

HONOURABLE SRI JUSTICE U.DURGA PRASAD RAO

SECOND APPEAL No.934 of 1999

JUDGMENT:

This Second Appeal is preferred by the appellant/plaintiff aggrieved by the Judgment and Decree dated 05.04.1999 in A.S.No.351 of 1997 passed by the learned III Additional Chief Judge, City Civil Court, Hyderabad, whereby and whereunder the learned Judge allowed the appeal filed by the defendant and set aside the Judgment and Decree dated 30.07.1997 in O.S.No.4371 of 1991 passed by the VI Assistant Judge, City Civil Court, Hyderabad, filed for specific performance of contract.

2) The parties in this Second Appeal are referred as they were arrayed before the Trial Court.

3) The factual matrix of the case is thus:

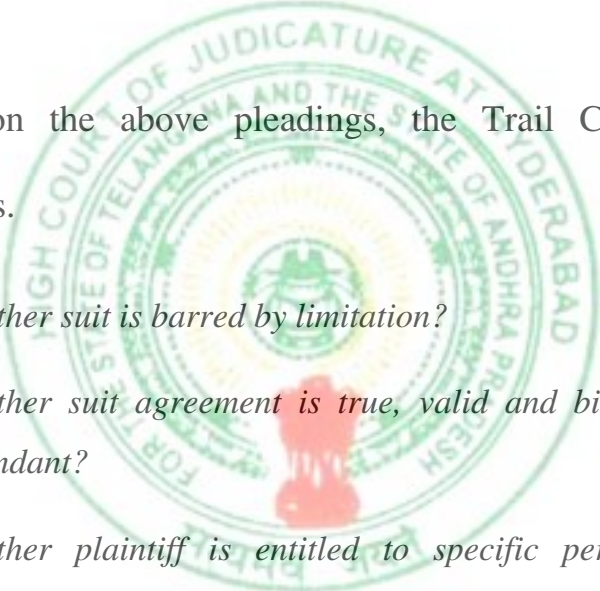
a) Plaintiff's case is that defendant owns Plot No.11 bearing Municipal No.8-1-120/86/1 situated at Banjara Hills, Road No.12, Hyderabad; agreed to sell an extent of 350 square yards to the plaintiff at the rate of Rs.80/- per square yard under Ex.A1—agreement of sale dated 01.05.1985 by receiving Rs.14,000/- towards advance; he has to obtain permission from the competent authority for alienation and execute registered sale deed within one month; plaintiff's husband requested several times to execute the sale deed but of no avail; after waiting for a reasonable time, plaintiff issued Ex.A2—legal notice dated 19.08.1991 calling upon the defendant to execute registered sale deed; he gave

Ex.A3—reply notice dated 28.08.1991 denying all the material averments.

Hence, the suit.

b) Defendant filed written statement contending that he never offered to sell an extent of 350 sq. yds to the plaintiff on 01.05.1985 and received Rs.14,000/- towards advance as alleged. He also denied that he promised to obtain permission from competent authorities for alienation. He further contended that suit agreement is a rank forgery. He thus prayed to dismiss the suit.

c) Basing on the above pleadings, the Trial Court framed the following issues.

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- i) *Whether suit is barred by limitation?*
 - ii) *Whether suit agreement is true, valid and binding on the defendant?*
 - iii) *Whether plaintiff is entitled to specific performance of contract as prayed for?*
 - iv) *To what relief?*

d) During trial, PWs.1 and 2 were examined and Exs.A1 to A8 were marked on behalf of plaintiff. DW1 was examined and no documents were marked on behalf of defendant.

e) After hearing both sides and basing on the oral and documentary evidence, the trial Court observed that suit is filed well within limitation and both the parties were present at the time of execution of Ex.A1-suit agreement and Rs.14,000/- was paid by the plaintiff to the defendant and

hence the suit agreement is true and valid and binding on the defendant. It also observed that as the plaintiff was ready and willing to perform her part of contract, she is entitled to specific performance and accordingly decreed the suit.

f) Aggrieved, the defendant filed A.S.No.331 of 1997 before the III Additional Chief Judge, City Civil Court, Hyderabad and the said appeal was allowed by setting aside the judgment and decree of the trial Court in O.S.No.4371 of 1991.

Hence, the instant Second Appeal by plaintiff.

g) During the pendency of appeal, sole respondent died and respondents 2 and 3 were brought on record as his LRs. vide Court order dated 12.02.2014 in SAMP No.1636 of 2013.

4) The following substantial questions of law were framed by this Court out of the grounds of appeal filed by the appellant.

1) *Whether the appellant Court was correct in holding that*

Ex.A1 was not established and no consideration was passed?

2) *Whether the appellate Court was correct in holding that*

the suit was barred by limitation when the presumption is that time is not essence of the contract in respect of immovable properties?

3) *To what relief?*

5) Heard arguments of Sri M.V.Suresh Kumar, learned counsel for appellant and Sri P.V.Vidyasagar, learned counsel for respondents.

6) **Substantial Question No.1:** Vehemently denouncing the judgment of the appellate Court, learned counsel for appellant/plaintiff would argue that appellate Court committed a grave error in disbelieving the evidence of PWs.1 and 2 in respect of execution of Ex.A1—sale agreement and passing of advance amount of Rs.14,000/- from plaintiff to defendant. PW1 and defendant are known persons and doing their respective business activities in the industrial estate, Balanagar. Therefore, there was no need for plaintiff to fabricate Ex.A1. PWs.1 and 2 clearly stated about execution of Ex.A1—agreement and his receiving the advance amount of Rs.14,000/-. PW2 is an independent witness who knows PW1 and defendant but he is neither related to PW1 nor working under him so as to help him in fabrication of Ex.A1. Except harping Ex.A1 is to be a forged document, the defendant did not take any steps to disprove the evidence of PW1. Neither he filed petition to refer the disputed signature on Ex.A1 with his admitted signature to hand writing expert nor did he file any police complaint against plaintiff and PW1 for committing forgery. Thus, apart from the cogent evidence of PWs.1 and 2, the conduct of defendant would clearly establish the genuineness of Ex.A1—agreement to sell.

7) Learned counsel for respondents, on the other hand, while supporting the judgment of the lower appellate Court argued that the plaintiff could not prove the due execution of the sale agreement as the

evidence of PWs.1 and 2 is an interested evidence. Further, even otherwise suit was hopelessly barred by limitation. He thus prayed to dismiss the appeal.

8) This Court gave anxious consideration to the evidence of PWs.1 and 2 concerning to execution of Ex.A1.

a) PW1 is the husband of plaintiff. His evidence is that his industry and industry of defendant are located in the industrial estate, Balanagar and he knows the defendant for the last 23 years; defendant purchased suit plot from one Iqbal Begum under registered sale deed dated 05.10.1978 from which he offered to sell an extent of 350 square yards at the rate of Rs.80/- per square yard. Hence, they entered into an agreement to sell dated 01.05.1985; plaintiff paid Rs.14,000/- as advance at the time of agreement; the defendant promised to execute registered sale deed within one month from the date of agreement; defendant has to obtain ULC permission and clearance from APSFC for registering the sale deed but he did not obtain them and when the plaintiff demanded, defendant was postponing. He was extensively cross-examined by the defendant. In the cross-examination PW1 reiterated his earlier version in the chief examination. He stated that the defendant is a family friend; the scribe came to the Unit and drafted Ex.A1; defendant was also present at the time of drafting; he told he pledged the original sale deed in bank and he will take back the same and fill up the blanks in Ex.A1 with regard to particulars of sale deed; PW1 paid Rs.14,000/- by way of cash to defendant but there is no receipt for payment of Rs.14,000/-.

b) PW2 is the attester of Ex.A1. He deposed he knows Plaintiff and defendant; he also knows about Ex.A1 transaction; defendant agreed to sell land measuring 350 square yards situated in Shaikpet village, Banjara Hills to plaintiff for Rs.28,000/- and plaintiff paid Rs.14,000/- on the date of agreement as part of sale consideration and the transaction took place in his presence and he witnessed Ex.A1. In the cross-examination he stated that PW1 is not his friend but he is having acquaintance with PW1 for the last 10 years; Ex.A1 was written in his presence; it was prepared in Unit 33; it is true that 01.05.1985 was a holiday and all industries were closed. He denied the suggestion that he was deposing falsehood since he was related to PW1 and created Ex.A1.

c) When the above evidence of PWs.1 and 2 is carefully analyzed, I find ring of truth in their evidence. So far as PW1 is concerned, the defendant has not challenged his version that both of them having industries in the same industrial estate at Balanagar and they know each other for the last 23 years; there were no earlier disputes between both of them except that a similar suit was filed in respect of another plot. In those circumstances, I find no reason for PW1 to fabricate Ex.A1. PW2 is concerned he is working under one P.S.John in the same industrial unit but not under plaintiff. He only knows the plaintiff and defendant. So, there was no special occasion for him to collude with plaintiff to fabricate Ex.A1. Hence, the evidence of PWs.1 and 2 is believable which establishes execution of Ex.A1 by the defendant.

d) As rightly argued by the counsel for appellant, the defendant did not take action against the plaintiff by filing a police complaint for their alleged forgery. His further conduct would also manifest that suit agreement is a genuine one. In Ex.A1 at page-2, some blanks are left with regard to particulars of the sale deed obtained from Iqbal Begum. PW1 in his cross-examination stated that defendant told him that he pledged the original sale deed in the bank and he would take back and fill up the blanks in Ex.A1 with regard to particulars of sale deed. He further stated that he does not know whether the defendant redeemed the loan due to the bank in the year 1985 itself. Thus, it is the case of defendant even prior to the date of Ex.A1, he redeemed bank loan and obtained his sale deed and if really Ex.A1 was a genuine document, certainly at the time of execution, the defendant would produce his title deed and all the particulars of his sale deed would have been mentioned in Ex.A1. Thus, the blanks in Ex.A1 would show that Ex.A1 is a forged document. It must be noted in this regard, if really the defendant redeemed the bank loan even prior to date of Ex.A1, certainly he would be in a position to produce the certificate from the concerned bank regarding the date of redemption of the loan. Had he produced such a certificate into the Court, then the blanks left out in Ex.A1 might have created a doubt about the genuineness of Ex.A1. The defendant did not produce the certificate showing that he redeemed bank loan. This conduct on his part would give strength to the genuineness of Ex.A1. Unfortunately, the appellate Court on a perverse appreciation of facts and evidence held that Ex.A1 and passing of consideration are false. Thus, substantial question No.1 is concerned,

it is held that plaintiff could establish Ex.A1 and passing of advance amount of Rs.14,000/- to defendant.

9) **Substantial Question No.2:** As can be seen from Ex.A1 the cumulative effect of clauses 3 and 4 therein is that plaintiff has to pay balance amount of Rs.14,000/- within one month from the date of agreement and thereupon the defendant shall register suit plot in her favour. It is the contention of plaintiff that the said time stipulation of one month is not essence of the contract. Whereas apart from the forgery plea, the alternative contention of defendant is that time is essence of the contract and since plaintiff failed to honour the same she does not deserve decree. The finding of the appellate Court as can be viewed from para-15 of its judgment is that in spite of time is the essence of the contract or not, the suit is to be filed within the period of limitation in terms of Article 54 of the Limitation Act. The appellate Court observed that when the defendant failed to execute the sale deed by receiving the balance amount within one month, the plaintiff ought to have approached the Court within three years from the expiry of said period of one month. However, the plaintiff did not do so on the ground that defendant has not obtained permission from the ULC authorities or Municipal authorities. The appellate Court observed that there is no stipulation at all in Ex.A1 that the defendant shall obtain permission from ULC authorities or Municipal authorities and hence plaintiff's version that defendant postponed the registration on the pretext he should obtain permission from the ULC authorities or Municipal authorities cannot be accepted. Thus, it ultimately held that since the plaintiff failed to file the suit within three

years from the date of expiry of one month mentioned in Ex.A1 and she filed the suit in the year 1991, the same is barred by limitation. On a careful perusal of facts and evidence on record, I find the aforesaid finding of the appellate Court is legally correct.

10) It is true as per clauses 3 and 4 in Ex.A1, the plaintiff has to pay the balance amount of Rs.14,000/- from the date of Ex.A1 and thereupon the defendant has to register the sale deed. The trite law is that in respect of sale of immovable properties the presumption is against time being essence of the contract.

a) In *Mohammed Abdul Azeem v. M/s. South India Prime Tannery Pvt. Ltd.*¹, this Court after referring various judgments of the Apex Court, has held that in contracts relating to immovable properties there was no presumption that time is the essence of the contract. Mere stipulation of time for performing a particular term with penal provision will not make time as essence of the contract unless it is established by the party who pleads time is essence. The intention of the parties to make time is the essence can be covered by express stipulation in the contract or from the facts and surrounding circumstances.

b) When the instant case is viewed in the light of above precedential jurisprudence, general presumption is that time is not essence of the contract, merely because one month time is fixed to pay the balance sale consideration. To treat that time is the essence, the defendant shall come

¹ AIR 2016 AP 170

up with cogent evidence to show that time clause was fixed not to serve as an empty rhetoric but due to his pressing need for money. That is not the case here. Therefore, if the plaintiff failed to pay the balance sale consideration within one month and seek for registration, on that ground defendant cannot contend plaintiff does not deserve decree. However, I must hasten up to say, it does not mean that plaintiff can take her own sweet time after expiry of one month period and file suit at her pleasure. Article 54 of the Limitation Act would say, the three years period for filing the suit would start running from the date fixed for performance. In the instant case, one month time was fixed for payment of balance amount to obtain registered sale deed. Since the said one month period is held not essence of the contract, plaintiff cannot be found fault for not obtaining the sale deed within that one month period. However, she has to institute the suit within three years from thereafter to be within the period of limitation prescribed under Article 54. In that event, she was required to file the suit by 01.06.1988. However, suit was filed only in the year 1991 and hence as rightly held by the appellate Court, the suit was hopelessly barred by limitation. The contention advanced on behalf of the plaintiff that the defendant promised that he would obtain permission from ULC authorities and Municipal authorities and he was dodging the same and therefore that period shall be excluded from reckoning the period of limitation cannot be accepted. As already stated supra, such conditions are not stipulated in Ex.A1. Learned counsel for appellant/plaintiff sought to argue that in spite of absence of such terms in Ex.A1, plaintiff can project the same. I am afraid this argument is

preposterous. Thus, substantial question No.2 is concerned, it is held suit is barred by limitation and hence liable to be dismissed.

11) In view of above findings, this Second Appeal is dismissed by confirming the judgment of the appellate Court in A.S.No.351 of 1997. However, having regard to the facts and circumstances of the case, the respondents herein are directed to return the advance amount of Rs.14,000/- to the appellant with interest at the rate of 6% per annum from the date of suit agreement i.e.01.05.1985 till the date of realization. No costs in the appeal.

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

Date: 29.12.2017
Murthy

U. DURGA PRASAD RAO, J

