

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

SECOND APPEAL No.632 OF 2011

JUDGMENT:

The appellant in A.S. No.194 of 2007 on the file of the Court of II Additional District Judge, West Godavari, Eluru, who is the plaintiff in O.S. No.114 of 1999 on the file of the Court of Senior Civil Judge, Kovvur, preferred this second appeal under Section 100 of the Code of Civil Procedure, 1908 (for short, 'CPC') challenging the concurrent finding recorded by the trial court and the first appellate court denying the primary relief of specific performance of agreement of sale.

02. The ranks given to the parties in O.S. No.114 of 1999 will hereinafter be adopted throughout the Judgment, for convenience of reference.

03. The plaintiff filed a suit in O.S. No.114 of 1999 for specific performance of agreement of sale, to direct the defendant to execute registered sale deed dated 27.05.1998 and alternate relief of recovery of advance amount paid and for damages of Rs.1,50,000/- with interest at 6% per annum alleging that the plaintiff purchased the property under the agreement of sale dated 26.05.1998 from the defendant for Rs.1,50,000/- agreeing to pay balance of sale consideration by 26.11.1998, paid advance of Rs.1,40,000/-. The plaintiff is ready and willing to perform his part of obligation under agreement of sale i.e. payment of balance of amount for obtaining registered sale deed, but the defendant did not cooperate to execute registered sale deed in terms of agreement of sale. Therefore, the plaintiff made demands for execution of

the registered sale deed, but there is no response from the defendant. Hence he filed the suit.

04. The defendant filed written statement denying the allegations including agreement of sale while contending that he borrowed an amount of Rs.55,000/- from Allumolu Vishnu and created a registered mortgage without possession in favour of the said person. Taking advantage of the mortgage of the property, the present agreement of sale is created and that the plaintiff is never ready and willing to perform his part of obligation under the agreement of sale and that he did not receive any amount as advance in the alleged contract of sale and prayed for dismissal of the suit.

05. Based on the above pleadings, the trial court framed the following three issues and additional issue.

1. Whether plaintiff is entitled to specific performance of agreement of sale as prayed for?
2. Whether plaintiff is entitled for refund and damages as claimed for?
3. To what relief?

Additional issue:

Whether the suit agreement of sale dated 27.05.1998 is true and valid?

06. During trial, on behalf of plaintiff, P.Ws.1 to 3 were examined, Exs.A.1 to A.5 were marked. On behalf of defendant, the defendant himself was examined as D.W.1 and Exs.B.1 to B.6 were marked.

07. Upon hearing, both the counsel, the trial court disbelieved the very execution of Ex.A.1-agreement of sale and declined to grant primary relief of specific performance and alternate relief of refund of advance amount allegedly paid and damages as claimed by the plaintiff.

08. Aggrieved by the Decree and Judgment of the trial court, the plaintiff preferred appeal in A.S. No.194 of 2007 on the file of the Court of II Additional District Judge, West Godavari, Eluru, and the same was allowed in part by Decree and Judgment dated 03.12.2010 granting alternate relief of refund of advance amount of Rs.1,40,000/- with interest @ 6% per annum from the date of suit till realization.

09. Having dissatisfied with the grant of alternate relief of refund of advance amount, the present second appeal is filed raising several contentions, mainly contending that the first appellate court having believed the execution of agreement of sale ought not to have denied the relief, since the relief of specific performance is discretionary under Section 20 of the Specific Relief Act, 1963 and it can be denied only on equitable considerations pointing to its refusal and the circumstances show that the damage would constitute an adequate relief. But the first appellate court erroneously declined to grant relief of specific performance and prayed to grant primary relief of specific performance.

10. The appellant/plaintiff formulated as many as six substantial questions of law extracting certain principles laid down in the Judgments and precedents on Specific Relief Act,

without directly formulating any substantial question of law that involved in the matter.

11. During hearing, learned counsel for the appellant/plaintiff, has contended that the relief of specific performance cannot be denied unless circumstances show that he was not ready and willing to perform his part of obligation under the agreement of sale-Ex.A.1.

12. However, Sri Sai Gangadhar Chamorthy, learned counsel for the respondent/defendant, has supported the judgment of the first appellate court in all respects.

13. Considering rival contentions, perusing the material available on record, the substantial questions of law formulated by this Court is as follows:

Whether the appellant/plaintiff is ready and willing to perform his part of obligation under the agreement of sale by issuing any notice in Form Nos.47 and 48 of Appendix A to the First Schedule of CPC? If not, whether refusal to grant a decree in favour of the primary relief of specific performance is in accordance with law?

IN RE. QUESTION:

14. The trial court totally disbelieved the agreement of sale and declined to grant both primary and alternate relief including damages. Whereas the first appellate court believed the agreement of sale-Ex.A.1 and passing consideration of Rs.1,40,000/- as advance, granted alternate relief to refund of advance amount together with interest @ 6% per annum from the date of suit till realization.

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15. The respondent/defendant did not prefer any appeal challenging the relief granted by the first appellate court i.e. refund of advance amount together with interest. Therefore, the finding with regard to execution of agreement of sale-Ex.A.1 and payment of advance of Rs.1,40,000/- has attained finality. Hence, this Court need not examine the genuineness of agreement of sale-Ex.A.1 and liability to refund of advance amount of Rs.1,40,000/- together with interest at 6% per annum.

16. The only question before me is that whether the appellant/ plaintiff is ready and willing to perform his part of obligation under the agreement of sale.

17. As seen from agreement of sale-Ex.A.1, the respondent/ defendant sold the property under the agreement of sale dated 27.05.1998, and received an amount of Rs.1,40,000/- as advance, and the appellant/ plaintiff agreed to pay balance of sale consideration within six months from the date of execution of agreement of sale-Ex.A.1, to obtain registered sale deed. The said period prescribed in agreement of sale expired by the end of January, 1999. But the suit was filed on 31.12.1999. The reason for the delay is that the respondent/ defendant did not co-operate for execution of registered sale deed receiving balance of sale consideration, despite the repeated requests made by the plaintiff.

18. The first appellate court disbelieved readiness and willingness to perform the obligation of the appellant/plaintiff under the agreement of sale, as no notice was issued within the

stipulated time of six months demanding the respondent/defendant to execute registered sale deed, receiving balance sale consideration of Rs.10,000/-.

19. As seen from the record, no notice was issued and there is no material to show that the appellant/plaintiff made any demand to the respondent/defendant to execute registered sale deed receiving balance of sale consideration. A similar question came up before this Court in **BADDAM PRATHAP REDDY v. CHENNADI JALAPATHI REDDY**¹, wherein, considering various judgments of the Apex Court, it was held that no notice in Form Nos.47 and 48 of Appendix-A to I Schedule of CPC is mandatory to believe readiness and willingness to perform the obligation by the plaintiff.

20. According to Sections 43 and 44 of the Indian Contract Act, 1872 when the order of performance is fixed for performing the obligation of the parties to the suit, it is for the parties to adhere to order of performance fixed and the terms and conditions of the agreement.

21. As seen from the contents of agreement of sale-Ex.A.1, the appellant/ plaintiff has to pay balance of sale consideration within six months from the date of its execution, such payment is not linked with registration, but failed to pay the same and no steps have been taken to pay the amount atleast by issuing notice demanding the respondent/defendant to receive the amount. The order of performance fixed under Ex.A.1 is that the appellant/ plaintiff has to pay balance of sale consideration

¹ 2008(5) ALD 200

within six months and thereafter the respondent/ defendant has to execute registered sale deed. So the payment is totally de-linked to the execution of registered sale deed and that the appellant/ plaintiff failed to pay balance of sale consideration as agreed within the stipulated time, it amounts to breach of agreement of sale, it falls under Section 16(b) of the Specific Relief Act, 1963.

22. Even otherwise, a notice of demand is mandatory as held by the Division Bench of the Apex Court in **OUSEPH VARGHESE v. JOSEPH ALEY AND OTHERS**², wherein it was held that a notice in Form Nos. 47 and 48 of Appendix A to I schedule of CPC is mandatory and in the absence of such notice in writing, readiness and willingness of the plaintiff cannot be accepted.

23. A similar question came up before the Division Bench of Apex Court in **MANJUNATH ANANDAPPA URF. SHIVAPPA HANASI v. TAMMANASA AND OTHERS**³, wherein the principle laid down in the above Judgment is reiterated and on the ground that the plaintiff failed to issue notice in Form Nos.47 and 48 of Appendix A to I schedule of CPC, readiness and willingness cannot be accepted. Therefore, in view of the principles laid down in the above judgments, taking into consideration of the facts and circumstances of the case, it is difficult to hold that the appellant/plaintiff is ready and willing to perform his part of obligation, which is mandatory under Section 16 (c) of Specific Relief Act, 1963.

² MANU/SC/0493/1969

³ MANU/SC/0248/2003

24. In **SARADAMANI KANDAPPAN V. S. RAJALAKSHMI & OTHERS**⁴ the Apex Court held that when the order of performance is fixed under agreement of sale, or contract, it is the duty of the parties to perform their obligation in the order of performance fixed and failure to perform their obligation disentitles them to claim equitable and discretionary relief of specific performance.

25. The main endeavour of the appellant/ plaintiff is that the relief claimed under Section 20 of the Specific Relief Act, 1963 is purely discretionary in nature and it is hedged by two conditions contained in Section 20 of the Specific Relief Act when the relief of Specific performance can be refused.

26. In the present case, the appellant/ plaintiff miserably failed to establish his readiness and willingness and his total conduct is blameworthy and committed breach of terms and conditions of the contract which attracts Section 16(b) of the Specific Relief Act. Thereby taking into consideration of the conduct of the appellant/ plaintiff, it is difficult to hold that the appellant/plaintiff is ready and willing to perform his part of obligation under agreement of sale-Ex.A.1.

27. Hence, the first appellate court rightly declined to grant primary relief and the finding does not warrant interference of this Court while exercising power under Section 100 of CPC to reverse the finding with regard to primary relief.

28. In the result, the appeal is dismissed affirming the Decree and Judgment dated 03.12.2010 in A.S. No.194 of 2007

⁴ AIR 2011 SC 3234

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passed by the II Additional District Judge, West Godavari,
Eluru. No costs.

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

M. SATYANARAYANA MURTHY, J

Date: 12.08.2016

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