

**THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA
RAO**

SECOND APPEAL No.305 of 2016

JUDGMENT:

This Second Appeal is preferred challenging the judgment and decree dt.29-01-2016 in A.S.No.231 of 2012 of the Additional District Judge, Narsapur, West Godavari District confirming the judgment and decree dt.17-10-2012 in O.S.No.379 of 2006 of the Principal Junior Civil Judge, Narsapur, West Godavari District.

2. The appellant herein is defendant in the suit. The parties will be referred to as per their array in the suit.

3. The defendant is a cousin of the 1st plaintiff and owner of the plaint schedule property.

4. It is the case of the 1st plaintiff that an agreement of sale dt.13-12-2003 was entered into by defendant agreeing to sell the plaint schedule property to him for a consideration of Rs.30,000/- and an advance of Rs.5,000/- was paid by 1st plaintiff to the defendant. He contended that as per the terms of the agreement of sale, balance sale consideration has to be paid in four installments i.e. Rs.4,500/- by 31-12-2003, Rs.10,000/- by 11-02-2004, Rs.5,000/- by 11-03-2004 and Rs.10,000/- by 11-05-2004; that he paid

Rs.4,500/- on

01-02-2004, Rs.8,000/- on 31-03-2004, Rs.2,000/- on 02-07-2004, Rs.3,000/- on 02-07-2004, Rs.2,000/- on 17-09-2004, Rs.3,000/- on 17-09-2004 and Rs.5,000/- on 31-03-2005 and the defendant acknowledged the same in his own hand on the reverse of the suit agreement of sale; and that he paid Rs.28,000/- and only balance of Rs.2,000/- was payable. He contended that when he requested the defendant to receive the balance sale consideration and register a sale deed, he kept on postponing the same on one pretext or the other. He therefore got issued legal notice dt.30-10-2006 calling upon the defendant to receive the balance sale consideration and register the sale deed, and although the defendant received the said notice, he did not give any reply. The 1st plaintiff therefore contended that he was always ready and willing to perform his part of agreement of sale, but the defendant was not ready and willing to perform his part and therefore the suit for specific performance be decreed.

5. The defendant filed a written statement denying the plaint allegations. He contended that he did borrow a sum of Rs.20,000/- from the 1st plaintiff on 12-12-2003 with interest @ 18% per annum and at that time, the 1st plaintiff obtained his signatures on blank pronote, on blank non-judicial stamp papers and also on blank white

papers. He contended that he paid a sum of Rs.28,000/- to the

1st plaintiff on various dates and he was demanding the 1st plaintiff to verify the pronote debt account by calculating from 12-12-2003, but he did not do so. He contended that the 1st plaintiff filled up the non-judicial stamp paper on which he had obtained the signatures of the defendant at the time when borrowing was made on 12-12-2003, created the suit agreement of sale and filed the suit. Alternatively, he also pleaded that the 1st plaintiff might have forged his signatures on the back of the stamp papers to show that the defendant received the amounts towards alleged sale agreement only to grab the defendant's property. He also raised a plea that the plaint schedule property is an ancestral property and he alone could not have entered into an agreement or any transaction since his children have also a right therein. He prayed for dismissal of the suit.

6. The trial Court framed the following issues:

“(i) Whether the suit agreement of sale is a genuine document?”

“(ii) Whether the plaintiff is entitled to get the specific performance of the suit agreement of sale?”

“(iii) Whether the plaintiff is entitled to get the decree passed as prayed for?”

“(iv) To what relief?”

7. Pending suit, the 1st plaintiff died and his legal representatives were brought on record as plaintiff Nos.2 to 4.

8. In the trial Court, the plaintiffs examined the 1st plaintiff as P.W.1 and marked Exs.A-1 to A-10. The defendant examined himself as D.W.1, another witness as D.W.2 and marked Exs.B-1 and B-2.

9. By judgment dt.17-10-2012, the Court below decreed the suit. It held that the defendant had issued a reply notice also, which was marked as Ex.B-1, on the very same day the suit was filed by

1st plaintiff on 13-12-2006 and the same had been received by

1st plaintiff on 15-12-2006. It observed that the defendant had admitted his signature on Ex.A-1 agreement of sale and that Exs.A-2 to A-8 endorsements on the reverse of the agreement of sale Ex.A-1 contain the signatures of defendant showing that the defendant received the amounts. It held that the alleged borrowing of Rs.20,000/- from the plaintiff on 12-12-2003 by defendant and its alleged repayment was not established, since the defendant, having stated that he noted these payments in his personal diary, did not produce it. It observed that having disputed his signatures on Exs.A-2 to A-8, the defendant took no steps to get the signatures in Exs.A-2 to A-8 sent to an expert for comparison with his admitted

signatures and handwriting. It also observed that no scrap of paper is produced by defendant to prove that he borrowed Rs.20,000/- from the 1st plaintiff and that the defendant had not even given any police report, if really his signatures were obtained on blank pronotes or white papers by the 1st plaintiff. It also noted that D.W.2, who claimed to be the friend of defendant, admitted that the signatures appearing in Exs.A-2 to A-8 belong to defendant and even to the naked eye, the signatures tally with the signatures of the defendant. It also held that time was not at all the essence of Ex.A-1, since stipulation to that effect was struck off.

10. Questioning the same, the defendant filed A.S.No.231 of 2012. The said appeal was also dismissed confirming the findings of the trial Court. The lower appellate Court extracted the findings of the trial Court, referred to the evidence of D.W.1 and confirmed the same.

11. Challenging the same, this Second Appeal is filed.

12. Learned counsel for appellant Sri K.Chidambaram contended that a specific contention had been raised in the written statement that the subject property is the ancestral property and the defendant alone was not competent to alienate it, that the 1st plaintiff in his

evidence also admitted that the plaint schedule property is the ancestral property of the 1st plaintiff's father and the father of the defendant, and this point has not been dealt with by either the trial Court or the lower appellate Court. He contended that in the lower appellate Court, a specific contention was raised in this regard, but the lower appellate Court had not adverted to it.

13. In the written statement, pleading of the defendant on this point in para-8 is as under :

"Moreover the schedule property is absolutely ancestral property, the defendant alone cannot enter into an agreement or any transaction. As the children of the defendant are also right holder in the schedule property".

14. It is no doubt true that the 1st plaintiff had also admitted in his evidence that the plaint schedule property was the ancestral property of his father and the father of the defendant, but the fact remains that the defendant has been found by both the Courts below concurrently to have entered into Ex.A-1 transaction. This finding on fact is arrived on appreciation of evidence on record and has not been questioned in this Second Appeal. When his pleading in the written statement is looked into, the defendant contends that apart from him, his children are also having a right in the plaint schedule property. Even if this be true, as a 'kartha' of the Hindu Undivided Joint Family consisting of himself and his children, he is entitled

to deal with the property and to execute agreements of sale in regard thereto. That apart, he has not examined any of his children in support of his pleading that they also have a share in the property. In fact it appears that this point was not even argued before the trial Court. Even in the grounds of appeal in the first appellate Court, no ground is taken that this plea was argued before the trial Court and the trial Court did not consider it.

15. In this view of the matter, I am of the opinion that there is no merit in the contention of the appellant/defendant that he had no authority to enter into Ex.A-1 agreement in favour of 1st respondent/1st plaintiff.

16. I do not find any substantial question of law arising for consideration in this Second Appeal. Therefore, the Second Appeal is dismissed. No costs.

17. As a sequel, the miscellaneous petitions, if any pending, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 17-06-2016

Vsv