

HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU

AS.No. 217 of 1997

ORDER:

This is an appeal filed against the decree and judgment dated 08.07.1996 passed in OS.No.130 of 1987 by the Subordinate Judge, Bhimavaram.

The suit is filed in the lower Court for specific performance of an agreement. The suit was decreed in favour of plaintiff and the unsuccessful defendants are the appellants.

For the sake of convenience, as this is a first appeal, the parties are referred to as plaintiff and defendant.

The case of the plaintiff, briefly, is that he had entered into an agreement with defendant No.1 for purchase of the suit schedule property. Defendant No.2 is the mother of defendant No.1. She has a life estate in the said property. The plaintiff's case is that defendant No.1 represented to him that he was authorized by his mother to enter into the sale agreement and that she would join at the time of execution of the sale deed. The plaintiff pleads that the suit schedule property was the subject matter of an earlier agreement by defendant Nos.1 and 2 with one P.Gopala Krishna Raju. The plaintiff states that with the sale consideration amount paid by him under the agreement, the earlier agreement was cancelled and a cancellation deed was also obtained.

Thereafter, the plaintiff exhibited his earnestness to complete the transaction but the defendants did not show any interest and therefore, the present suit is filed for specific performance. Defendant No.3 was added as the defendants alienated the suit property to him.

Defendant No.1 filed a written statement stating that the documents relating to the suit transaction were brought into existence and that the documents are “forged”. He denied the suit agreement and also the earlier agreement and the sale. He denied that there was a prior agreement which was cancelled. He states that the defendant No.3 is a *bona fide* purchaser for a value. He also states in the passing that the plaintiff did not have the financial capacity to enter into the agreement and that he is not entitled to specific performance.

Defendant No.2 filed a separate written statement stating that agreement of sale is a rank forgery and that she did not execute the agreement. She also states that the property was sold to defendant No.2 for a valuable consideration and that defendant No.3 is put in possession of the property. Defendant No.3 also filed a separate written statement stating that plaintiff is a litigant and is creating the litigation. He states that because of certain ill-will and animosity, the suit is filed against him and that he is a *bona fide* purchaser for a value.

On the basis of these pleadings, five issues were framed which are as follows:

1. Whether the suit agreement of sale dated 14.08.1984 is true?
2. Whether the third defendant is a bona fide purchaser for value of the suit schedule property without notice of the suit agreement of sale?
3. Whether the plaintiff is entitled for the relief of specific performance?
4. Whether the plaintiff is entitled for the refund of the sale consideration amount with interest in the alternative? and
5. To what relief?

D.Ws.1 to 5 were examined for the plaintiff and Exs.A.1 to A.9 were marked. On behalf of the defendants, DWs.1 to 5 were examined and Exs.B.1 to B.43 were marked. After taking the evidence and hearing the submissions, the lower Court decreed the suit by order dated 08.07.1996. It is this order, which is now impugned in the appeal.

Heard Sri C.C.S.Sastry, learned counsel for the appellant and Sri Srinivas Emani, learned counsel for the respondents.

As this is a suit for specific performance, the first and foremost issue that is to be decided is whether the plaint agreement is valid and true. The next question that would arise if the agreement is held to be true is whether the plaintiff was ready and willing to fulfill his part of the

agreement. The decision on these two issues will determine this appeal and also the result of the other two issues.

The plaintiff examined himself as PW.1. He also deposed that the money for the purchase of stamps was given by him to defendant No.1. In his chief-examination, he speaks that defendant No.1 himself purchased two sets of stamps with serial numbers 4308 to 4313. He clearly deposes that the four stamps of Rs.2/- denomination with 4308 to 4311 and Rs.1/- denomination stamps with 4312 and 4313 were purchased. He clearly states that Ex.A.1 was executed on stamp bearing No.4308, 4309 and 4312. The learned counsel pointed out that there is no cross-examination on the particulars of the stamp paper, which are clearly spelt out in the chief-examination. The agreement in question, Ex.A.1 is executed on the stamp papers as mentioned. However, the defendant No.1 came up with a theory in the course of his evidence that the plaintiff-PW.1 has taken away the stamp papers from his custody. It is his contention that he had given a hand loan to the plaintiff and to collect the same, he went to the plaintiff's shop. At that point of time, when he went outside to answer the call of nature, the plaintiff snatched away the blank stamp papers, which are kept in his bag. This theory of stealing of blank papers was elaborated by DW.1, during the course of his evidence stated that he noticed about the missing of stamp papers in the evening but, no police complaint was lodged nor

was the matter taken up either with the plaintiff or other authorities. It is also borne out in evidence that DW.1 is a person, who has close connection with the police and in his evidence, he clearly deposes that on 26.06.1995, the last date of hearing that “I went to the Sessions Court to give evidence in a session’s case. I might have given evidence in several matters nearly 40 matters before the Court. At the instance of police, I write mediators reports in session’s cases”. This evidence clearly proves that this witness is somebody who is acquainted with the police and police procedures. Therefore, if valuable stamp papers are misplaced or stolen and there is a likelihood of their misuse, it is highly unlikely that this witness would not have complained to the police. Therefore, the lower Court rightly came to a conclusion that this version of the witness is not believable. Apart from this there is no pleading about the theft of these stamp papers. In the written statement, the defendants plead that the agreement-Ex.A.1 is “forged”. Similarly, respondent No.2 also filed a written statement stating that the agreement is “forged”. If the agreement was forged, the cross-examination of PW.1 and the evidence of the defendants/witnesses should have been more pointed on the forgery aspect. Instead of that, they have relied on the theory of the theft of the stamp papers. As noticed by the Court below, the theft of the stamp papers is not pleaded in the written statement by either of the main defendants. Even otherwise, the plea is not proved.

Therefore, this Court is proceeding to examine the other evidence available with regard to the agreement of sale. PW.2 is the attester of this agreement. He was examined in chief and he clearly stated that A.Chandrasekharudu scribed the agreement of sale that he and one D.Umapathy attested the agreement. He also clearly deposes that the agreement-Ex.A.1 bears his signatures and the signature of the scribe etc. He states clearly that Ex.A.1 was signed by defendant No.1 after he understood the terms. He also states that it was voluntarily signed by him. Even in his cross-examination, he reiterates that the agreement is validly executed and that he attested the same. He denies the suggestion that the agreement was created or brought into existence.

The next witness, who is concerned with this agreement, is the scribe. He was examined as PW.3. In the course of his chief-examination, he was declared as a hostile witness and allowed to be cross-examined by the counsel for the plaintiff. In the course of cross-examination, after being declared hostile, he clearly talks of the contents of the agreement. He admits that there is an agreement of sale of the property and Rs.18,000/- was paid by plaintiff to defendant No.1, the balance of Rs.13,000/- and odd is payable. He also admits that the non-judicial stamp papers on which Ex.A.1 was executed are in the name of defendant No.1. Further, it was also noticed by the Court below that this witness admits to have signed as the scribe after it was

complete in all respects only. These are the three witnesses on the plaintiff's side who were connected with the execution of document-Ex.A.1.

The defendant examined himself as DW.1. He continues with his version that the non-judicial stamp papers were taken away by the plaintiff without his knowledge etc. In the course of his cross-examination, he admits that on 20.06.1995 he gave evidence in Session's Court at Eluru and would have also deposed in about 40 matters before the Court. He also states that at the instance of the police, he writes mediators' reports. Therefore, this Court also concurs with the finding of the lower Court that in the natural course of events, if a theft was committed of the stamp papers, the witness would have complained to the police about the alleged theft. The fact he did not do it strengthens the case against him.

It is also pertinent to note that this witness, in his written statement, denied that the Ex.A.2 agreement of February, 1984 was not executed by him. But in his cross-examination, he clearly admits as follows "the signature shown to me on Ex.A.2 is mine". Similarly, the last witness examined on behalf of the defendant is the document writer, who is the scribe of the sale deed executed in favour of defendant No.3. He also categorically admits as follows: "the signature of defendant Nos.1 and 2 are on Ex.A.2". Therefore, on an overall appreciation of the evidence, it is clear that the

defendants have failed to prove their version that they did not sign on Ex.A.1 or that the signatures on Ex.A.1 are forged. They did not also prove that the stamp papers on which Ex.A.1 was drafted was stolen by PW.1. This Court is of the opinion that in order to get over the fact, the stamp paper is in the name of the defendant, this entire theory of theft was invented. Hence, for all these reasons, Ex.A.1 is held to be validly executed.

Since this Court is of the opinion that the agreement of sale-Ex.A.1 is a valid document, the next question that would arise whether the plaintiff proved that he was ready and willing to perform his part of bargain. A few facts which are necessary to be appreciated are that Ex.A.1-agreement is dated 14.08.1984. The plaintiff got issued Exs.A.4 to A.7 notices demanding specific performance. The suit was filed soon after on 20.04.1987. PW.4 was a witness, who was examined to support the case of the plaintiff that the plaintiff demanded the defendant to execute the sale deed in his presence. This witness said that the plaintiff was ready with the balance sale consideration and that he also issued a notice to the defendant. The cross-examination of this witness does not in anyway take away the assertions made by him. Even in his cross-examination, he asserts that the plaintiff demanded the defendants twice in his presence to execute the sale deed. The next witness examined as PW.5 who is a practicing advocate, who has been practicing in that town

since 1961 and was aged about 64 years. He states that Ex.A.4 was issued by him on the instructions of the plaintiff to defendant Nos.1 and 2. Ex.A.5 is the postal receipt. He asserts that the letter was served on the defendant, but the postal acknowledgements were lost. Similarly, Ex.A.7 is the office copy of the notice issued to the Sub-Registrar on 08.01.1985. Ex.A.8 is the postal receipt and Ex.A.9 is the acknowledgement of the register. There is some cross-examination of this witness on Exs.A.4 to A.6, but Exs.A.8 and A.9 are not touched upon in the cross-examination. Ex.A.7 is the copy of the notice, which is maintained as office copy. There is no suggestion put to the witness also that Ex.A.7 is not the notice that was sent to the Sub-Registrar. The explanation given by the witness that he kept a copy of the notice sent to defendant Nos.1 and 2, later, when the said copy was sent to the sub-registrar, he took a xerox copy of the same, is a plausible version and cannot be discounted all together. The witness in question is also a lawyer with a sufficient standing. Therefore, this Court is of the opinion that the two notices are proved in the facts and circumstances of the case. The lower Court also relied on the provisions of the General Clauses Act to come to a conclusion that this notices were duly posted to the correct address and therefore, held them to be valid. This Court is therefore of the opinion that the plaintiff proved his readiness and willingness as required under law.

This Court, therefore, agrees with the finding of the lower Court on these issues.

In view of this discussion, the point that survives for consideration is, whether the sale deed executed in favour of defendant No.3 is a genuine and valid sale deed and whether defendant No.3 is a genuine purchaser for value without any notice of the transaction covered under Ex.A.1. The first witness examined for the defendants is DW.1. He deposes before the Court stating that he is the general power of attorney holder for the defendant No.3. The copy of the said general power of attorney is not filed into the Court. As per the settled law on this subject, reported in ***Janki Vashdeo Bhojwani and Anr. V. Indusind Bank Ltd. and Others***¹, a general power of attorney holder cannot depose in “place” of the original witness. He cannot give evidence on facts which he is not personally aware. He can only speak of facts which are in his personal knowledge and not as an agent. In the cross-examination of this witness, it is very clearly stated that defendant No.3 came to Bhimavaram five to six times after the general power of attorney was given to this witness. He also states that defendant No.3 was in touch with him to know the stage of the suit proceedings. He admits that defendant No.3 filed his written statement through his advocate. Importantly this witness also asserts that he does not know the contents of the written statement. He admits

¹ 2005 (2) SCC 217

that defendant No.3 might have filed three or four petitions during the trial of the suit and he also filed claim petitions in the suit. He admits that he does not have personal knowledge of the documents about which he deposes. In view of all of the above, this Court is of the opinion that his evidence is not reliable and not much weight can be attached to his deposition. Defendant No.3 should have been deposed in person as a witness since he claims to be an innocent purchaser for consideration. Neither defendant No.3 nor defendant No.2 came and depose before the Court. Therefore, in line with the judgments reported in ***Vidhyadhar V. Manikrao and another***² and ***Man Kaur (dead) by LRS. V Hartar Singh Sangha***³, this Court draws an adverse inference against their absence. There is no documentary evidence or satisfactory oral evidence to show that the sale in favour of defendant No.3 is a valid sale.

The lower Court also correctly noticed the fact that the attempt of the defendants appears to be to prevent the specific performance of the Ex.A.1-agreement. The lower Court noticed that defendant No.3 did not make any attempt to protect his interest in the property by giving evidence. The general power of attorney holder did not file his power of attorney and did not also have any knowledge of the documents. The defendant Nos.1,2 and 3 are related to each

² AIR 1999 1441

³ 2010 (10) SCC 512

other. Defendant No.3 admittedly is cousin brother of defendant No.1. This was elicited in the cross-examination. The fact that the witnesses are closely related to each other and the transfer of the property is made to close cousin along with the failure to examine defendant Nos.2 and 3 in the suit lends credence to what was argued in the Court. The attempt of the defendants is to somehow avoid the obligations under Ex.A.1. For all these reasons, this Court is of the opinion that the defence set up by the defendants is not proved.

Therefore, this Court concurs with the findings of the lower Court and holds that the plaintiff is entitled to specific performance of the agreement of sale dated 14.08.2004. This Court holds that defendant Nos.1 and 2 are directed to execute a sale deed in favour of the plaintiff on the receipt of the balance sale consideration as per the terms of the agreement dated 14.08.1994 and to deliver possession of the suit schedule property to the plaintiff all within 60 days from the date of this judgment. If the defendants do not in any way follow the orders of this Court, the plaintiff is given liberty to approach the lower Court and seek appropriate execution and also delivery of possession.

In the result, the appeal is dismissed with costs to the appellant.

Consequently, miscellaneous petitions, if any, pending in this appeal shall stand closed.

D.V.S.S. SOMAYAJULU, J

Date: 05.12.2017
KLP

