

THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

A.S.No.454 of 1997

JUDGMENT:

The unsuccessful plaintiff in the Court below preferred the instant appeal aggrieved by the judgment dated 28.10.1996 in O.S.No.100 of 1986 passed by learned Additional Subordinate Judge, Tirupati whereby and whereunder the learned Judge dismissed the plaintiff's suit filed for specific performance of agreement to sell dated 12.02.1986.

2) Brief facts of the case are that:

a) The case of the plaintiff is that defendant represented that he has absolute title and possession over Ac.7.80 cts of land situated in Settipalle village and from out of the said land he desired to sell 4 Acres to him. Believing the said representation, plaintiff agreed to purchase total extent of Ac.7.80 cts, but the defendant agreed to sell only 4 Acres. Accordingly, the parties entered into agreement of sale on 12.02.1986, as per which, the price was fixed at Rs.46,000/- per acre and total sale price was at Rs.1,84,000/-. The plaintiff paid an amount of Rs.61,400/- towards advance and agreed to get the sale deed registered by 11.05.1986.

b) It is the further case of the plaintiff that on 02.04.1986 he also paid further advance amount of Rs.50,000/- which was duly endorsed by the defendant on the reverse side of the agreement.

c) It is also the case of the plaintiff that a legal notice was received from one Devineni Sreenivasulu, a retired Police constable claiming certain

extent of land from the defendant out of Ac.7.80 cts. on the Eastern side. Similarly, some Harijans also issued a legal notice claiming certain extent of land owned by defendant. It is averred that the defendant actually purchased 3 Acres only under different sale deeds, but managed to get rough patta for Ac.7.80 cts with the connivance of survey party. It is learnt that said D. Sreenivasulu filed objections before the Settlement Officer, Nellore. Having come to know all these, the plaintiff was annoyed and when the defendant failed to clear the doubts and objections, he issued a legal notice dated 08.05.1986 to the defendant calling upon him to clear the doubts and execute a registered sale deed for 4 Acres which he agreed to purchase under the agreement. The defendant having received the said legal notice did not choose to comply with the demand and wantonly evaded to clear the doubt. The plaintiff had to pay the balance amount of Rs.72,600/- and he was ready to pay the said amount and willing to get the registered sale deed. It is also averred that defendant with an ulterior motive evading to receive the balance sale consideration and register the sale deed.

Hence, the suit.

d) The defendant filed written statement admitting execution of agreement and also receipt of advance amount and further amount of Rs.50,000/- paid by the plaintiff, but denied the other material allegations made in the plaint. It is averred that claims of Devineni Sreenivasulu and other Harijans were baseless. The plaintiff's desire was to see that he gets a property other than what was agreed to be sold under the sale agreement and therefore, he engineered the notices and hence he was not entitled to

seek specific performance of sale agreement. It is also averred that plaintiff demanded execution of sale deed with reference to the property not covered by the agreement. The plaint schedule has absolutely no relevance or relation to the agreement. The plaintiff made certain corrections in the schedule which are not known to him. The defendant was ready and willing to execute sale deed with reference to the property described in the agreement dated 12.02.1986 on receipt of balance sale consideration. It is contended that plaintiff was not in a position to pay the balance sale consideration and he was purposefully instigating the persons to issue legal notices and filed the present suit only to delay the process. He thus prayed to dismiss the suit with exemplary costs.

e) Basing on the above pleadings, the trial Court framed following issues:

1) Whether the plaintiff committed breach of the agreement as pleaded by the defendant?

2) Whether the plaintiff is entitled for specific performance of the agreement?

3) Whether the defendant is not liable for costs?

4) To what relief?

f) During trial, PW1 was examined and Exs.A1 to A5 were marked on behalf of plaintiff. DW1 was examined and no documents were marked on behalf of defendant.

g) The trial Court considering the evidence both oral and documentary, dismissed the suit observing that plaintiff insisted for execution of sale

deed on the Western side of the land which was not agreed upon between the parties and therefore he was not entitled for execution of sale deed. The trial Court also observed that plaintiff committed breach of contract and as such he is not entitled to have a regular sale deed.

Hence the present appeal.

3) The parties in the appeal are referred as they stood before the trial Court.

4) Respondents 2 to 6 are impleaded as per Court order dated 27.08.2013 in ASMP No.241 of 2012.

5) Heard the arguments of Sri P.V.Vidyasagar, learned counsel for appellant; Smt. T.Vidya Rani, learned counsel for respondent No.1 and M/s.Indus Law Firm for respondent Nos.4 to 6. None appeared for respondents 2 and 3.

6 a) Severely criticizing the judgment of the trial Court, learned counsel for appellant/plaintiff Sri P.V.Vidyasagar, firstly argued that the trial Court committed patent error in denying the specific performance on the observation that while the plaintiff contracted with defendant to purchase eastern portion of 4 Acres out of Ac.7-80 cts. but he unduly claimed specific performance for western portion of 4 Acres which was not the subject matter of the contract inspite of defendant agreeing to sell the contracted 4 Acres of the land on the eastern side and thus the plaintiff committed breach of the contract. Learned counsel argued that in Ex.A.1— sale agreement dated 12.02.1996, the boundaries and other particulars for

the total extent of Ac.7-80 cts. were mentioned with a stipulation that the parties entered into a sale agreement for 4 Acres out of the said Ac.7-80cts. In Ex.A.1 it is not specifically mentioned whether the contracted 4 Acres was towards East or West of the total extent. As such, it is preposterous for the defendant to contend that the plaintiff agreed to purchase only Eastern part of 4 Acres out of Ac.7-80 cts. and it is a gross mistake on the part of the trial Court to uphold such a contention to dismiss the suit. Since Ex.A.1 only stipulates the extent of the land but not specifying the Eastern or Western side of the total extent, the defendant cannot argue to suit his convenience that the plaintiff contracted to purchase only the Eastern part of 4 Acres out of Ac.7-80 cts. On the other hand, plaintiff is at liberty to seek for registered sale deed towards Western part of the land as there was no stipulation that the land contracted for sale was either on the Eastern or Western side.

He alternatively argued that even assuming that what was contracted was only the Eastern part, still the plaintiff was not debarred from seeking specific performance of contract towards Western part of Ac.7-80 cts. in view of the fact that there was admittedly a title dispute between defendant on one hand and D.Sreenivasulu and some Harijans on the other, in respect of some extent of Eastern part. He thus argued that in any event the trial Court was not correct in dismissing the suit finding fault with plaintiff seeking for sale of Western part.

b) Nextly, he argued that in any event, if the appellate Court comes to conclusion that the plaintiff does not deserve specific performance for

Western part, the Court may order refund of the earnest money though he has not specifically made a prayer to that effect in view of the peculiar circumstances to the effect that admittedly there existed title dispute in respect of some portion of the Eastern part of the plaint schedule.

He thus prayed at the first instance to allow the appeal and decree the suit for specific performance of Western part of the Ac.7-80 cts. of land or in the alternative to order refund of the earnest money with interest.

7) Per contra, learned counsel for 1st respondent/defendant Smt.T.Vidya Rani, while supporting the judgment argued that the contract under Ex.A.1 was only in respect of Eastern part of the Ac.7-80 cts. but not unspecified part out of total extent and therefore, the appellant is not correct in arguing otherwise. Since the contract was in respect of Eastern portion, the plaintiff ought not to have claimed in the plaint as well as his evidence for sale of Western part. As such, the trial Court rightly rejected his claim because he was not eligible for specific performance as he had not come to the Court with clean hands. Learned counsel further argued that there were no disputes with third parties with regard to the eastern part of the plaint schedule property and such disputes if any were only the handy works of the plaintiff to knock away the Western part of Ac.7-80 cts. which is more valuable than the Eastern part. Hence, the suit was rightly dismissed. Learned counsel further argued that the appellant is not entitled to seek for refund of earnest money either, for, he has not made any alternative claim in the plaint to that effect. She placed reliance on the decision reported in

P.Pandit Rao (died per L.R) and others vs. K.Damodar and another¹.

She thus prayed to dismiss the appeal.

8) Learned counsel for respondents 4 to 6 adopted the arguments advanced by learned counsel for 1st respondent.

9) In the light of above rival arguments, the points for determination in this appeal are:

- (i) *Whether 4 Acres of land contracted under Ex.A.1 is in respect of unspecified portion of land out of total extent of Ac.7-80 cts or towards its Eastern side?*
- (ii) *If the contract is only in respect of Eastern part of the total extent, whether plaintiff is entitled to seek for a sale deed in respect of Western part of the total extent?*
- (iii) *Whether the plaintiff is entitled to the alternative relief of refund of earnest money in the event, specific performance is refused?*
- (iv) *To what relief?*

10) **POINT**: It is not in dispute that parties entered into a contract under Ex.A.1—sale agreement. A perusal of Ex.A.1, more particularly its schedule, will not give any scope for doubt about the portion, which was contracted for sale. The schedule specifically shows that it was the eastern lot of 4 Acres out of Ac.7-80cts that was agreed to be sold by the defendant to the plaintiff. The boundaries of the schedule in Ex.A.1 would clinch the issue. The boundaries are:

¹ 2005(6) ALT 140

North : The road leading to Annasamipally
South : The land of Podiri Laxmi etc.,
East : The land of Venkata Ramaiah
West : The land retained by me (defendant)

The Western boundary clearly depicts that out of Ac.7-80 cts, the defendant retained remaining Ac.3-80 cts after contracting for 4 Acres. Since the portion retained by the defendant is shown towards Western side of total extent, the contracted lot of 4 Acres obviously falls on Eastern side. For argument sake, one may say that the above mentioned boundaries relate to the entire Ac.7-80 cts. but not the contracted 4 Acres and the Western boundary which is mentioned as the portion retained by the defendant may relate to some other land of the defendant but not the remaining Ac.3-80 cts. out of Ac.7-80 cts. This argument is not logically correct. As argued, if really, the defendant has some more land, let us say, Ac.1-00 cts to the adjoining west of Ac.7-80 cts, then, while executing Ex.A.1 he would have included the said Ac.1-00 cts to the remaining Ac.7-80 cts. and mentioned in the schedule that he was selling 4 Acres out of Ac.8-80 cts. but he would not leave the adjacent Ac.1-00 cts and mention Ac.7-80 cts. alone. Therefore, this argument cannot be accepted. Above all, PW.1 himself has admitted in his cross-examination that the agreement was in respect of Eastern side properties. He stated thus:

“It is true, the agreement referred to the properties on the Eastern side but in Para 7 of the plaint, I express my willingness to purchase the property preferably on the Western side.”

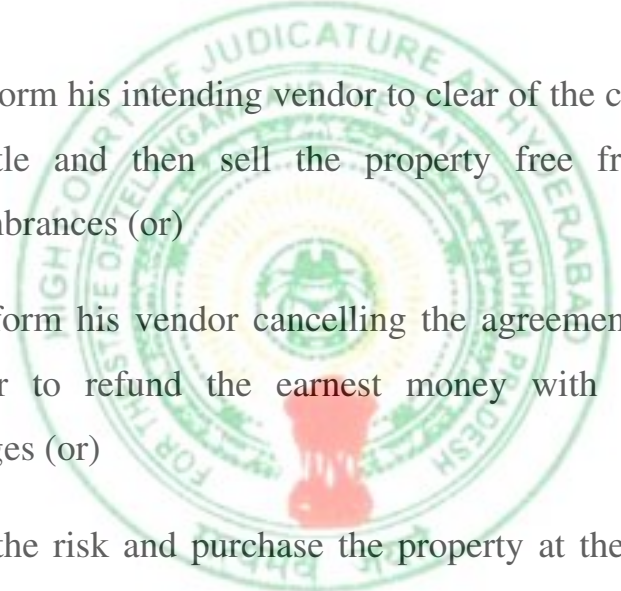
Thus it implies that the plaintiff clearly knows that what was contracted under Ex.A.1 was the eastern portion of 4 Acres out of Ac.7-80 cts. Therefore, point No.1 is concerned, it is held that agreement under Ex.A.1 was in respect of Eastern part of 4 Acres out of Ac.7-80 cts. but not an unspecified part of the total extent.

11) **POINT No.2:** Since it is clear that the contract is in respect of the eastern part of the 4 Acres, it has to be seen whether plaintiff is entitled to seek for specific performance in respect of Western part of Ac.7-80 cts. It should be noted that Para 7 of the plaint manifests the intention of the plaintiff wherein he stated that he learnt that out of Ac.7-80 cts, the defendant was having absolute right over 4 Acres only preferably on the Western side of the total extent of Ac.7-80 cts. for which he obtained rough patta and therefore, the plaintiff was seriously interested in getting the registered sale deed for 4 Acres out of Ac.7-80 cts. preferably on the Western side. In his cross-examination also he emphatically stated as follows:

“It is true, the agreement referred to the properties on the Eastern side but in Para 7 of the plaint, I express my willingness to purchase the property preferably on the Western side. When the plaint was drafted I sought Western portion, even now I insist for Western portion.”

a) Thus it is obvious that while the plaintiff contracted to purchase the Eastern lot of 4 Acres out of Ac.7-80 cts, however, he sought for specific performance of Western lot of 4 Acres out of Ac.7-80 cts. The reason according to him for such a shift is that one D. Sreenivasulu and some

Harijans claimed title in respect of some portion on the Eastern side out of Ac.7-80 cts. and in view of such title disputes between the defendant on one hand and the third parties on the other, his rights might be jeopardized if he purchased the Eastern portion of 4 Acres. According to plaintiff, these disturbing facts prompted him to opt for Western part. Be that as it may, the point is whether legally the plaintiff is entitled to seek specific performance for an alternative property. Under law, when a purchaser came to know that the property which he contracted to purchase is shrouded with title dispute, the options available to him are:

- 
- i) To inform his intending vendor to clear of the clouds surrounding his title and then sell the property free from disputes and encumbrances (or)
 - ii) To inform his vendor cancelling the agreement and seeking the vendor to refund the earnest money with interest and also damages (or)
 - iii) Take the risk and purchase the property at the cost of litigation with the third parties.
- b) In the instant case, having come to know that some third parties were making claim in respect of some portion of the land intended to be purchased by him, no doubt initially, the plaintiff gave Ex.A.3—notice to the defendant calling upon him to establish his title and clear the ambiguity of the rival claims put by Sri D. Sreenivasulu and others and execute the sale deed in favour of plaintiff. To that extent, the plaintiff was right. However, the defendant did not respond to the aforesaid notice. In such a situation, the plaintiff ought to have followed the other alternatives

mentioned supra. Instead he filed the suit seeking for a sale deed in respect of Western portion of Ac.7-80 cts. Even in the evidence also he emphatically claimed Western part. In legal parlance, his claim amounts to novation of old contract with a new contract unilaterally. Section 62 of the Indian Contract Act, speaks of the effect of novation, rescission and alteration of a Contract Act. It reads thus:

“Section 62. Effect of novation, rescission, and alteration of contract- If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.”

In *Citi Bank N.A. vs. Standard Chartered Bank and others*², the Supreme Court observed that novation of a contract cannot be done unilaterally. It observed thus:

“Para 47: Novation, rescission or alteration of a contract under Section 62 of the Indian Contract Act can only be done with the agreement of both the parties of a contract. Both the parties have to agree to substitute the original contract with a new contract or rescind or alter. It cannot be done unilaterally.”

c) Therefore, the plaintiff is legally barred from substituting the old contract with new contract unilaterally. The plaintiff may have a reason and in fact he has, for seeking Western part as towards Eastern side, there were some title disputes. In fact we will find in the evidence of DW.1 to the effect that D.Sreenivasulu and some Harijans of Settipalli issued notices to him claiming share in the said properties and they also filed

² AIR 2003 SC 4630

petitions before the Settlement Officers which ended in his (DW1) favour and the Government preferred appeal against those orders and the matter was pending before the Director of Settlement, Hyderabad in RP No.45 of 1990 and the said RP was preferred in respect of entire extent of the suit land and those disputes over the suit land were not settled sofar. He claimed that he was not willing to sell the Western part of the land and he was not willing to sell the agreement lands either, as the cost of the land was raised. Thus his evidence is clear to the effect that during the relevant period of Ex.A.1, admittedly some disputes were raised by third parties in respect of a part of Ac.7-80 cts. owned by the defendant. However, that itself will not confer a right on the plaintiff to claim a different parcel of land other than the one for which he contracted. Running the risk of repetition, it must be said that novation of a contract cannot be done unilaterally. The defendant's proclamation that he was not willing to sell the agreement-land also due to escalation of the price cannot be taken advantage by the plaintiff for the reason that in his own evidence he emphatically stated that what he wanted was Western side property but not the agreement property. So point No.2 is concerned, plaintiff is not legally entitled to claim a sale deed in respect of Western part of the Ac.7-80 cts. of land.

12) **POINT No.3:** The appellant/plaintiff alternatively seeks for refund of earnest money. Admittedly, the plaintiff has not claimed in the plaint an alternative relief for refund of earnest money in tune with Sec.22(1)(b) of Specific Relief Act. Sec.22(2) of the said Act creates an embargo for the

Court to grant such a relief unless it has been specifically claimed by the party. The said aspect has been reiterated by a learned Single Judge in *P.Pandit Rao*'s case (1 supra). However, in view of the facts peculiar to the instant case, in my considered view, refund of earnest money can be ordered. It is a case where admittedly plaintiff and defendant entered into suit agreement to sell and the defendant received Rs.1,11,400/- towards part of sale consideration. Admittedly, some disputes were raised by third parties in respect of part of the defendant's land and thus a cloud was cast in respect of some portion of the property which the plaintiff wanted to purchase from him. In those circumstances, the plaintiff sought for specific performance in respect of a different land other than the land which he contracted to purchase. Had he sought for a sale deed in respect of the land which he contracted to purchase, he would have been deserved for a decree in the normal course. In view of the unilateral novation, he was held not entitled to the decree of specific performance. Pending appeal, it appears, the respondents have sold the suit schedule property to some third parties and they were impleaded as respondents. In this backdrop, the defendant cannot be allowed to be unduly enriched. Therefore, having regard to the peculiar background surrounding the instant case, though not a general law, the defendant can be directed to return the earnest money to the plaintiff.

13) **POINT No.4:** In the result, this appeal is partly allowed and while upholding the judgment passed by the trial Court in O.S.No.100 of 1986, the defendant in the suit is directed to refund the earnest money of Rs.1,11,400/- to the plaintiff with simple interest @ 6% p.a from the date

of suit till the date of realisation. Each party shall bear their own costs throughout.

As a sequel, miscellaneous petitions pending if any, shall stand closed.

Date: 20.12.2016

U.DURGA PRASAD RAO, J

scs

