

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

SECOND APPEAL No.158 OF 2011

JUDGMENT:

The unsuccessful defendant in O.S. No.30 of 2000 on the file of the Junior Civil Judge, Kaikalur, Krishna District throughout, is the appellant in the present Second Appeal. Respondent herein is the plaintiff in the said suit.

2. For the sake of convenience, the parties herein are referred to as they were arrayed in O.S. No. 30 of 2000.

3. The respondent - plaintiff filed suit in O.S. No.30 of 2000 to enforce the Agreement of Sale said to have executed by the appellant - defendant concerning Ac.0.50 cents out of total extent of Ac.1.50 cents in Revenue Survey No.219/2 of Alapadu Panchayat, for a total sale consideration of Rs.17,500/-, and the said agreement of sale was executed on 20.01.1997 by the defendant and even registered the same under document No.182 of 1997. A sum of Rs.15,000/- was paid on that day towards advance which finds place in the agreement of sale, the balance of Rs.2,500/- was required to be paid on or before 31.08.1997. The usual averments of the demand made by the plaintiff and evasion by the defendant to perform his obligations including the issue of notice by the plaintiff making a demand thereof which stood unanswered, have been narrated in the plaint. The failure to perform

the obligations under the registered agreement of sale by the defendant herein led to suing him by filing the aforesaid suit.

4. It was resisted by the defendant herein by filing written statement putting forth that the agreement of sale was intended to create security for the debt contracted by him of Rs.8,000/- on 25.09.1992 with interest @ 24% per annum.

5. The trial Court settled the following three issues:

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- 1) Whether the agreement of sale dt.20.1.97 is correct?
- 2) Whether the plaintiff is entitled for specific performance of contract of sale dt.20.1.97?
- 3) To what relief? ”

6. After framing the aforesaid issues, on behalf of the plaintiff, examined himself as PW.1 and also examined one of the attestors to the agreement of sale as PW.2 and marked Exs.A-1 to A-3, which are agreement of sale, office copy of notice and postal acknowledgment. It appears, though, the defendant participated in the trial and even got cross-examined PWs.1 and 2, but, somehow, did not enter into witness box to lead evidence. That constrained the trial Court to hear the arguments of the learned counsel for the plaintiff herein and decreed the suit with costs on 12.06.2006 with a direction to the defendant to execute and register a sale deed and deliver the possession thereof within two (2) months, failing which, the plaintiff herein was at liberty to get it done through the process of Court.

7. Aggrieved over the said judgment and decree, dated 12.06.2006, the defendant preferred the Appeal Suit No.116 of 2006 before the learned District Judge, Krishna District at Machilipatnam. Various grounds have been agitated in the grounds of appeal and put forth that due to communication gap between himself and his learned counsel on record, he was not examined as a witness and, finally sought to set aside the decree and afford him a chance to lead the evidence.

8. The learned District Judge, Krishna District, has referred to the main point urged before him on behalf of the defendant as to that the trial Court has not afforded an opportunity to him to adduce evidence and to remand the matter to trial Court to enable him to adduce the evidence.

9. In paragraph No.10, the learned appellate Judge has formulated the following three points for determination.

- 1) Whether the sale agreement came into existence in the manner suggested by defendant?
- 2) Whether the trial court committed any error in appreciating the evidence on record?
- 3) To what relief?

10. Disbelieving the stand taken by the defendant, deriving a probability that if the defendant did really execute a pro-note in the year 1992, there was no need to execute a registered agreement of sale which is the suit document marked as Ex.A-1 as a security after lapse of five years period and having appreciated the evidence of PWs.1 and

2 and the documentary evidence, negated the request of the defendant to remit the matter as none of the ingredients envisaged by the provisions of Rules 23, 23-A, 24, 25 and 26 of Order 41 of CPC are satisfied so as to accede to the said request made by the defendant and, consequently, dismissed the appeal on 27.02.2008.

11. Having dissatisfied with the judgment and decree in the aforesaid appeal suit, the defendant preferred the Second Appeal.

12. Heard Sri Kesana Rama Koteswara Rao, learned counsel for the appellant - defendant. Though, service was effected on the respondent - plaintiff, none appears.

13. The grounds agitated in the present appeal substantially are, that, though, the Courts ignored the alternative prayer sought for, by the plaintiff in the suit and no issue was settled therefor, and ought to have granted alternative relief instead of granting specific performance. Though, substantial questions of law have been projected in paragraph No.4 in clauses (a) and (b) thus:

- (a) Whether the plaintiff asked alternative remedy in his prayer in the suit relating to specific performance that the courts can pass judgment and decree of the specific performance instead of alternative decree and judgment?
- (b) In absence of the evidence of defendant the appellate court can remand the matter for afresh trial?

still, there is no need to delve on them for the reasons; first, the judgments rendered by both the Courts below are concurrent and

findings recorded were totally concurrent and at the threshold, on this ground alone, the present second appeal is liable to be dismissed. Even, considering the arguments advanced by the learned counsel for the defendant that alternative relief ought to have been granted by the Courts below as prayer was made by the plaintiff which was totally ignored by both the Courts below, and no issue was settled therefor, but, mere non-framing of an issue touching the alternative prayer, certainly, cannot be a ground to set aside the concurrent findings recorded by both the Courts below and to remit the matter to the trial Court for the purpose of settling the issue. In case, the Courts below, on appreciation of evidence, both, oral and documentary let in by the plaintiff's side and the answers given by PWs.1 and 2 in their cross-examination which would be invariably at the instance of the defendant, arrived at the conclusion that the plaintiff was not entitled to enforce the suit agreement of sale, certainly would have thought of ordering the alternative plea and would have even granted it under Order VII Rule 7 CPC as nothing precludes the Courts to resort to the same. Therefore, there is no merit in that submission.

14. Concerning the request to remit the matter once again advanced by the learned counsel, the appellant is unable to satisfy the rulings rendered under Order 19 Rule 2 or 3 of CPC and the circumstance under which such request can be acceded to. This apart, when his participation through cross-examination of PWs.1 and 2 is occurring and later the defendant had not chosen to step into witness

box is no ground to accede to the request of remitting the matter to the trial Court, more particularly, when judgments were rendered on appreciation of evidence on record disbelieving the main stand of the defendant that the suit agreement of sale was executed as security for the debt contracted about five years prior thereto. The learned counsel, no doubt, placed reliance on the rulings in **Kanshi Ram v. Om Prakash Jawal and others**¹, **Vimaleshwar Nagappa Shet v. Noor Ahmed Sheriff and others**²; and **Hemanta Mondal and others v. Ganesh Chandra Naskar**³. The fact-situation occurring in the said cases would altogether different when looked at the defence put forth by the defendant herein. Therefore, they do not render any assistance to the defendant herein to support his case in the present second appeal. Hence, viewed from any angle, there is no merit in the present Second Appeal.

15. The present Second Appeal is, accordingly, dismissed at the admission stage itself. There shall be no order as to costs.

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

A. SHANKAR NARAYANA, J

June 05, 2017.

Mgr

¹. (1996) 4 SCC 593

². AIR 2011 SC 2057

³. (2016) 1 SCC 567