

HON'BLE SRI JUSTICE S. RAVI KUMAR

SECOND APPEAL No.1388 of 2010

JUDGMENT:

This appeal is preferred challenging the decree and judgment dated 25.04.2006 in A.S.No.98 of 2004 on the file of IV Additional District Judge (FTC), Ongole, whereunder, judgment and decree dated 22.03.2004 in O.S.No.55 of 1991 on the file of Senior Civil Judge, Addanki is confirmed.

2. Appellant herein is unsuccessful plaintiff in both the Courts. Plaintiff filed O.S.No.55 of 1991 claiming relief of specific performance of an agreement of sale dated 11.09.1990 executed by D1 and D2 in respect of plaint schedule property for a consideration of Rs.32,000/-. The claim of plaintiff was resisted by D1 and D2 contending that the agreement was duly cancelled through Ex.B5 notice and thereafter property was sold to D3 as time was the essence of contract. Trial court on a consideration of oral and documentary evidence, accepted the plea of defendants and held that plaintiff did not come forward to perform her part of contract within stipulated time and she only exhibited her readiness and willingness after issue of Ex.B5 notice and observing so, held that plaintiff was not entitled for the relief of specific performance by enforcing Ex.A1 agreement. Aggrieved by the dismissal of suit, plaintiff preferred appeal to the District Court and IV Additional District Judge (FTC), Ongole. First appellate court on a reappraisal of oral and documentary evidence, confirmed the findings of trial Court and dismissed the appeal. Aggrieved by the same, present Second Appeal is preferred contending that following are the substantial questions of law that would arise for decision of this Court.

“1. Whether in the facts and circumstances of the case, there is any presumption under Section 27 of General Clauses Act to presume a deemed service of Ex.B5 notice on the plaintiff when there is a clear evidence that the said notice has

been returned by the Postal Authorities as the plaintiff was absent in the village more particularly the court below believed the version of the plaintiff that she was at her parents house due to her pregnancy?

2. Whether in the facts and circumstances of the case, the time is essence of suit contract dated 21.09.1990 since there is no such clause or term in the agreement and since it was not made by issuing the notice Ex.B5 which also does not have any such term.

3. Whether in the facts and circumstances of the case, the term stipulated in the agreement that in case of delay in payment of balance of sale consideration by the plaintiff that the advance amount would be forfeited also amounts that the agreement shall stand cancelled since there is clear and unambiguous difference between the incidents of cancellation and forfeiture.”

3. Heard arguments.

4. Advocate for appellant submitted that the Courts below have erred in drawing presumption under Section 27 of the General Clauses Act in respect of Ex.B5 notice and when plaintiff has no knowledge of Ex.B5, she has every right to enforce Ex.A1 agreement. It is further submitted that in the agreement except forfeiture of advance amount, there is no stipulation of cancellation of agreement, treating, time as essence of contract. It is submitted both trial Court and appellate Court have erred in treating the forfeiture clause as cancellation.

5. I have perused the material papers including judgment of the trial Court and first appellate Court with reference to grounds raised as substantial questions of law. Second and third grounds are in respect of appreciation of factual aspects. With regard to ground touching Section 27 of the General Clauses Act, that section contemplates to draw a presumption in respect of a notice issued through registered post with acknowledgment due. Here, the trial Court and first appellate Court on a consideration of oral evidence of both parties, particularly evidence of PW.6, have drawn a presumption under Section 27 of General Clauses Act in respect of Ex.B5 notice and accepted the plea

of defendants with regard to cancellation of Ex.A1 agreement. So, even that objection of plaintiff is in respect of factual appreciation with reference to the evidence and no law is involved, particularly substantial question of law to admit the second appeal.

6. For these reasons, I am of the considered view that no law is involved, leave alone, substantial question of law for determination of this court and that second appeal is liable to be dismissed at admission stage.

7. Accordingly, this Second Appeal is dismissed at admission stage. No costs. Miscellaneous Petitions pending in this appeal, if any, shall stand closed.

S. RAVI KUMAR, J

Date: 03-02-2016.

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