

THE HON'BLE SRI JUSTICE A.V.SESHA SAI

S.A.No.184 of 2017

ORDER:

This second appeal, preferred under Section 100 of the Code of Civil Procedure, challenges the Judgment and Decree dated 01.12.2016 rendered by the VI Additional District Judge, Gooty, Ananthapur District in AS.No.10 of 2016, reversing the Judgment and Decree dated 24.02.2016 passed by the Court of the Senior Civil Judge, Gooty, Anantapur District in O.S.No.193 of 2009.

2. The circumstances leading to the filing of the present second appeal are as under:

2.1. The first respondent herein instituted O.S.193 of 2009 on the file of the Court of the Senior Civil Judge, Gooty, Ananthapur District against the appellant and the second respondent herein for a decree of specific performance of Agreement of Sale dated 08.10.2007. The said property is a house property situated within the limits of Pamidi Gram Panchayath, Anantapur District.

2.2. The appellant/first defendant resisted the said suit by way of filing a written statement and defendant No.2/second respondent herein also filed written statement. On the basis of the pleadings available on record, the learned Senior Civil Judge, Gooty framed the following issues and additional issues:

ISSUES:

1. Whether the plaintiff is entitled for the relief of specific performance of agreement of sale against the defendant as prayed for?
2. To what relief?

ADDITIONAL ISSUES:

1. Whether the endorsement dated.2-2-08 is true valid and binding on the 1st defendant?
2. Whether the endorsement dated.31.8.08 is true valid and binding on the 1st defendant?
3. Whether the agreement was made on stamp paper dt.5-2-09 for extension of time till 31.12.09 is true valid and binding on the 1st defendant?
4. Whether the plaintiff paid an amount of Rs.10,000/- to the 1st defendant on 25-6-09 towards sale consideration as alleged by the plaintiff?
5. Whether the time is essence of the present contract?
6. Whether the plaintiff was always ready and willing to perform his part of contract?

2.3. During the course of trial, plaintiff/first respondent herein examined himself as PW.1 apart from examining PWs.2 to 4 on his behalf and marked Exs.A.1 to A.7 and whereas the first defendant examined herself as PW.1 and PWs.2 and 3 were examined on behalf of the defendants and on behalf of the defendants Exs.B.1 to B.9 were filed.

2.4. The learned Senior Civil Judge, by way of the judgment and decree dated 24.02.2016 dismissed the suit filed by the first respondent herein. Assailing the same, the plaintiff/first respondent herein preferred A.S.10 of 2016 on the file of the Court of the VI Additional District Judge, Gooty under Section 96 of the Code of Civil Procedure. The learned District Judge taking into account the grounds raised and the defence taken, framed the following points for consideration:

- “1. Whether the plaintiff/appellant was ever been ready and willing to perform his part of contract under suit agreement of

sale and the 1st defendant postponed the execution of regular sale deed in terms of suit agreement of sale as pleaded by plaintiff/appellant? If so plaintiff/appellant is not entitled for grant of decree for specific performance of suit agreement of sale?

2. Whether trial Court committed an error in recording finding that the plaintiff was guilty of suppression of material facts and in dismissing the suit on such finding and decree and judgment of trial Court in dismissing the suit on such finding is liable to be set aside?

3. To what relief?"

3. The learned Appellate Judge eventually on 01.12.2016 allowed appeal A.S.No.10 of 2016, setting aside the judgment and decree rendered by the trial Court, thereby decreed the suit, directing the plaintiff to deposit balance sale consideration of Rs.1,30,000/- within one month together with interest @ 12% per annum from 01.02.2008.

4. The present second appeal filed under Section 100 of the Code of Civil Procedure challenges the validity and the legal sustainability of the said judgment and decree rendered by the lower appellate Court.

5. Heard Sri Maheswar Rao Kuncham for the appellant and Sri Virupaksha Dattaatreya Gowd for the first respondent and perused the material available before the Court.

6. It is contended by the learned counsel for the appellant that the appellate Judge is not justified in reversing the well considered Judgment and Decree passed by the trial Court and according to the learned counsel the appellate Court grossly erred in meddling with the decree passed by the trial Court in the absence of any perversity in the judgment of the trial Court. It is further submitted by the learned counsel for the appellant that the trial Judge correctly dismissed the suit on the ground of suppression of material facts by

the plaintiff since the relief of specific performance is a discretionary remedy. It is further contended by the learned counsel that the plaintiff has to stand on his own legs and the weakness if any on the part of the defence cannot be a ground for decreeing the suit in favour of the plaintiff. It is further contended by the learned counsel that taking of possession by the plaintiff and leasing out the same was suppressed by the plaintiff and the said aspect would be sufficient for denying the equitable relief of specific performance in favour of the plaintiff/first respondent herein.

7. In support of his submissions and contentions learned counsel for the appellant places reliance on the judgment of the Hon'ble Apex Court in *ARIKALA NARASA REDDY v. VENKATA RAM REDDY REDDYGARI AND ANR*¹ and the judgments of this Court in *DHANRAJ AND ORS. v. SALEH*² and *YELLINA VENKATESWARA RAO v. BOLLINA VENKATA RAMANA AND ORS*³.

8. On the contrary, it is contended by the learned counsel for the first respondent appellant that there is no error nor there exists any infirmity in the impugned judgment and decree, as such, no interference of this Court is warranted. It is the further submission of the learned counsel that there is no question of law much less substantial question of law in the case of the appellant herein, as such, the jurisdiction of this Court under Section 100 of the Code of Civil Procedure cannot be permitted to be invoked by the appellant herein. It is further contended that the case of the first defendant appellant herein with regard to alleged suppression of material facts cannot be sustained and is not supported by any pleadings or evidence on record.

To bolster his submissions and contentions, learned counsel for the first respondent plaintiff takes the support of the judgement of the Hon'ble Apex

¹ (2014)5SCC 312

² 2016 (2) ALT 417

³ 2016 (5) ALD 821

Court in the case of *SANTOSH HAZARI v. PURUSHOTTAM TIWAI (DEAD) BY LRS*⁴.

9. In the above background, now the issues that emerge for consideration of this Court are__

1. Whether the appellant herein is successful in making out a case, warranting interference of this Court under Section 100 of the Code of Civil Procedure?
2. Whether the plaintiff is liable to be non-suited on the ground of alleged suppression of material facts and whether the judgment and decree rendered by the lower appellate Court warrant any correction of this Court?

10. The case of the plaintiff, according to the pleadings on record, is that the defendant No.1/appellant herein agreed to sell the schedule property by executing Ex.A.1 Agreement of Sale dated 08.10.2007 and received a sum of Rs.1,88,000/- towards advance with an understanding to receive the balance amount of consideration by 30.01.2008. It is further pleaded by the plaintiff that on 02.02.2008, the first defendant received a further sum of Rs.60,000/- and extended the time till 30.08.2008 and to the effect an endorsement was made on the backside of the agreement. It is further pleaded that subsequently, the defendant No.1 extended the time for specific performance till 31.01.2008 and thereafter till 31.12.2009. It is the further case of the plaintiff that the first defendant received a sum of Rs.10,000/- from the plaintiff on 25.06.2009 and despite the readiness and willingness on the part of the plaintiff, the first defendant postponed the execution which prompted the plaintiff to issue Ex.A.6 notice dated 08.12.2009 to the first defendant, calling upon the first defendant to execute the Registered Sale Deed and to receive the amounts of sale consideration and despite the same the first defendant did not execute the registered sale deed.

⁴ (2001) 3 SCC 179

11. On the other hand, it is the case of the first defendant/appellant herein that the endorsement is the result of fabrication and forgery and that the first defendant never agreed for extension of time as alleged in the plaint. The learned Trial Judge answered additional issues 1, 2, 3, 4 and 5 in favour of the plaintiff and while answering the said issues the trial Court held that Exs.A.2, A.3 and A.4 endorsements are true, valid and binding on the first defendant. The Trial Court also believed the version of the plaintiff as regards payment of Rs.10,000/- to the first defendant on 25.06.2009 and recorded a categorical finding while answering additional issue No.4. While answering additional issue No.5 the trial Court also came to a conclusion that the time was not the essence of the present contract.

12. While considering the issue No.1 and issue No.6, the trial Court categorically recorded a finding that the plaintiff proved his readiness and willingness to perform his part of contract, but on the ground that the plaintiff obtained possession of the plaint schedule property after the date of purchase and he suppressed the said fact, the trial Court refused to decree the suit obviously placing reliance on the Ex.B.9 document, a letter dated 10.07.2009 signed by the sureties to the second defendant society.

13. The appellate Court, while answering the points framed for determination, taking into consideration of the absence of any pleadings in the plaint and the statements in the evidence about the possession and enjoyment of the plaint schedule property and duly taking into consideration the pleadings in the written statement with regard to the defendant being in possession of the property, decreed the suit by allowing the appeal. The appellate Court also noted the important and significant aspect of absence of any recital in Ex.A.1 agreement of sale regarding delivery of possession of the plaint schedule property. As correctly observed by the learned appellate Judge Ex.B.9 got marked on behalf of the defence would not disclose the date of

taking possession of the plaint schedule property by the plaintiff. One important aspect which cannot be lost sight of is that the plaintiff/first respondent herein is not the author of Ex.B.9 letter and the same was allegedly given by the sureties of the first defendant to the second respondent. It is also significant to note that the authors of the said letter was not examined by the defendants to prove the same.

14. Coming to the judgments cited by the learned counsel for the petitioner_ in the case of *ARIKALA NARASA REDDY (supra 1)*, the hon'ble Apex Court at paragraph 15 held that the Courts cannot go beyond the pleadings of the parties and in absence of pleadings, evidence if any, produced by the parties, cannot be considered and no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them.

15. In the instant case, it is not at all the pleading of the plaintiff that the first defendant delivered possession of the property after the execution of Ex.A.1 Agreement of Sale nor the plaintiff as PW.1 deposed about he delivery of property in his favour. On the contrary, during the cross-examination, he categorically deposed that it is not true to say that the suit schedule property was in his possession since 2007. Another aspect which needs mention at this juncture is that the first defendant not only in his written statement but also in his evidence categorically deposed about his possession over the suit schedule property. Therefore, the above referred judgment of the Hon'ble apex Court would not render any assistance to the appellant herein.

16. In *DHANRAJ AND ORS (supra 2)*, this Court found that in a suit for specific performance the plaintiff has to win or lose his case on his own strength and not on the weakness in the case of the defendant and while

approaching the Court one must come with clean hands since it is a relief of equity.

17. In the instant case, the plaintiff proved his readiness and willingness in accordance with the provisions of the Specific Performance Act to perform his part of contract and both the Courts below concurrently found and recorded findings in favour of the plaintiff. Therefore, the said judgment is not helpful to the appellant herein.

18. In the case of *YELLINA VENKATESWARA RAO (supra 3)*, this Court held that the relief of specific performance is a discretionary relief and the Court is not expected to grant the said relief even if it is lawful to do so, particularly, if the party approaches the Court by suppressing the material facts, the Court would normally refuse to grant such relief.

19. As observed *supra*, there is absolutely no material on record which suggests that the plaintiff suppressed the material facts. Therefore, this Judgment also would not render any assistance to the appellant herein.

20. Coming to the judgment cited by the first respondent plaintiff in *SANTOSH HAZARI (supra 4)*, the Hon'ble Apex Court at paragraphs 10 and 14 held as under:

“10. At the very outset we may point out that the memo of second appeal filed by the plaintiff-appellant before the High Court suffered from a serious infirmity. Section 100 of the Code, as amended in 1976, restricts the jurisdiction of the High Court to hear a second appeal only on 'substantial question of law involved in the case'. An obligation is cast on the appellant to precisely state in the memorandum of appeal the substantial question of law involved in the appeal and which the appellant proposes to urge before the High Court. The High Court must be satisfied that a substantial question of law is involved in the case and such question has then to be formulated by the High Court. Such questions or question may be the one proposed by the appellant or may be any other question which though not proposed by the appellant yet in the opinion of

the High Court arises as involved in the case and is substantial in nature. At the hearing of the appeal, the scope of hearing is circumscribed by the question so formulated by the High Court. The respondent is at liberty to show that the question formulated by the High Court was not involved in the case. In spite of a substantial question of law determining the scope of hearing of second appeal having been formulated by the High Court, its power to hear the appeal on any other substantial question of law, not earlier formulated by it, is not taken away subject to the twin conditions being satisfied: (i) the High Court feels satisfied that the case involves such question, and (ii) the High Court records reasons for its such satisfaction.

14. A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be 'substantial', a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. To be a question of law 'involving in the case' there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis."

21. It is a settled and well established principle of law that unless the findings recorded by the Courts below are patently perverse, fundamentally erroneous and foundationally defective and in utter disregard of the basic principles of law, the invocation of jurisdiction of this Court under Section 100 of the Code of Civil Procedure is impermissible. The substantial question of law framed in the present second appeal, by any stretch of imagination, can

be regarded as substantial nor this Court finds any such substantial questions of law in the case of the appellant herein, as such, this Court is not inclined to entertain the present second appeal under Section 100 of the Code of Civil Procedure.

22. In view of the above reasons and having regard to valid and cogent reasons recorded by the appellate Court, this Court has absolutely no scintilla of hesitation nor any traces of doubt to hold that the substantial question of law which is a prerequisite for entertaining and admitting the second appeal under Section 100 of the Code of Civil Procedure is totally and conspicuously absent in the present case.

23. For the aforesaid reason, the second appeal is dismissed. As a sequel, miscellaneous petitions, if any, shall stand closed. There shall be no order as to costs.

Date:07.07.2017
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A.V.SESHA SAI, J

THE HON'BLE SRI JUSTICE A.V.SESHA SAI



S.A.No.184 of 2017

Dated: 07.07.2017

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