no other

than wife of 3rd defendant and for that they have no right or title and they are in illegal and unauthorized possession and enjoyment. Consequently on the flat No.101 of first floor as they are calling flat No.201 of 2nd floor on which they are liable for damages to use and occupation etc, hence to pass decree and judgment to that effect.

23. The written statement of 1st defendant including his amended written statement is in saying 2nd defendant is a third party to the transaction between plaintiff and defendant Nos.1, 4 & 5 and no question of granting relief against her and no scrap of paper filed to prove that 2nd defendant is making interior works and trying to occupy flat No.101 of first floor. It is needless to repeat said alienee 2nd defendant is only to claim through 1st defendant and defendant Nos.4 & 5 and subject to result of pending suit under the Doctrine of lis pendense, said contention is baseless.

24. Coming to other contest the 1st defendant once admits the oral terms of supplemental agreement, the defendants 2 & 3 cannot set up separate defence. The 1st defendant while saying the original entering of the development agreement Ex.A1 dated 03.12.1999 between plaintiff and her 2 sisters (defendant Nos.4 & 5) and 1st defendant and the clause Nos.3(a) (e) (d), 4, 6, 8 therein as not in dispute so also the other clauses and they all are bound by the same and also not disputing the entering of the supplemental agreement dated 13.02.2000. What the 1st defendant says further at best in Para 3 of the written statement is that, said supplemental agreement dated 13.02.2000 become unenforceable due to the conditions and circumstances incorporated therein and MCH has disallowed ground floor out of the plan applied while sanctioning. Thereby, what plaintiff contending of there is a ground floor is not correct, but misconceived. The sanctioned plan as

per which area available is only 10266 square feet and plaintiff and her 2 sisters entitled to half and 1st defendant the remaining and clause (3) of the supplemental agreement is misconceived and due to decrease of area by MCH and other circumstances said supplemental agreement is ineffective and unenforceable as it is prior to issuing of the sanction plan and as per sanction plan when there is no existence of ground floor and when there is no question of existence of construction of flat No.001. Said contest is also in fact misconceived as at best approval plan not given for top floor does not mean other reference in the supplemental agreement of the 1st floor is above (stilt) cellar + ground can be taken changed. Even taken for arguments sake ground floor reference not there in approved plan obtained that does not mean what is described in the supplemental agreement of 1st floor is above stilt or cellar + ground can be changed unilaterally without consent of plaintiff.

25. The other dispute regarding the liability of payments of rents etc concerned what the 1st defendant says is his is a reputed entity with good will etc and that 1st defendant agreed to pay Rs.5,000/- per month to plaintiff and other 2 sisters i.e., defendant Nos.4 and 5 from date of delivery of possession of the site for proposed construction with old house till delivery of 50% of the built up area in the complex as per sanction plan issued by MCH and the construction that to be completed within 18 months from date of sanction plan. It is also mentioned that after entering into the agreement, defendant No.1 prepared proposed construction of plans of the complex of the area expected 18380 square feet of stilt floor, ground floor and 5 floors and plans submitted to MCH and after assumption that above constructed area of the proposed plan will be available, a supplemental agreement was entered on 13.02.2000 (Ex.A2) and it was expected of plans would be sanctioned by MCH by end

of February 2000 as per proposed area and flat numbers were numbered and supplemental agreement was executed. But, unfortunately MCH while granting sanction for construction of residential complex, raised objections and disallowed ground floor and construction of the other places also and the approved construction area was reduced from 18380 to 10266 square feet and the plan was released on 24.09.2000. It is the contest therefrom that as such the supplemental agreement became unenforceable and it was agreed between plaintiff, 1st defendant and defendant Nos.4 and 5 that all the 3 shall take half of constructed area that is 5133 square feet and remaining half by 1st defendant and after obtaining sanction plan from MCH, 1st defendant obtained possession of said house i.e., on 30.09.2000 and agreed to pay rents at Rs.5,000/- per month to plaintiff and her 2 sisters and Rs.45,000/- paid to the plaintiff and adjusted towards rents from 01.10.2000 onwards up to June 2001 and 1st defendant handed over construction area of 5260 square feet to plaintiff and 2 sisters collectively in March 2002. With the above written statement there are no any documents filed by the defendants.

26. So the sum and substance of his contention is that the supplemental agreement entered voluntary and what is stated for the unforeseen situation happened of MCH not approved, there is a change in the circumstances. In fact the supplemental agreement itself speaks from the specific clause therein that it is subject to variance in area of construction to say half by plaintiff and her 2 sisters and other half by 1st defendant. When such is the case, after approved plan, for such variance, the 1st defendant did not enter into any further supplemental agreement and not even issued any notice to plaintiff.

27. Thus, the original entering of the agreement and arrangement of stilt + ground floor + 5 floors proposed to construct not in dispute. The

question of disallowing ground floor does not arise but for the top floor. Once such is the case, the builder cannot unilaterally contend, from what is originally mentioned as stilt is still stilt, however in showing ground floor is first floor, first floor is 2nd floor, 2nd floor is 3rd floor, 3rd floor is 4th floor and 4th floor is 5th floor. What was proposed of stilt + 6 floors including ground floor when modified to stilt + 5 floors including ground floor, what is proposed to give to the plaintiff agreed, is above stilt and the floor above to the same to say whatever nomenclature he calls, thereby he is bound to give to the plaintiff but for to a reduced extent if any, that too, when no notice issued and even to claim handed over in March 2002, there is no document filed much less any proof of it with the written statement or additional written statement as to by what acknowledgment. In the additional written statement dated 17.09.2004, at Para (3) clause (e) what was stated is after MCH plan obtained on 24.09.2000 to complete the construction by 23.02.2002 and the plaintiff filed the suit before 10 months from the date of sanction plan is premature. The defendants did not file any counter claim much less by asking for partition. Further pending suit, they alienated the property that is by 1st defendant along with defendant Nos.4 & 5 to the 2nd defendant, wife of 3rd defendant, under original of Ex.A13=A14 and thereby the defendant Nos.2 & 3 could not get any better rights.

28. It is from the pleadings, 5th defendant on behalf of defendant Nos.4 & 5 though not so mentioned, filed the written statement in June 2005 mentioning as additional written statement, saying while admitting the Ex.A1 agreement and also the supplemental agreement and same relied and even confronted to PW.1 along with Ex.B2 sanctioned plan as referred supra and the area to be allotted is subject to increase or decrease as per sanctioned plan and ultimate constructed actual area to

say each floor expected to be 3656 square feet for the total 18380 square feet and half of it defendant Nos.4 & 5 entitled 9190 with plaintiff and equal area by 1st defendant subject to increase or decrease. Whereas constructed area is 16000 square feet as per Commissioner report and plaintiff, defendant Nos.4 & 5 were to be allotted 8000 square feet and 1st defendant in equal extent. In fact there is no proof of actual allotment and that is not even the plea of the 1st defendant earlier and there is no mention of date and time and proof of allotment even so also to say the flat No.201 is allotted to 4th defendant or handover to 4th defendant by 1st defendant much less to the consent of 1st plaintiff. As per plaintiff there is actual construction beyond sanctioned plan area, to represent built up area about 18430.17 square feet. Defendant Nos.3 & 2 in claiming through 1st defendant or defendant Nos.4 & 5 from pending suit alienation when cannot claim any better rights equally in the absence of proof by defendant Nos.4 & 5 or 1st defendant of said allotment of flat No.201 and 301 alleged to defendant Nos.4 & 5 as per the arrangement by defendants much less by any acknowledgment by plaintiff and with consent to that. The additional written statement of 1st defendant later filed in May 2015 at best introduced what the plea of 5th defendant supra and coming to the further additional written statement of 1st defendant dated 29.07.2008 at Para 3 what is alleged is the supplemental agreement dated 13.02.2002 has become unenforceable that was not registered, area mentioned in clause (2) was reduced and consequently share of parties to be reduced. At para 9 of said additional written statement of the 1st defendant it is further averred about payment of amount of Rs.1,50,000/- to plaintiff and equal sums to her sisters defendant Nos.4 & 5 and agreed to pay plaintiff and defendants and from day of payment

and old house till completion built up area of the complex as per the municipal sanction plan constructed and to complete within 18 months therefrom.

29. From the above even subsequent to the municipal approved plan which reduced one floor from 1 + 6 known as stilt, ground and 5 floors, to stilt + 5 floors including ground floor, it does not mean ground floor is not in existence as what is originally called the ground floor above stilt is the defendants now calling as first floor. Thus but for to say out of stilt + 6 what was approved is stilt + 5 and even they arranged so it is not the flat No.101 at the ground floor that is above stilt even mentioned by the defendant as if 2nd floor and above stilt and above ground floor i.e., numbered as 101 and so on by change of number by creating jagalrey, the 1st defendant much less the other defendants cannot knock away the rights of the plaintiff. The supplemental agreement terms once admitted from the written statement of the 1st defendant and defendant Nos.4 and 5 supra, they cannot say that the supplemental agreement arrangement became unenforceable, but for to say from very agreement terms any variance to be effected after the municipal approval plan that to be intimated by the 1st defendant to the plaintiff and her sisters i.e., defendant Nos.4 and 5 and without ascertaining from plaintiff any alienation by them to the 2nd defendant under original of Ex.A13=A14 sale deed is thereby not at all binding on the plaintiff. Once that was the conclusion arrived by the trial Court even from the evidence, what is required to be decided further at best is whether there was after approved plan any oral arrangement which is subsequent to the so called supplemental agreement of February 2000. There is no proof from any worth evidence and when once that could not be established and there is no any proof of delivery of possession to the

plaintiff by any acknowledgment for same by plaintiff. Having regard to the above, both the appeals fail.

30. However, it is made clear that the observation of the trial Court cancelling the sale deed in favour of the 2nd defendant is required to be modified of not binding on the plaintiff therefrom it no way disentitles based on it to execute inter se between the defendants for some other flat among the flats of the building to do equity and justice to 2nd defendant by defendant Nos.1, 4 & 5 by rectification of the boundary for the different flats other than of the plaintiff. It is also made clear that in view of the subsequent events to the supplemental agreement from the approved plan granted by reducing one floor out of cellar + ground + five and also for the extents of the approved plan for the respective flats by taking consideration of actual constructions including deviation by approved plan subject to regularization if any if not already done, remedy is left open to defendant No.1 and also to defendant Nos.4 & 5 in allotting the said flats to the plaintiff as per the supplemental agreement, for the difference in area make a claim pursuant to the market values to be arrived to compensate, if necessary, pursuant to this judgment an application in the form of final decree application for all practical purposes from the rights defined above to workout as indicated above.

31. Accordingly and in the result, both the appeals are disposed of by confirming the trial Court's decree and judgment in respect of the suit schedule property entitled by plaintiff and alienation by defendant Nos.1, 4 & 5 in favour of 2nd defendant not binding on the plaintiff so also the sale deed, but for instead of its cancellation by entitling the parties inter se to execute any rectification deed for some other flat with different boundaries rather total cancellation and for the

difference in area pursuant to the supplemental agreement and municipal approved plan and actual construction from the plaintiff for the 1st defendant to entitle by filing application to compensate for working out equities, if any, as indicated above. No order as to costs.

Pending Miscellaneous Petitions in both the appeals shall stand closed.

JUSTICE Dr. B.SIVA SANKARA RAO

Date: 26.12.2016
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