

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

SECOND APPEAL No.1507 of 2011

JUDGMENT:

The unsuccessful plaintiff through out, preferred this Second Appeal under Section 100 of Code of Civil Procedure (for brevity 'CPC') challenging the decree and judgment passed by the trial Court in O.S.No.102 of 1992 on the file of Principal Junior Civil Judge, Tanuku, whereby the trial Court dismissed the suit filed by the plaintiff for specific performance of agreement of sale dt. 26.08.1962, which was confirmed by the Appellate Court, by its Decree and Judgment dt. 11.12.2009.

2. For convenience of reference, the parties to the appeal will herein be referred as ranked in O.S.No.102 of 1992 by Principal Junior Civil Judge, Tanuku, through out the judgment.

3. The Plaintiff filed the suit for specific performance of agreement of sale dt. 26.08.1962 directing the defendants to execute a registered Sale Deed and for delivery of vacant possession of the schedule property, on receipt of balance sale consideration, if any, and alternatively, refund of Rs.6,836/-, alleging that defendant No.2 is the wife of defendant No.1 and husband of plaintiff and defendant No.1 are brothers and they are sons of Venkatanarayana.

Venkatanarayana own Ac.1.06 cents in R.S.No.116/16 of Velivennu Village with absolute rights, who agreed to sell the same to plaintiff for a consideration of Rs.7,500/- while agreeing to discharge his debt due to the plaintiff herself to a tune of Rs.5,100/- and discharge his other debts to Kantamani Ramamurthy to an extent of Rs.106-9-0 annas due under the promissory note dt. 9.2.1962 and other debt due to Balabhadra Narasimhamurthy dt. 04.04.1992 for Rs.200-7-0 annas and after discharging the debt, the balance sale consideration of Rs.2084/- is payable to defendant No.1. It was also stipulated that the vendor would execute a registered Sale Deed after the maintenance holder's liability ceases whenever demanded.

4. It was also provided that in case the vendor was to pre-deceased, the maintenance holder, the vendee i.e., the plaintiff could enter into possession and then pay the maintenance holder every year Rs.500/-, the maintenance amount, and obtain a regular sale deed from the successors-in-interest of the vendor. But the maintenance holder died earlier to vendor and no such an eventuality did occur. Venkatanarayana executed sale agreement, referred supra, incorporating the terms agreed upon and the plaintiff discharged debts due to 3rd parties, referred above. But, Venkatanarayana died on 01.12.1991. The plaintiff, after the death of his vendor Seshayya, learnt that defendant

No.1 obtained a settlement deed from Venkatanarayana, regarding vested remainder interest by a document dt. 30.10.1964. Defendant No.1 and all other members of the family are aware of the fact that the total amount of Rs.6,836/- was received by Ventakanarayana in different modes about the discharge of debt etc., The plaintiff is always ready and willing to perform her part of obligation under the agreement of sale to obtain a registered sale deed by paying balance of sale consideration bearing registration expenses. But, the defendants did not come forward to execute the registered sale deed.

5. Defendant No.2 filed Written Statement, which was adopted by defendant No.1, where a specific denial was made about the very execution of agreement of sale itself since the schedule property is the joint family property and the said Venkatanarayana, the vendor of the plaintiff, was not exclusive owner and possessor of the schedule property and therefore, he is not competent to execute the agreement of sale and that the plaintiff is not entitled to claim either primary relief or the alternative relief since the suit was filed after long after lapse of time.

6. During the life time of Venkatanarayana, the plaintiff representing her son as guardian, filed a Pauper Suit O.P.No.09 of 1982 against the defendants, late

Venkatanarayana and plaintiff's husband, for partition of the plaint schedule property. But, the said OP was dismissed on merits. The plaintiff also filed O.S.No.276 of 1982 against defendant No.1 and late Venkatanarayana setting up a false claim for damages and the said suit was dismissed on merits.

7. The alleged agreement of sale dt. 26.08.1962 executed by Venkatanarayana for Rs.7,500/ towards discharge of debts is not true and correct and that the defendants are not aware about ready and willingness of the plaintiff to perform her part of obligation and therefore, the agreement of sale is not true and valid.

8. The alleged payment for discharge of debts due to various creditors is false and therefore, the plaintiff is not entitled to claim any relief and prayed for dismissal of the suit.

9. Basing on the pleadings, the trial Court framed the following issues:

i) Whether the sale agreement dt. 26.08.1962 is true, valid and binding on the defendant ?

ii) Whether the plaintiff is entitled to the relief of specific performance or for the refund of Rs.6,876/- ?

iii) To what relief ?

10. During trial, on behalf of plaintiff, PWs. 1 and 2 were examined and Exs. A.1 to A.8 were marked. On behalf of

defendants, Dw.1 and Dw.2 were examined and Exs. B.1 to B.8 were marked.

11. Upon hearing argument of both counsel, the trial Court disbelieved the agreement of sale, marked as Ex.A.6, and endorsement thereon, dismissed the suit filed for both primary relief and alternative reliefs.

12. Aggrieved by the decree and judgment of the trial Court in dismissing the suit, the unsuccessful Plaintiff preferred Appeal No.07 of 2001 on the file of IV Additional District Judge, (FTC), West Godavari, which ended in dismissal, upon considering the material available on record.

13. Aggrieved by the decree and judgment of the appellate Court, confirmed the decree and judgment of the trial Court, the present Second Appeal is preferred raising several contentions.

14. The substantial questions of law raised in the ground of appeal before this Court are regarding non-consideration of evidence of Pw.2 while holding that Ex.A.6—Agreement of Sale is a forged document by the Courts below and it is an error on the face of record and the trial Court would have drawn the presumption under Section 90 of Indian Evidence Act (for short 'the Act'). But, the Courts below ignored the

presumption under Section 90 of the Act and committed an error and prayed to allow this second appeal.

15. Sri K. Chidambaram, learned counsel for appellant/plaintiff, while reiterating the grounds urged in the ground of appeal and substantial questions of law formulated in the grounds of appeal, contending that question of referring Ex.A.6—Agreement of Sale, in the O.P.No.09 of 1992 filed for partition is not a ground and even otherwise, the document is of more than 30 years old and on the strength of such document, the Court would have drawn presumption under Section 90 of the Act and if such presumption is drawn, the plaintiff is entitled to claim specific performance of agreement of sale on the strength of Ex.A.6 and the endorsement thereon.

16. Now the substantial question that arise for consideration is:

“ Whether a presumption under Section 90 of Indian Evidence Act is applicable to the agreement of sale marked as Ex.A.6 and if so, whether the Decree in appeal is liable to be set aside, based on re-appreciation of evidence of PW.2? ”

17. Substantial question of law: The suit is filed by the plaintiff for specific performance of agreement of sale marked as Ex.A.6 dt. 26.08.1962 (un-registered agreement) and the suit was filed in the year 1992, i.e.,

almost after lapse of 30 years from the date of alleged execution of Ex.A.6. The plaint was presented on 17.03.1992 i.e., one month after completion of 3 years from the date of alleged execution of Ex.A.6.

18. The only contention urged before this Court is that the presumption under Section 90 of Indian Evidence Act is applicable to Ex.A.6 since it is a document of more than 30 years old. Section 90 of the Indian Evidence Act, runs as follows:

“Presumption as to documents thirty years old:

Where any document purporting or proved to be five years, old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

19. As per Section 90 of the Evidence Act, the presumption under Section 90 of Evidence Act is founded on necessity and convenience because it extremely difficult and sometimes not possible to lead evidence to prove handwriting, signature or execution of old document after lapse of 30 years. In order to obviate such difficulties or improbabilities to prove execution of an old document.

Section 90 has been incorporated in the Evidence Act, which does away with the strict rule of proof of private document. Presumption of genuineness may be raised if the document in question is produced from proper custody. It is however, the discretion of the Court to accept the presumption flowing from Section 90. There is, however, no manner of doubt that judicial discretion under Section 90 should not be exercised arbitrarily and not being informed by reasons, as held in *Sri Lakhi Baruah v. Sri Padmakanta Kalita*¹.

20. The presumption under Section 90 of Evidence Act applies to the documents proved to be 30 years old and more and the documents must come from proper custody. The presumption is discretionary and so where a document is suspicious on the face of it mutilated, the Court may refuse to make it. It may call upon the party to offer other proof. The presumption applies only to the document which bears the signature of writer or witnesses and not to unsigned or anonymous papers. Presumption only relates to the signature on the document i.e., to its genuineness though it does not involve any presumption that its contents are true and that they have been acted upon. 30 years is to be counted from the date the document purports

¹ AIR 1996 SC 1253

to bear. The presumption applies to the original documents only. Thus, the rule of evidence under Section 90 of Evidence Act applies only to the extent of signature on the document, but, when it is suspicious, the Court may insist for proof of such document in any of the modes provided under the Evidence Act either by direct or secondary evidence or with the aid of expert opinion, which is relevant under Section 45 of Evidence Act or by opinion evidence under Section 73 of Evidence Act.

21. Here the plaintiff resorted to prove the document by examining PW.2, who is attester of the document. But, the trial Court disbelieved the execution of A.1 assigning reasons since the evidence of PW.2 is not trust worthy. Therefore, the trial Court also disbelieved the endorsement on the reverse of Ex.A.6—Agreement of Sale.

22. Strangely there was an endorsement on the reverse of Ex.A.6 and it was not marked as exhibits before the trial Court separately. PW.2, who is the attester of the document, expressed his inability and he did not speak about the execution of Ex.A.1. However, the evidence of Plaintiff with regard to execution of the document is not credible since in her cross examination in chief, she stated that some of the endorsements were scribed by Jogireddy, scribe of Ex.A.6 and some were by their village Karanam.

In the cross examination, her evidence that she does not know who is the scribe of payment endorsements on the reverse of Ex.A.6 and her father-in-law used to take sale agreement with him and got payment endorsements made thereon and she could not give the details of such payment endorsements as to their years, months or dates and therefore, basing on her inconsistent evidence, her presence at the time of execution of Ex.A.6 and endorsements thereon, was disbelieved due to her inability to testify as to who scribed those endorsements.

23. The main contention before this Court is that a presumption shall be drawn under Section 90 of the Indian Evidence Act since Ex.A.6 is a document more than 30 years old. As discussed in the earlier paras, it is a discretionary presumption and the Court when the execution of document is surrounded by suspicious circumstances, the Court may not draw presumption and exercise such discretion as to the genuineness of Ex.A.6. Therefore, the trial Court did not draw presumption and insisted the plaintiff to prove the execution of Ex.A.6, like any other document, to prove the same.

24. The plaintiff made efforts to prove the execution of Ex.A.6 by examining PW.2, whose evidence is not trustworthy in view of her evidentiary admissions in the

evidence. Therefore, the findings recorded by both trial Court and the Appellate Court are based on appreciation of evidence and it is purely a fact finding recorded by the trial Court. Even otherwise, in view of the suspicious circumstances, it is difficult to draw presumption available under Section 90 of Indian Evidence Act to accept the execution of Ex.A.6. Therefore, the trial Court and the Appellate Court rightly disbelieved execution of Ex.A.6 and thereby denied the relief of specific performance of agreement of sale marked as Ex.A.6.

25. The alleged agreement of sale was executed in the year 1962, but the suit was filed after 30 years and when the suit is for specific performance, which is purely discretionary, the suit shall be filed within a time fixed therein or within a reasonable time. What is the reasonable time is depend upon the facts of each case. Here, the suit was filed more than 30 years from the execution of the alleged agreement of sale, which is unreasonable. Therefore, it is difficult to hold that the plaintiff is entitled to claim either primary relief or alternative relief of refund of advance amount paid by way of discharge of debts due to the plaintiff and 3 others referred supra.

26. On oral consideration of entire material available on record, I find no illegality or irregularity in the findings of

the trial Court, confirmed by the Appellate Court, warranting interference of this Court while holding this point against the plaintiff and in favour of the defendants.

27. In the result, this Second Appeal is dismissed confirming the decree and judgment in O.S.No.102 of 1992 on the file of Principal Junior Civil Judge, Tanuku. But, without costs in the circumstances of the case.

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

M. SATYANARAYANA MURTHY, J

Date: 26-08-2016.

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HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY



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