

IN THE HIGH COURT OF JUDICATURE AT HYDERBAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADERSH
APPEAL SUIT NO. 916 OF 2011

Between:

Smt. Killamsetty Eswari and another

.....Appellants

And:

Sri Pedada Tulasi Rao (died) and nine others

..... Respondents

JUDGMENT PRONOUNCED ON : 01-09-2016

HON'BLE SRI JUSTICE : V. RAMASUBRAMANIAN

AND

HON'BLE SMT. JUSTICE : ANIS

1. Whether Reporters of local Newspapers may be allowed to see the Judgments? : Yes
2. Whether the copies of judgment may be marked to Law Reporters/ Journals? : Yes
3. Whether their Ladyship/Lordship wish to see the fair copy of the judgment? : Yes

* THE HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN

AND

THE HON'BLE SMT. JUSTICE ANIS

+ APPEAL SUIT NO. 916 OF 2011

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.... Respondents

! Counsel for appellants: Sri M.V.Durga Prasad

^ Counsel for respondents 2 to 4 and 7 to 10: Sri V.L.N.G.K.Murthy

Counsel for respondents 5 and 6: Sri V.V.Prabhakar Rao

< Gist:

> Head Note:

? Cases referred:

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH

Delivered on : 01-09-2016

Coram :

The Honourable Mr. Justice V.RAMASUBRAMANIAN
and
The Honourable Smt. Justice ANIS

APPEAL SUIT NO. 916 OF 2011

1. Smt. Kilamsetty Eswari, W/o.Sri Janardhana Rao,
aged about 63 years, R/o.Pedabaratam Street, Srikakulam.
2. Sri Chinnari Suryanarayana, S/o.Sri Satyanarayana,
aged about 46 years, R/o.Plot No.7, Srinivasa Nagar Colony,
Srikakulam.

... Appellants

Vs.

1. Sri Pedada Tulasi Rao (died)
2. Sri Pedada Laxmana Rao, S/o.Nagabhushan Rao,
aged about 45 years, C/o.P.Sriramamurthy,
Sai Nilayam, Opp: D.No.1-206, Sai Santosh Nivas,
Panthula Joga Rao Street, Behind St. Theresa School,
Baji Junction, Visakhapatnam – 27.
3. Sri Pedada Murali, Chief Engineer,
S/o.Nagabhushana Rao, aged about 43 years,
R/o.Automotive Manufacture, Maddilapalem,
Visakhapatnam.
4. Sri Pedada Venkataramana Rao, S/o.Nagabhushana Rao,
aged about 41 years, R/o.D.No.45-35-14/6,
Lakshmi Devi Nivas, Jagannadham, Akkayyapalem,
Visakhapatnam – 16.
5. Sri Andhavarapu Varaha Narasimham,
S/o.late Andhavarapu Satyanarayana,
Age: 68 years, Occ: Business,
R/o.16-3-111, Gujarathipeta, Srikakulam.

6. Sri Andhavarapu Venkata Nagendra Prasad,
S/o.Andhravarapu Varaha Narasimham,
Age: 37 years, Occ: Business,
R/o.16-3-111, Gujarathipeta, Srikakulam.

7. Smt. P.Padmaja, W/o.late P.Tulasi Rao,
Hindu, aged about 50 years, Housewife,
R/o.25-50-25, Abid nagar, Akkayyapalem,
Visakhapatnam.

8. Smt. P.Naga Malleswari, W/o.Harnath,
Hindu, aged about 34 years, Housewife,
R/o.Srikakulam, Srikakulam District.

9. Smt. P.Lochana, W/o.Madhu,
Hindu, aged about 31 years, Housewife,
R/o.25-50-25, Abid nagar, Akkayyapalem,
Visakhapatnam.

10. Smt. P.Jyoshna, W/o.Chaitanya,
Hindu, aged about 29 years, Housewife,
R/o.Srikakulam, Srikakulam District.

... Respondents

(Respondents 5 and 6 are impleaded as per the order
dated 28.09.2015 passed in A.S.MP.No.1775 of 2015)

(Respondents 7 to 10 are brought on record as L.Rs. of
deceased-respondent No.1 as per the order dated 28.07.2016
passed in A.S.MP.No.1406 of 2016)

For Appellants : Sri M.V.Durga Prasad

For Respondents 2 to 4 and 7 to 10 : Sri V.L.N.G.K.Murthy

For Respondents 5 and 6 : Sri V.V.Prabhakar Rao

**HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN
AND
HON'BLE SMT. JUSTICE ANIS**

APPEAL SUIT NO. 916 OF 2011

JUDGMENT: *(Per Hon'ble Sri Justice V.Ramasubramanian)*

The plaintiffs in a suit, whose prayer for specific performance was negatived, but in whose favour a decree for refund of money was granted, have come up with the present regular appeal.

2. Heard Mr. M.V.Durga Prasad, learned counsel for the appellants, Mr. V.L.N.G.K.Murthy, learned counsel appearing for the respondents 2 to 4 and 7 to 10, Mr. V.V.Prabhakar Rao, learned counsel appearing for the respondents 5 and 6 who are the subsequent purchasers of the property.

3. The appellants herein filed a suit in O.S.No.21 of 2007 on the file of the District Court, Srikakulam as against the respondents 1 to 4 herein (the first respondent since died and his legal representatives were impleaded as respondents 7 to 10). The suit was for specific performance of an agreement of sale of immovable property dated 06.09.2004.

4. The respondents 1 to 4 took a defence in their Written Statement that they wanted to dispose of the suit schedule property, for the purpose of acquiring another property in Visakhapatnam and that the completion of the sale transaction hit several road blocks, in view of the tenants not vacating the property, but contesting the rent

control proceedings. They also pleaded that at a mediation held in August, 2007, the parties had agreed for the return of the advance amount and that thereafter the plaintiffs had come up with the suit.

5. The Court below framed two issues, which are as follows:

i) Whether the plaintiffs are entitled for specific performance of an agreement of sale dated 06.09.2004?

ii) To what relief?

6. During trial, the appellants/plaintiffs examined four witnesses on their behalf. The second plaintiff was examined as PW1, the father-in-law of PW1 who was one of the attestors to the agreement of sale was examined as PW2, another attestor to the agreement of sale was examined as PW3 and the scribe of the agreement of sale was examined as PW4. The plaintiffs filed as many as 11 documents as Exs.A.1 to A.11.

7. On the side of the defendants, the fourth defendant was examined as DW1 and the second defendant was examined as DW2. The defendants filed the certified copy of the deposition of PW4, in the rent control proceedings, as Ex.B.1. Other than this document, the defendants did not file any documents.

8. Based upon the oral and documentary evidence, the trial Court came to a conclusion that though Ex.A.1 agreement was true, valid and binding, the defendants had not satisfied the requirements of Section 16(c) of the Specific Relief Act, 1963 (for short 'the Act').

The Court below also came to the conclusion that in view of the pendency of the disputes between the defendants and their tenants, it was difficult for the defendants to complete the transaction and handover vacant possession as per the agreement of sale. After holding so, the trial Court went into the question of hardship, which is one of the parameters on which the discretionary relief of specific performance had to be decided and held that the hardship that would be caused to the defendants in granting specific performance was much more. Therefore, the Court below rejected the prayer for specific performance, but allowed the alternative relief of recovery of the advance money of Rs.11,50,000/-. The Court below directed this amount to be refunded by the defendants together with interest at 12% per annum from the date of agreement, viz., 06.09.2004 upto the date of the decree. The Court also awarded 6% interest on the said amount, from the date of the decree till the date of realization.

9. Not satisfied with the decree for refund of the advance money, the plaintiffs have come up with the present appeal.

10. Before we proceed further, we are obliged to point out, that the appellants herein did not seek in their suit, the alternative relief of recovery of money. The alternative relief for the refund of money in a suit for specific performance, can be granted subject to the prescriptions contained in Section 22(2) of the Act. Under sub-section (2) of Section 22 of the Act, no relief under clause (a) or clause (b) of sub-section (1) shall be granted by the Court unless it has been specifically claimed. Since such a restriction creates

serious hardship to the plaintiff in a suit for specific performance, the proviso stipulates that at any stage of the proceedings, the plaintiff can be allowed to amend the pleadings so as to seek any alternative relief. Whenever a prayer for amendment is made in terms of the proviso to sub- section (2) of Section 22, the normal restrictions imposed under Order VI Rule 17 of the Code of Civil Procedure, 1908 (for short 'the Code') will not apply. Anyway we are not concerned in this case about the validity of the decree for refund of money granted by the trial Court, in view of the fact that the defendants have not only refrained from challenging the decree but also deposited the entire decretal amount into the trial Court.

11. Keeping the above in mind, if we get back to the present appeal, we think that the following points arise for determination in this appeal:

1. Whether the Court below was right in rejecting the prayer for specific performance in the facts and circumstances of the case?
2. Whether the plaintiffs had succeeded in establishing the requirements stipulated by the Act to secure a decree for specific performance?

Issues 1 and 2

12. Since both issues are interconnected, we deem it fit to deal with both of them together. It is seen from a copy of the plaint filed

by the appellants that the agreement of sale was entered into on 06.09.2004. The total consideration fixed in the agreement of sale was Rs.68 lakhs. On the date of the agreement of sale, the plaintiffs had paid a sum of Rs.10 lakhs. All these facts are not in dispute. There is also no dispute with respect to the property that was the subject-matter of the agreement.

13. Under Ex.A.1 agreement of sale, the defendants were obliged to do, before the completion of the transaction, certain things, viz., a) to pay all electricity charges and property tax due and ensure that the suit property is without any disputes; and b) to remove a building standing on the property at their own cost, secure a final decree in a suit for partition that had been compromised in an appeal before this Court and to have the property actually divided by metes and bounds.

14. There was also one obligation imposed upon the plaintiffs under the agreement of sale. The obligation was that the plaintiffs should pay further advance within three months and obtain receipts.

15. Pursuant to the above, the plaintiffs appear to have paid a further advance of Rs.1,50,000/- on 29.04.2005, as seen from the endorsement made on the reverse of the first page of Ex.A.1. In any case, the payment of further advance and the endorsement are not in dispute.

16. In the light of the above, the plaintiffs sought to establish before the Court below – (1) that time was not the essence of

contract; (2) that they were always ready and willing to perform their part of contract; and (3) that they were not aware of the occupation of the property by tenants and the initiation of proceedings by the defendants for evicting the tenants.

17. But the Court below did not believe the story of the plaintiffs that they were not aware of the existence of tenancies in the suit property. This was due to the fact that one of the tenants in the suit schedule property was actually examined as PW4. He was one of the attestors to Ex.A.1 agreement of sale. As a matter of fact, he was one of the witnesses examined as RW2 in an eviction case and his deposition was filed as Ex.B.1.

18. In the light of the very evidence let in by the plaintiffs, through PW4 who was one of the attestors to Ex.A.1 agreement of sale, the very pleading made by the plaintiffs in Paragraph III (c) of the plaint, was obviously false. The relevant part of Paragraph III (c) of the plaint reads as follows:

“The plaintiffs suspect the bonafidies of defendants as the defendants dillydallying to execute a regular registered sale deed in favour of plaintiffs after receiving the balance sale deed consideration offered by the plaintiffs and the defendants filed an RCC 2, 3 and 4 of 2007 against the tenants to evict them from scheduled portions. The very same willfully suppressed by the defendants at the time of execution of agreement to sell dated 6-09-2004. Thus the defendants playing fraud against plaintiffs by suppressing the real facts.”

19. Even in evidence, the second plaintiff examined as PW1, feigned ignorance of the existence of the tenants. During cross-examination, PW1 stated as follows:

“I have no knowledge whether the schedule property is given to any tenants for rent and I do not know who is residing in the said property.”

In contrast, PW4 stated during his cross-examination as follows:

“It is true that I was living in one portion at the time of construction of my house which is situated opposite to schedule property. I stayed for three months for rent in the said portion. There are three other portions apart from the portion occupied by me. There were tenants in other three portions which are adjacent to my portion.”

20. Therefore, it was clear that the plaintiffs did not go to Court, with clean hands. The averments contained in the plaint, especially in a suit for specific performance, to the effect as though they did not have any knowledge of the existence of the tenancies, disentitle them to the grant of the discretionary relief of specific performance.

21. Moreover, as rightly observed by the Court below, the plaintiffs in a suit for specific performance, are obliged to aver and prove that they had performed or had always been willing to perform the essential terms of contract which are to be performed by them. Unfortunately, the plaintiffs, though averred their readiness and willingness to perform the essential terms of the contract, did not

produce any proof to show their readiness. As pointed out earlier, the plaintiffs filed 16 documents. Ex.A.1 was the agreement of sale. Exx.A.2 and A.3 are the legal notice and reply notice respectively. Ex.A.4 was the final decree in a suit for partition between the defendants and their father. Exx.5 and 6 were the postal receipts and acknowledgement cards. Exx.A.7 and A.8 were the certified copies of the orders passed by the Rent Controller in two eviction petitions against the tenants. Exx.A.9 to A.11 are the certified copies of the orders passed in the appeals filed against the orders of eviction passed by the Rent Controller.

22. In other words, there was not a scrap of paper produced by the plaintiffs to show their readiness. We are conscious of the fact that it is neither necessary for the plaintiffs nor required of them to bring jingling coins into the Court and establish their readiness. ***The requirements of Section 16(c) of the Act are two-fold. The plaintiffs should establish both willingness as well as readiness. While willingness is an animus of mind which can be established only through oral evidence, readiness is a factor that should be established by something more than mere oral evidence.*** Unfortunately, the plaintiffs who pleaded readiness and willingness, failed to prove their readiness through any piece of paper or document.

23. Though the trial Court erred in recording a finding that the plaintiffs ought to have deposited the balance of sale consideration

into Court, the ultimate conclusion reached by the trial court was correct, albeit through a wrong reasoning.

24. Once it is found that readiness on the part of the plaintiffs had not been established, the plaintiffs would not be entitled to a decree for specific performance.

25. The issue whether there was readiness on the part of the plaintiffs could also be decided from another angle. The date on which the agreement of sale was entered into was 06.09.2004. The final decree proceedings in the suit for partition between the defendants and their father, came to an end on 25.01.2005. The further advance as stipulated in Ex.A.1 was made to the extent of Rs.1,50,000/- on 29.04.2005. The suit notice was issued on 23.07.2007.

26. What happened during the interregnum period of two years between 29.04.2005 to 23.07.2007, is not explained in the plaint. The relevant paragraphs of the plaint are conspicuously silent about what happened from 29.04.2005 upto 01.05.2007. As per the averments contained in Paragraph III (d), the plaintiffs sought to raise a dispute for the first time after 29.04.2005 only in the first week of May, 2007. Therefore, the requirements of Section 16(c) of the Act, does not stand satisfied. We are not holding that time was the essence of the contract of sale and we are not putting the period between 29.04.2005 and 01.05.2007, as a period during which the plaintiffs were guilty of delay or laches. We are highlighting this only

to show that the failure of the plaintiffs to produce any evidence for establishing their readiness, is aggravated by such a long lapse of time and their conduct.

27. Mr. M.V.Durga Prasad, learned counsel for the appellants contended that in a civil suit the plaintiffs are obliged only to prove what is disputed and not what is admitted. Under Order VIII Rule 5 of the Code what is not denied specifically, is deemed to have been accepted. In the entire Written Statement filed by the defendants 1 to 4, they did not even make a formal denial of the averments contained in the plaint that the plaintiffs were ready and willing to perform their part of obligations under the contract. Therefore, it is contended by the learned counsel for the appellants that the plaintiffs cannot be expected to prove something on which there was no dispute raised.

28. We are unable to accept the above submissions. It is true that a civil proceeding is predominantly decided on the basis of the pleadings and the evidence. It is also true that Order VIII rule 5 of the Code requires a defendant to specifically plead a denial or admission of the averments. It is also true that in the Written Statement filed by the defendants, they did not choose to deny the allegation contained in the plaint that the plaintiffs were ready and willing to perform their part of the obligations.

29. But the difficulty for the appellants in this case is that ***a positive admission on the part of the defendants, stands on a***

different footing than a deemed admission that would arise as a result of the legal fiction created under Order VIII Rule 5 of the Code. Where the plaintiffs seek to take advantage of the legal fiction in certain circumstances, they may be entitled to. But the requirement of Section 16(c) of the Act cannot be satisfied by invoking the legal fiction created by Order VIII Rule 5 of the Code. For instance, a decree on admission is possible under Order XII Rule 6 of the code. The admission contemplated under Order XII Rule 6 of the Code cannot be equated to a deemed admission that is permitted under Order VIII Rule 5 of the Code. Similarly, the requirement of Section 16(c) of the Act will not stand satisfied, merely because of a deemed admission presumed under Order VIII Rule 5 of the code.

30. It is needless to point out that under Section 20(1) of the Act, the jurisdiction to decree specific performance is discretionary. The provision makes it clear that the Court is not bound to grant such a relief merely because it is lawful to do so. However, sub-section (1) of Section 20 also adds a note of caution to the effect that the discretion of the Court is not arbitrary but sound and reasonable. One peculiarity of sub-section (1) of Section 20 is that while under normal circumstances, the discretion exercised by the Court of first instance cannot be corrected on appeal, sub-section (1) of Section 20 carves out an exception that the discretion exercised under the Act is capable of being corrected by a Court of appeal. Therefore, the suit for specific performance cannot be treated as one of the run

of the mill cases where simple law of pleadings could be applied *dehors* the provisions of the enactment.

31. The Court below had found and we have also found that the case on hand falls within the parameters of sub-section (2) of Section 20 of the Act, where the court may exercise the discretion not to decree specific performance. This is a case where one or more of clauses (a) to (c) of sub-section (2) of Section 20 stands satisfied. Therefore, we are of the considered view that both the issues arising for determination are to be answered against the appellants and the judgment and decree of the Court below do not call for any interference.

32. In the result, the appeal is dismissed, however, without any order as to costs. As a sequel thereto, miscellaneous petitions, if any, pending shall stand closed.

V. RAMASUBRAMANIAN, J

ANIS,J

Date: 01.09.2016
anr

Note: L.R. Copy to be marked.

B/o
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