THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE U.DURGA PRASAD RAO

CIVIL MISCELLANEOUS APPEAL No.629 of 2016

JUDGMENT: (*Per Hon'ble Sri Justice U.Durga Prasad Rao*)

This C.M.A is filed by the respondent/defendant aggrieved by the order dated 27.06.2016 in I.A.No.337 of 2015 in O.S.No.48 of 2015 whereby, learned Additional District Judge, Hindupur, restrained the respondent/defendant from alienating the petition mentioned schedule property pending disposal of the suit.

2) The parties in this appeal are referred as they stood in the suit.

3 a) The respondents 1 to 3 herein are the plaintiffs in O.S.No.48 of 2015 on the file of the Additional District Judge, Hindupur and they laid the suit against the present appellant for a decree of specific performance of agreement to sell dated 01.02.2013. The case of plaintiffs is that the defendant is the absolute owner of plaint schedule property and he agreed to sell it to the plaintiffs for Rs.1,14,78,250/- and accordingly, both parties entered into an agreement to sell dated 01.02.2013 and the plaintiffs paid Rs.15,00,000/- as advance and both parties agreed that the balance amount has to be paid within eight(8) months from the date of execution of the sale agreement. Both parties agreed that the plaintiffs shall lay plots at their expense by getting approval and sell the plots to third parties and the defendant shall register the sale deeds in favour of

the purchasers from the plaintiffs. It is their further case that the plaintiffs made part payment of the sale consideration and obtained endorsements from defendant on the suit agreement to sell as follows:

S.No.	Date	Amount
1.	23.04.2013	Rs.10,00,000-00
2.	05.10.2013	Rs,30,00,000-00
3.	16.04.2014	Rs.30,00,000-00
4.	09.01.2015	Rs.25,00,000-00
	Total amount paid	**Rs.95,00,000-00**

The plaintiffs claimed that they were always ready and willing to perform their part of contract and time was not the essence of the contract. They pleaded that they demanded the defendant number of times to execute the sale deed in the presence of elders but the defendant postponed on one pretext or other and so ultimately plaintiffs got issued notice to the defendant on 14.08.2015 demanding execution of the registered sale deed by fixing the date of registration as 27.08.2015. They waited at the Registrar Office, Hindupur on 27.08.2015 with the balance sale consideration but the defendant did not turn up, instead, he issued a reply notice with all false allegations.

Hence the suit.

b) The defendant admitted the execution of agreement to sell dated 01.02.2013 and his receiving Rs.15,00,000/- as advance. His case is that as per the terms of the agreement, the plaintiffs have to pay the balance amount of Rs.99,78,250/- within eight (8) months from the date of agreement to sell and time was the essence of the contract. The defendant claimed that he himself got converted the suit schedule property into a non-agricultural land after obtaining permission from

Revenue Divisional Officer, Penukonda by incurring expenditure and the plaintiffs have not undertaken the said exercise and thus violated the conditions stipulated in the agreement. The defendant staunchly denied plaintiffs making the periodical payment of Rs.95,00,000/- and obtaining endorsements on the reverse of the agreement to sell. He contended that the endorsements dated 23.04.2013 for Rs.10,00,000/-; 05.10.2013 for Rs.30,00,000/-; 16.04.2014 for Rs.30,00,000/-; and 09.01.2015 for Rs.25,00,000/- were forged endorsements. The defendant further contended that as per the original agreement to sell dated 01.02.2013, a photostat copy of which was tendered to him, there were only two attesting witnesses namely D.Nagabhushana Reddy, S/o. Anjina Reddy of Muddireddi Palli and M.Shivalingappa S/o. Narayanappa of Sasana Kota, Parigi Mandal but on perusal of copies of the plaint and suit documents which were served along with the summons, the defendant found that the plaintiffs tampered with the original agreement to sell dated 01.02.2013 and obtained the signature of one V.Balakeshava Reddy S/o.Subbanna of Ayyavari Palli of Tadiparti Mandal as third attesting witness to the agreement as well as one of the attestors of the alleged part payment endorsements. Hence, it was evident that the plaintiffs tampered with the original agreement to sell to have illegal gain and therefore, the suit is not maintainable. He further contends that since the plaintiffs failed to pay the balance sale consideration within eight(8) months from the date of agreement to sell, they do not deserve a decree for specific performance and further, they also do not deserve the advance amount. The defendant admitted the exchange of notices and prayed for dismissal of the suit.

c) Along with the suit plaintiffs filed I.A No.337 of 2015 under Order 39 Rules 1 and 2 CPC seeking interim injunction restraining the defendant from alienating the petition schedule property pending disposal of the suit. The defendant filed counter and opposed the said petition. After enquiry, the trial Court allowed the said petition by its impugned order.

Hence, the instant CMA at the instance of the defendant.

4) Heard arguments of Sri O.Manohar Reddy, learned Senior counsel for appellant and Sri Maheswara Rao Kuncham, learned counsel for respondents.

5) Challenging the impugned order, learned Senior Counsel Sri O. Manohar Reddy, would argue that as per the terms of the agreement, the plaintiffs have still to pay huge balance amount of Rs.99,78,250/- within eight (8) months from the date of agreement but they did not honour the said stipulation and thus violated the essential condition of the agreement. Since the time was the essence of the contract and as the plaintiffs failed to perform their part, they do not deserve the equitable relief of specific performance and for the same reason, *prima facie* case is not in their favour. Added to it, since the plaintiffs have not come to the Court with clean hands in as much as, they tampered with the agreement to sell by fabricating the endorsements of part payments and

also adding their henchmen as one of the attestors, they do not deserve the interim injunction. He would further argue that the balance of convenience is also not in favour of plaintiffs because they failed to get conversion of suit agricultural land into non-agricultural land and lay plots at their expense as per terms of agreement and on the other hand, the defendant got the conversion by applying to the R.D.O and by incurring huge expenditure and in that view of the matter, if the defendant is restrained from alienating the plots till disposal of the suit, he would incur huge loss. He argued that the trial Court failed to appreciate all these facts in a proper perspective and granted interim injunction with an unwarranted observation as if the payment endorsements were all genuine. He thus prayed to allow the CMA by expunging the observation of the trial Court.

6) Per contra, learned counsel for respondents while supporting the impugned order would argue that the plaintiffs paid not only the advance amount of Rs.15,00,000/- but also another Rs.95,00,000/- under different payment endorsements and they were all genuine endorsements and as the defendant received all those amounts between the years 2013 to 2015, time cannot be said to be the essence of the contract. He would further argue, it was the plaintiffs, in fact applied for conversion of the land and laid the plots and since the land stands in the name of defendant, they applied in the name of defendant and therefore, it is preposterous for the defendant to contend that he himself applied to the authorities. The defendant tried to evade execution of the sale deed since

the cost of the suit land increased subsequent to the agreement. He thus submitted that *prima facie* case and balance of convenience are in favour of the plaintiffs and if injunction is not granted and defendant alienates the suit schedule property pending suit, that may lead to multiplicity of proceedings. He thus prayed to dismiss the C.M.A.

7) In the light of above rival arguments, the point for determination is:

"Whether the respondents/plaintiffs deserve interim injunction and whether the order of the trial Court in this regard is factually and legally sustainable?"

8) **POINT**: The admitted facts are that the defendant is the owner of Ac.9-37 cts of dry land situated in Utakuru village near Hindupur and he agreed to sell the same to the plaintiffs and both parties entered into an agreement to sell dated 01.02.2013 for a sum of Rs.1,14,78,250/-. It is also an admitted fact that at the time of agreement, the plaintiffs paid Rs.15,00,000/- as advance. The copy of the agreement produced by the respondents/plaintiffs would reveal that plaintiffs were obligated to pay the balance amount of Rs.99,78,250/- within eight (8) months from the date of agreement and obtain a regular registered sale deed from the defendant. It was mentioned therein that if they failed to pay the balance amount within the stipulated time, they cannot have any right over the suit schedule land and also the advance amount paid by them. It is further stipulated that the plaintiffs at their expense shall get the land converted into a non-agricultural land and make layouts and get approval

and can sell the plots to third parties and the defendant would register the sale deeds in favour of the intending purchasers and in that way he would get the balance amount. If, by the end of the stipulated eight (8) months all the plots were not sold, the plaintiffs have to pay the balance amount due and obtain registration of those plots in their names. The agreement also shows that the plaintiffs paid Rs.10,00,000/- on 23.04.2013; Rs.30,00,000/- on 05.10.2013; Rs.30,00,000/- on 16.04.2014 and Rs.25,00,000/- on 09.01.2015 under four endorsements allegedly signed by the defendant. The defendant staunchly denied the aforesaid endorsements. In this backdrop, the point is whether the plaintiffs deserve the prohibitory interim injunction.

9) Inspite of admitting the execution of agreement to sell and receiving an advance amount of Rs.15,00,000/-, the defendant refuses to execute the sale deed on the main plank of contention that the plaintiffs failed to pay the balance amount of Rs.99,78,250/- within the stipulated period of eight (8) months and they committed the breach of the essential term of the contract and also that they tampered with the agreement in the sense they fabricated four payment endorsements with the help of their henchmen. Whether plaintiffs paid part of the sale consideration under four endorsements or they fabricated those endorsements is a pure question of fact which has to be determined only after full-fledged trial. Similarly, whether plaintiffs got converted the suit land into a non-agricultural land and applied for approval of layout at their expense or whether the defendant has done the said exercise is

also a question determinable after trial. Therefore, in this limited enquiry, it is not apt for us to express any opinion either way on those aspects. What is germane for consideration in the present enquiry is, assuming though not admitting that the plaintiffs have not paid the part of balance sale consideration under the disputed four endorsements and not applied for conversion of the land by incurring expenditure, still, whether they can be said to have failed to establish the basic ingredients like *prima facie* case, balance of convenience and irreparable loss in their favour.

10) It is well settled principle that a *prima facie* case means the existence of a *prima facie* right, infraction of which requires protection by a temporary injunction. Further, a *prima facie* case means an arguable case determined in the trial. *Prima facie* case should not be confused with *prima facie* title. In the instant case, admittedly the plaintiffs have obtained agreement to sell and paid an advance of Rs.15,00,000/-. If the part payments pleaded by them are established in trial, the contention of the defendant that the time was the essence of the contract and they failed to honour the said term will fade away, since he received the amounts beyond the period of eight (8) months. However, as already stated supra, we are not touching that controversial aspect now. Yet, another admitted fact makes us to hold, atleast temporarily for the limited purpose of deciding the *prima facie* case, that the time is not the essence of the contract. It is a cardinal principle that in respect of contracts relating to sale of immovable properties, the presumption is

that time is not the essence of the contract. We can gainfully refer to the decision of the Apex Court reported in ***Govind Prasad Chaturvedi vs. Hari Dutt Shastri and another***[1], wherein it was held thus:

> *"It is settled law that the fixation of the period within which the contract has to be performed does not make the stipulation as to time the essence of the contract. When a contract relates to sale of immovable property it will normally be presumed that the time is not the essence of the contract. The intention to treat time as the essence of the contract may be evidenced by circumstances which should be sufficiently strong to displace the normal presumption that in a contract of sale of land stipulation as to time is not the essence of the contract."*

In the instant case, except stipulating that the balance amount has to be paid within eight (8) months, it appears, the defendant has not treated the time as essence because he has not issued any notice canceling the agreement on the alleged failure of the plaintiffs to pay the balance amount within the stipulated time. He only issued a reply to the notice of the plaintiffs two years after the agreement. So from the conduct of the defendant, it cannot be inferred that he really treated the time as an essential condition of the contract. So the admitted facts would show that the plaintiffs having entered into an agreement to sell on 01.02.2013 and paid Rs.15,00,000/- and issued notice dated 14.08.2015 and filed the suit within the period of limitation. These unimpeachable facts, in our view project a *prima facie* case i.e, a triable issue in their favour. We also find balance of convenience and irreparable loss tilting in their favour for the reason that if the defendant

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[1] AIR 1977 SC 1005

is allowed to alienate the suit schedule property pending disposal of the suit, it will lead to multiplicity of the proceedings. On the other hand, if the defendant is injuncted, the comparative loss will not be more to him than if injunction is denied to the plaintiffs. Therefore, in our considered view, the plaintiffs deserve the interim injunction as granted by the trial Court. However, we hasten to make it clear that we cannot appreciate the observation of the trial Court to the effect that the signatures on endorsements are of the respondent (defendant). The trial Court ought not to have made such a predetermined observation in an interlocutory Application. Needless to say that said controversy forms into an issue to be resolved in the trial. Hence we expunge the said observation made by the trial Court in its impugned order.

11) In the result, this Civil Miscellaneous Appeal is dismissed by confirming the order of the trial Court in I.A No.337 of 2015 in O.S.No.48 of 2015. We call upon the trial Court to decide the suit without being influenced by the observations made in this C.M.A. No costs.

As a sequel, miscellaneous applications pending, if any, shall stand closed.

SANJAY KUMAR, J

U. DURGA PRASAD RAO, J

Date: 03.01.2017
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