

HONOURABLE SRI JUSTICE A. SHANKAR NARAYANA

C.C.C.A. No.103 OF 1999

JUDGMENT:

Assailing the judgment and decree, dated 20.04.1999, in O.S. No.215 of 1992, passed by the VII Senior Civil Judge, City Civil Court, Hyderabad, present appeal is preferred by the plaintiff under Section 96 of the Code of Civil Procedure, 1908.

2. The appellant herein is plaintiff in O.S. No.215 of 1992, while respondent is the defendant.

3. For the sake of convenience, the parties hereinafter referred to as they were arrayed in the aforesaid suit.

4. Heard Sri A. Sreenivasa Rao, learned counsel for Sri M.V.S. Suresh Kumar, learned senior counsel for the appellant, and Ms. I. Mammu Vani, learned counsel for Sri S. Malla Rao, learned counsel for the respondent.

5. Referring to certain facts is absolutely necessary to appreciate the case of the plaintiff in the present appeal and to adjudicate upon the controversy herein.

6. The plaintiff filed the suit to enforce the agreement of sale, dated 04.12.1989, said to have executed by the defendant alienating the suit schedule property bearing House No.22-2-513, admeasuring 100 square yards, situated at Noor Khan Bazar, Hyderabad, for a total consideration of Rs.1,50,000/-. The plaintiff's case is that, on

04.12.1989, when the agreement of sale was executed, an amount of Rs.50,000/- was paid as earnest money and, thereafter, Rs.30,000/- was paid towards part payment and the balance of Rs.70,000/- was paid subsequent to issue of legal notice, dated 14.11.1991 which was received on 16.11.1991. It is according to the plaintiff, through notice, dated 14.11.1991, the plaintiff expressed her willingness to pay the balance amount and to collect the same and execute a registered sale deed and, accordingly, the defendant approached her, received the amount and passed a receipt, dated 18.11.1991 marked as Ex.A-5. The plaintiff claims that subsequent thereto, though, a second notice was got issued on 23.12.1991 to execute a regular sale deed, the defendant went on evading to comply with the obligation cast on her under the agreement of sale, Ex.A-1 and, therefore, she was constrained to file the suit.

7. The definite case of the defendant was, she admits the execution of Ex.A-1; receipt of Rs.50,000/- as advance; and another sum of Rs.30,000/- towards part payment; but denied the receipt of Rs.70,000/- and passing a receipt under Ex.A-5. According to her, payment of Rs.70,000/- was never made by the plaintiff and for breach of terms and conditions of the agreement, the suit agreement rendered unenforceable. She also sets out her case that when the plaintiff expressed her inability to pay the balance amount and as requested by her, the monthly rents that were due without levying any penalty were adjusted for the months from June, 1990, till September,

1994, a sum of Rs.45,900/-, and the balance amount due was Rs.34,100/- as on 01.09.1994, according to the defendant, she was ready to continue the deductions till the same was adjusted towards future rents. She expressed her intention to proceed with eviction proceedings against the plaintiff. She, thus, prayed for dismissal of the suit with costs.

8. The trial Court settled the following four issues:

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1. Whether time was the essence of the contract?
2. Whether both the agreements are enforceable against defendant?
3. Whether plaintiff is entitled to the relief of specific performance?
4. To what relief? ”

9. During trial, the plaintiff examined herself as PW.1 and exhibited A-1 to A-13. On behalf of the defendant, besides herself examining as DW.1, also examined another witness as DW.2 and marked Exs.C-1 and C-2 through the evidence of DW.2.

10. The trial Court, on issue No.1, tendered finding, holding that the time was not essence of the contract.

i) On issue Nos.2 and 3, having appreciated the evidence led by both sides, disbelieved Ex.A-5, and thereby recorded a finding that the signature occurring on Ex.A-5 was not written by the defendant. In holding so, the trial Court derived certain probabilities and also based

on the opinion tendered by the Expert, opining that the disputed signature occurring on Ex.A-5 does not tally with the admitted signatures contained in Exs.C1 and C-2, and thereby, the trial Court recorded finding that Ex.A-5 was fabricated for the purpose of suit and ultimately dismissed the suit, observing that the amount of Rs.80,000/- received by the defendant shall be adjusted in the rents payable by the plaintiff commencing from June, 1990 onwards.

11. The learned counsel for the appellant adverting to the grounds agitated in the present appeal would, of course, fairly submit that none of the witnesses to Ex.A-5 were examined to prove the receipt under Ex.A-5 said to have passed by the defendant. The learned counsel would submit that the report of Hand-writing Expert examined as DW.2 has no credence in the light of admission of DW.1. The learned counsel was referring to the initial admission made by DW.1 in her cross-examination wherein she admitted the signature occurring on Ex.A-5 as that of her signature. But, however, by way of re-examination, the same was clarified, and she disputed the signature occurring on Ex.A-5 belonging to her.

12. Now, the points that arise for consideration in the present appeal are:

- i) Whether Ex.A-5 is true, valid and binding?
- ii) Whether the appellant is entitled to enforce the agreement of sale, dated 04.12.1989?

- iii) Whether the judgment and decree under challenge are sustainable?

Point Nos.(i) to (iii):

13. The probabilities derived by the trial Court based on Ex.A-5 is concerned, firstly, the date of Ex.A-5 was not recited in Ex.A-6 and second on the notice got issued by the plaintiff on 23.12.1991. Ordinarily, when there is reference to the receipt in the notice, non-mentioning of the date would have been of not that much consequence in a case of this nature. Certainly, though, it appears to be a minute aspect, still, it has got bearing on the truth or otherwise in the case set out by the plaintiff touching Ex.A-5. The amount of Rs.70,000/- said to have collected by the defendant was on 18.11.1991, according to the plaintiff, a notice under Ex.A-6 was got issued on 23.12.1991. When the plaintiff pleads that the defendant, on one pretext or other was, postponing the execution of sale deed pursuant to Ex.A-1, certainly, the details of Ex.A-5 ought to have referred to invariably in Ex.A-6, the second notice. Thus, non-mentioning the details of passing of receipt under Ex.A-5 in Ex.A-6, certainly, gives rise to an inference adverse to the case of the plaintiff. Had the plaintiff mentioned the date, the defendant, certainly, would have checked up whether the amount mentioned therein was really received or not, and whether she had passed such a receipt on 18.11.1991.

14. Now, turning to the related aspects of Ex.A-5, the opinion of the Expert, certainly, favours the defendant and stands adverse to the plaintiff's case. In such an event, the plaintiff is obligated with the duty to examine at least one of the attestors to Ex.A-5. Ex.A-5 does contain two witnesses attesting it, but none of them were examined by the plaintiff. The plaintiff has not come out with any reason for not examining any of the attestors to Ex.A-5. Therefore, it has to be held that Ex.A-5 is not proved in accordance with evidentiary rule. Further, even to a naked eye, the signature occurring on Ex.A-5 purporting to be that of the defendant is not identical with her signatures on Ex.C-2. Thus, viewed from any angle, Ex.A-5 cannot be believed as having been passed by the defendant. In such an event, certainly, the plaintiff cannot succeed even in the present appeal. Thus, the findings recorded by the trial Court, even examined intrinsically, do not suffer from any legal infirmity warranting interference. There is no merit in the appeal.

15. The present Appeal is, therefore, dismissed. No order as to costs.

As a sequel thereto, miscellaneous applications, if any, pending in the appeal shall stand closed.

A. SHANKAR NARAYANA, J

September 07, 2017
Mgr