

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

SECOND APPEAL No.561 of 2013

JUDGMENT:

This Second Appeal, under Section 100 of the Code of Civil Procedure, 1908, by the unsuccessful plaintiff, is directed against the decree and judgment dated 29.10.2012 of the learned XIII Additional Chief Judge (Fast Track Court), City Civil Court, Hyderabad, passed in A.S.No.351 of 2006, whereby, the learned XIII Additional Chief Judge, while dismissing the appeal, confirmed the decree and judgment dated 04.04.2006 of the learned IV Senior Civil Judge, City Civil Court, Hyderabad, passed in O.S.No.1226 of 1998, filed by the plaintiff for specific performance of agreement of sale.

2. For convenience sake, the parties will be hereinafter referred to as per their array before the trial Court.

3. Plaintiff filed suit for specific performance of agreement of sale dated 04.11.1995 to direct the defendants to execute registered sale deed in terms of oral agreement of sale (later reduced into writing) under which, plaintiff purchased the suit schedule property for Rs.1,80,000/-, paid Rs.70,000/- as earnest money while agreeing to pay the balance of sale consideration of Rs.1,10,000/- within the time stipulated therein, contending that the agreement was signed by defendants 1, 3 and 4 except the 2nd defendant, who was not available by the date of execution of agreement of sale; Defendants agreed to sell the schedule property in order to discharge the overdraft availed by them from Mahesh Co-operative Bank and the earnest money paid on the date of agreement was deposited by 1st defendant to the credit of overdraft account with Mahesh Co-operative Bank on the next day; The plaintiff is ready and willing to perform his part of obligation under the agreement of sale and

in fact, paid major part of consideration to the credit of the overdraft account with Mahesh Co-operative Bank to a tune of Rs.88,000/-; Possession of property was delivered to plaintiff who later constructed a building, let out to one Vitthaldas Sony on monthly rent of Rs.2,500/-; Thus, plaintiff is in possession and enjoyment of schedule property being the purchaser under agreement of sale; Subsequently, defendants did not co-operate in executing registered sale deed in favour of plaintiff; Hence, he is constrained to file the suit for specific performance.

4. Defendants 1, 3 and 4 resisted the claim of plaintiff on various grounds denying material allegations, *inter alia* contending that there was no oral agreement of sale to sell the property; agreement of sale dated 04.11.1995 was executed by defendants 1, 3 and 4 alone and not by the 2nd defendant; Plaintiff agreed to pay the balance of sale consideration by 04.02.1996 as stipulated in the agreement of sale, but failed to pay the same and, therefore, he forfeited the amount paid as earnest money, i.e., Rs.70,000/- while canceling the agreement of sale; Alleged payment to the credit of overdraft account with Mahesh Co-operative Bank is not known to the defendants and they never directed the plaintiff to do so; Defendants never delivered possession of schedule property to plaintiff and they are in possession and enjoyment of the property, let out the same to one Vitthaldas Sony on monthly rent of Rs.2,500/-; When said Vitthaldas Sony failed to pay monthly rent, they filed S.C.No.192 of 1998 on the file of Additional Chief Judge, City Small Causes Court and O.S.No.320 of 1999 on the file of V Junior Civil Judge, City Civil Court, Hyderabad, claiming perpetual injunction restraining defendants in the said suit from interfering with the peaceful possession and enjoyment of the property; The 1st defendant filed

O.S.No.3187 of 1997 on the file of IX Junior Civil Judge, City Civil Court, Hyderabad and obtained *status quo*; Defendants got issued notice dated 21.04.1997 to the plaintiff informing forfeiture of amount under the agreement of sale and also issued another notice dated 22.07.1997 informing cancellation of agreement of sale for failure on the part of plaintiff to perform his part of obligation; Thus, defendants 1, 3 and 4 forfeited the earnest money and cancelled the agreement of sale; There is no subsisting contractual relationship between the plaintiff and defendants 1, 3 and 4 and thereby, plaintiff is not entitled to claim specific performance of agreement of sale; the suit is liable to be dismissed.

5. The 2nd defendant filed separate written statement denying the claim and his liability to perform his part of obligation under the agreement of sale.

6. The 5th defendant filed a **memo** adopting the written statement filed by defendant No.3.

7. Basing on the above pleadings, trial Court framed the following issues for trial:-

1. Whether the agreement of sale is valid and binding against the defendant No.2?
2. Whether the agreement with defendants 1, 3, and 4 stood cancelled and advance of Rs.70,000/- forfeited due to failure of the plaintiff in not paying the balance as per the terms of agreement dated 04.11.1995?
3. Whether there is an oral agreement between the parties apart from written agreement dated 04.11.1995?
4. Whether the plaintiff is entitled for the specific performance of agreement of sale?
5. Whether the defendants delivered the suit house to the plaintiff?
6. Whether Vithaldas is the tenant of the plaintiff?

7. To what relief?

8. During trial, on behalf of plaintiff, P.Ws.1 to 3 were examined and Exs.A.1 to A.15 were marked. On behalf of the defendants, D.Ws.1 and 2 were examined and Exs.B.1 to B.8 were marked. Exs.X.1 and X.10 also were got marked through P.W.2.

9. Upon hearing argument of both the counsel, the trial Court disbelieved readiness and willingness of the plaintiff to perform his part of obligation under the agreement of sale and dismissed the suit.

10. Aggrieved by the decree and judgment of the trial Court, the plaintiff preferred first appeal in A.S.No.351 of 2006 before the lower appellate Court, which ended in dismissal vide the order under challenge.

11. During hearing, Sri P.Panduranga Rao, learned counsel for appellant/plaintiff, made two-fold submissions. They are **(1)** when no clause is there in agreement of sale that the plaintiff has to pay the balance of sale consideration and obtain registered sale deed within reasonable time, defendants 1, 3 and 4 are not entitled to forfeit the earnest money paid by plaintiff and cancel the agreement of sale unilaterally and that, therefore, decree and judgments of both the Courts below are perverse and are liable to be set aside; and **(2)** Time is not the essence of contract and that failure to pay balance of sale consideration as agreed would not amount to failure or breach of terms and conditions of agreement of sale, but trial Court and lower appellate Court, on erroneous appreciation of evidence and law, dismissed the suit holding that plaintiff failed to establish readiness and willingness to perform his part of obligation under the agreement of sale.

12. Undisputedly, Ex.A.1 – agreement of sale dated 04.11.1995 was executed by defendants 1, 3 and 4 in favour of plaintiff agreeing to sell the schedule property for Rs.1,80,000/- and an amount of Rs.70,000/- was paid by plaintiff towards earnest money. The said fact was admitted by D.W.1 in his evidence which is produced before this Court. During his cross examination, he categorically admitted about the execution of Ex.A.1 and receipt of an amount of Rs.70,000/- as earnest money. As seen from the contents of Ex.A.1 – agreement of sale, defendants 1 to 4 intended to execute agreement of sale in favour of plaintiff, but it was executed by defendants 1, 3 and 4 only. Therefore, execution of Ex.A.1 is against the intention of defendants 1 to 4 and consequently, Ex.A.1 is an incomplete document. On this ground alone, specific performance cannot be enforced against defendants 1 to 4.

13. The terms of agreement of sale is relevant to decide the controversy and the same is extracted hereunder. Clause No.4 of Ex.A.1 (agreement of sale) reads as follows:-

“The balance of sale consideration of Rs.1,10,000/- (Rupees one lakh and ten thousand only) will be paid by the Second Party (plaintiff) to the First Party (defendants) within three months (3), i.e., on or before 4th February, 1996, at the time of execution of registration of the sale deed before the registering authority.”

14. Thus, according to clause No.4 of the agreement of sale, plaintiff has to pay the balance of sale consideration of Rs.1,10,000/- within three months from the date of execution of registered sale deed, i.e., on or before 04.02.1996. But, plaintiff did not pay balance of sale consideration before the stipulated date, i.e., 04.02.1996 and on the other hand invented a story of payment of amount to the credit of

overdraft account with Mahesh Co-operative Bank and produced Exs.X.1 to X.10 on different dates. Defendants 1, 3, and 4, in their written statement, denied that they directed plaintiff to deposit the amount to the credit of overdraft account with Mahesh Co-operative Bank. When plaintiff agreed to pay the balance of sale consideration on or before 04.02.1996, depositing the amount in installments to the credit of overdraft account with Mahesh Co-operative Bank is nothing but willfully acting in variance with the terms of contract and the same is hit by Section 16 (b) of the Specific Relief Act, 1963. The said act of the plaintiff would not amount to payment of balance of sale consideration in the absence of any direction by the defendants in that regard. Except pleading readiness and willingness to perform his part of contract, plaintiff did not produce any material to substantiate the same.

15. Learned counsel for appellant/plaintiff contended that time is not the essence of contract in sale of immovable property. No doubt, in sale of immovable property, time is not the essence of contract and it is a general presumption. But when the parties agreed to certain terms and conditions in an agreement, they are bound by those terms and conditions. In the instant case, clause 8 of Ex.A.1 – agreement of sale reads as under:-

“In case, if the second party (plaintiff) fails to pay the balance amount of sale consideration and obtains the sale deed registered from the first party (defendants) within the stipulated period of three months, the First Party shall be entitled to forfeit the earnest money, i.e., a sum of Rs.70,000/- (rupees seventy thousand only) paid by the second party today.”

16. Thus, the condition in the above clause implies that time is essence of contract. Even otherwise, plaintiff raised a specific contention that possession of property was delivered to him. Except contending so, no scrap of paper is produced before the Court to substantiate the said contention. As seen from the contents of Ex.A.1, it is only a possessory agreement and nothing is endorsed subsequent to date of execution evidencing delivery of possession to plaintiff. Therefore, alleged delivery of possession is a false plea raised before the trial Court, which was rightly disbelieved. When plaintiff approached the Court seeking discretionary and equitable relief of specific performance, it is his duty to approach the Court with clean hands. Time and again, several Courts held that in a suit for specific performance, when plaintiff approaches the Court raising false pleas, suit cannot be decreed, since relief of specific performance is purely an equitable relief.

17. Similar question came up before Madras High Court in **S.S.Chokkalingam Vs. R.B.S.Mani and others**¹, wherein the Madras High Court, relying on **H.G.Krishna Reddy and Co. Vs. M.M.Thimmaiah and another**², held that a party who seeks the relief of specific performance has to prove that no time limit was fixed for completion of transaction and that if he is permitted to pay the amount in dribblets and the same is disproved by the other side, then, he is not entitled to claim the relief of specific performance. In the present case, plaintiff contended that there was no time stipulation for payment of balance of sale consideration and that time can never be essence of contract in immovable property. As already stated *supra*, there is a

¹ 1994 (1) LW 321 (DB)

² (1983) 1 MLJ 467

specific stipulation in clause 8 of agreement of sale for payment of amount on or before a particular date giving liberty to defendants to forfeit the amount in default. In such a case, plaintiff is disentitled to claim the relief of specific performance. The plaintiff filed suit for specific performance after one year from the date of execution of Ex.A.1 and never demanded the defendants 1 to 4 in writing to execute registered sale deed in his favour. If really the plaintiff is ready and willing to perform his part of obligation under agreement of sale in strict adherence to Ex.A.1 agreement of sale, he would not have kept quiet for such a long time.

18. There is yet another circumstance, i.e., failure to issue notice demanding execution of registered sale deed tendering balance of sale consideration. In **Syed Dastagir Vs. T.R.Gopalakrishnasetty**³, the Apex Court held that issue of demand in Form Nos.47 and 48 of Appendix-A of C.P.C. is mandatory to claim specific performance of agreement of sale to establish their readiness and willingness. But in the present case, Plaintiff did not issue any notice in Form Nos.47 and 48 of Appendix-A of C.P.C. to defendants claiming specific performance of contract. On the other hand, though defendants issued notice to plaintiff forfeiting the earnest money deposit and later cancelled the agreement of sale, plaintiff did not choose to issue reply notice demanding execution of registered sale deed. In such a case, Court can disbelieve readiness and willingness to perform his part of obligation, pleaded by the plaintiff, which is mandatory under Section 16 (c) of the Specific Relief Act, 1963. Even otherwise, the initial onus is on the

³ 2002 (9) SCC 582

plaintiff to establish his readiness and willingness to perform his part of obligation.

19. To decide the readiness and willingness of the parties, the only test is 'conduct of parties'. In **J.P.Builders and another Vs. A.Ramdas Rao and another**⁴, the Apex Court held as follows:-

"Section 16(c) of the Specific Relief Act, 1963 mandates "readiness and willingness" on the part of the plaintiff and it is a condition precedent for obtaining relief of grant of specific performance. It is also clear that in a suit for specific performance, the plaintiff must allege and prove a continuous "readiness and willingness" to perform the contract on his part from the date of the contract. The onus is on the plaintiff. It has been rightly considered by this Court in R.C. Chandiok and Another. Vs. Chuni Lal Sabharwal and others {(1970) 3 SCC 140} that "readiness and willingness" cannot be treated as a straight jacket formula. This has to be determined from the entirety of the facts and circumstances relevant to the intention and conduct of the party concerned. It is settled law that even in the absence of specific plea by the opposite party, it is the mandate of the statute that plaintiff has to comply with Section 16(c) of the Specific Relief Act and when there is noncompliance with this statutory mandate, the Court is not bound to grant specific performance and is left with no other alternative but to dismiss the suit. It is also clear that readiness to perform must be established throughout the relevant points of time. "Readiness and willingness", the part of the contract has to be ascertained from the conduct of the parties."

20. Similar view was expressed by the Apex Court in **Telikicherla Sesibhushan Vs. Kalli Raja Rao and others**⁵.

21. In view of the law declared by the Apex court in the above referred decisions and taking into consideration the totality of the circumstances, viz., conduct of plaintiff in depositing the balance of sale

⁴ 2011 (1) SCC 429

⁵ 2014 LS (SC) 733

consideration to the credit of the overdraft account with Mahesh Co-operative Bank in variance with terms and conditions of agreement; non payment of balance of sale consideration within the stipulated time; and, converting lump sum payment into installments covered by Exs.X.2 to X.10, it is clear that the plaintiff was not ready and willing to perform his part of obligation under agreement of sale. Both the Courts below rightly concluded that plaintiff failed to perform his part of contract. Even otherwise, the said question is purely a question of fact, which does not fall within the ambit of Section 100 of C.P.C., which is limited to substantial question of law. The trial Court and the lower appellate Court recorded concurrent findings that plaintiff was not ready and willing to perform his part of obligation as mandated under Section 16 (c) of Specific Relief Act and willfully acted in variance with the terms and conditions of agreement of sale which is contrary to Section 16 (b) of the Specific Relief Act.

22. For these reasons, this Court find that no substantial questions of law are involved in this appeal and therefore, the appeal is liable to be dismissed, being *de void* of merit.

23. In the result, the Second Appeal is dismissed at the stage of admission. No costs. Miscellaneous petitions, if any, pending in this appeal, shall stand closed as a sequel.

M. SATYANARAYANA MURTHY, J

29th September, 2016
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