

THE HON'BLE JUSTICE SRI T. SUNIL CHOWDARY

SECOND APPEAL No.657 of 2012

JUDGMENT:

1 The defendants, who suffered a decree of specific performance in both the Courts preferred this second appeal, questioning the legality and validity of the judgment and decree dated 06.03.2012 passed in A.S.No.13 of 2009 on the file of the Court of the Principal District Judge, Visakhapatnam upholding the judgment and decree dated 19.11.2008 passed in O.S.No.18 of 2004 on the file of the Court of the Senior Civil Judge, Chodvaram.

2 For the sake of convenience, the parties to this second appeal will be hereinafter referred to as they were arrayed in the suit.

3 The facts leading to the filing of the present second appeal, in nutshell, are as follows:

4 The defendants, who are father and son, are the absolute owners of an extent of Ac.1-20 cents situated in Lingabhupalapatnam village, Cheedikada Mandal, Visakhapatnam district (hereinafter referred to as 'the suit schedule property'). On 22.02.2001, the defendants executed an agreement of sale in favour of the plaintiff agreeing to sell the suit schedule property for a total consideration of Rs.1,26,000/- and received Rs.20,000/- towards advance sale consideration. As per the terms and conditions of the agreement, the plaintiff has to obtain a regular sale deed within three months from the date of agreement of sale. Though the plaintiff is ready and willing to

perform his part of contract, the defendants have been postponing execution of regular sale deed. Therefore, the plaintiff got issued a legal notice on 04.05.2001 directing the defendants to execute sale deed for which they issued a reply on 15.05.2001 with false and frivolous allegations. Hence the suit for specific performance.

5 Resisting the suit, the first defendant filed the written statement denying the various averments made in the plaint, *inter alia* contending that the plaintiff, with an evil intention to grab the suit schedule property, made an attempt to occupy the same in the year 2001. Then this defendant filed O.S.No.80 of 2001 on the file of the Court of the Principal Junior Civil Judge, Chodavaram for perpetual injunction in respect of the suit schedule property against the plaintiff herein and three others. The plaintiff created the agreement of sale dated 22.02.2001 by forging the signatures of the defendants. The defendants never executed any agreement of sale in favour of the plaintiff. The plaintiff got issued legal notice on 04.05.2001 to these defendants with false and frivolous allegations and these defendants issued a reply on 15.05.2001 with true facts. The prevailing market value of the property in the year 2001 was Rs.1,600/- per Cent. The suit schedule property does not disclose the survey number. The suit is barred by limitation. Hence the suit is liable to be dismissed. The second defendant adopted the written statement filed by the first defendant by filing a memo.

6 Basing on the above pleadings, the following issues were settled by the trial court:

1. Whether the plaintiff is entitled for specific performance of the agreement of sale?
2. Whether the plaintiff is alternatively entitled for refund of Rs.20,000/- with costs and interest?
3. Whether the Agreement of sale dated 22/2/2001 was created by force by the plaintiff and is not supported by valid consideration?
4. To what relief?

7 Before the trial Court, on behalf of the plaintiff, P.Ws.1 to 5 were examined and Exs.A.1 to A.3 were marked. On behalf of the defendants, D.Ws.1 to 3 were examined and Ex.B.1 was marked.

8 Basing on the oral, documentary evidence and other material available on record, the trial court arrived at a conclusion that Ex.A.1-Agreement of sale dated 22.2.2001 is true, valid and binding on the defendants and accordingly decreed the suit in favour of the plaintiff for the relief of specific performance.

9 Feeling aggrieved by the judgment and decree dated 19.11.2008 passed by the trial Court in O.S.No.18 of 2004, the defendants preferred A.S.No.13 of 2009 on the file of the Principal District Judge, Visakhapatnam. The first appellate Court, after reappraising the oral and documentary evidence available on record, without being influenced by the findings recorded by the trial Court, arrived at a conclusion that the plaintiff is entitled to the relief of specific performance and accordingly dismissed the appeal. Hence the present second appeal by the defendants.

10 The learned counsel for the appellants/defendants submitted that the courts below failed to consider that non-mentioning of the survey number in the plaint schedule by itself is a valid ground to dismiss the suit even without going into the merits of the case. He further submitted that the findings recorded by the courts below are perverse as they are not supported by any evidence and hence liable to be set aside. He further submitted that the courts below ought not to have decreed the suit in favour of the plaintiff basing on the stray admissions made by D.W.1 and other witnesses. ***Per contra*** the learned counsel for the respondent / plaintiff submitted that the findings recorded by the courts below are supported by oral and documentary evidence. He further submitted that the plaintiff filed an application for amendment of the plaint to include the survey number of the plaint schedule property and the same was allowed. He further submitted that this Court shall not lightly interfere with the concurrent findings of fact recorded by the courts below in view of the scope of Section 100 CPC and hence this second appeal is liable to be dismissed.

11 Basing on the submissions made by the learned counsel for both parties and the grounds of appeal, the following questions of law arise for consideration in this second appeal:

- i. 'Whether the courts below granted decree in favour of the plaintiff basing on the weaknesses of the defendants by placing burden of proof on them?
- ii. Whether the findings recorded by the courts below are perverse?'

POINT No.1:

12 To substantiate the arguments, the learned counsel for the defendants has drawn the attention of this Court to the ratio laid down in **1)** Kisanlal Maniklal Rathi vs. Dinkar Yashwant Patil¹, **2)** K.Gopala Reddy vs. Suryanarayana², **3)** Chakicherla Audilakshamma vs. Atmakaru Ramarao³, **4)** Harish Mansukhani vs. Ashok Jain⁴, **5)** Ram Das vs. Salim Ahmed⁵ and **6)** State of Madhya Pradesh vs. Nomi Singh⁶.

13 As per the principle enunciated in the cases cited supra, the plaintiff has to establish his case and the Court cannot grant decree in favour of the plaintiff solely basing on the weaknesses of the defendant's case.

14 The learned counsel for the defendants has further drawn the attention of this Court to the following decisions:

P. Paneerselvan vs. A. Baylis S/o V.Anbumani⁷, wherein the High Court of Madras at para No.23 held as under:

“.....The agreement does not specifically indicate that a particular property was to be sold. The agreement merely indicates that out of future property to be acquired or from the property already acquired, property worth Rs. 1,00,000/- is to be conveyed. If there would have been acceptable materials to indicate that in fact the parties had agreed the land required to be sold at a particular rate per cent, even the court could have come to the assistance of the plaintiff by saying that the land of equivalent value is required to be sold. In the present case, in the absence of any rate regarding the rate per cent and in the absence of specific identity of the property, we are constrained to come to the conclusion that the plaintiff cannot seek for specific performance of the contract as the contract continues to be vague and indefinite.”

¹ 2003(4)ALLMR1083 = 2004(1)MhLJ138

² 2004 (1) KCCR 662

³ AIR 1973 AP 149

⁴ ILR (2008) Supp.() Delhi 195

⁵ (1998) 9 SCC 719

⁶ (2015) 14 SCC 450

⁷ (2005)4 MLJ 198

Marudannayagam Pillali vs. P.K. Venkataswami Naidu⁸

wherein the High Court of Madras at Para No.5 held as under:

“Normally boundaries prevail over numbers but circumstances may demand that the survey numbers should prevail over the descriptive boundaries particularly when the descriptive boundaries are themselves vague and their identification difficult. There can be no inflexible principle in this.”

Municipal Committee, Hoshiarpur vs. Punjab State

Electricity Board⁹ wherein the Hon’ble apex Court at Para Nos.27

to 29 held as under:

27. There is no prohibition on entertaining a second appeal even on a question of fact provided the Court is satisfied that the findings of fact recorded by the courts below stood vitiated by non-consideration of relevant evidence or by showing an erroneous approach to the matter i.e. that the findings of fact are found to be perverse. But the High Court cannot interfere with the concurrent findings of fact in a routine and casual manner by substituting its subjective satisfaction in place of that of the lower courts. (Vide: Jagdish Singh v. Natthu Singh AIR 1992 SC 1604; Karnataka Board of Wakf v. Anjuman-E-Ismael Madris-Un-Niswan AIR 1999 SC 3067; and Dinesh Kumar v. Yusuf Ali : AIR 2010 SC 2679).

28. If a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then the finding is rendered infirm in the eyes of law. If the findings of the Court are based on no evidence or evidence which is thoroughly unreliable or evidence that suffers from the vice of procedural irregularity or the findings are such that no reasonable person would have arrived at those findings, then the findings may be said to be perverse. Further if the findings are either ipse dixit of the Court or based on conjecture and surmises, the judgment suffers from the additional infirmity of non-application of mind and thus, stands vitiated. (Vide: Bharatha Matha and Anr. v. R. Vijaya Renganathan and Ors.: AIR 2010 SC 2685)

29. In view of above, the law on the issue can be summarised to the effect that a second appeal lies only on a substantial question of law and it is necessary to formulate a substantial question of law before the second appeal is decided.

15 On the other hand, the learned counsel for the respondent / plaintiff relied on the ratio laid down in **Biswanath Ghosh vs.**

⁸ AIR 1968 Mad 433

⁹ (2010) 13 SCC 216

Gobinda Ghosh¹⁰. As per the principle enunciated in the cases cited supra, a second appeal can be entertained only on involvement of substantial question of law.

16 Let me consider the facts of the case on hand in the light of the above legal principles.

17 It is not in dispute that the defendants are the absolute owners of the suit schedule property which is an extent of Ac.1.20 cents situated in Lingabhupalapatnam village, Cheedikada Mandal, Visakhapatnam district. Before filing the suit, the plaintiff got issued Ex.A.2 - legal notice dated 04.05.2001 for which the defendants got issued Ex.A.3 - reply on 15.05.2001. On receipt of Ex.A.2 notice, the defendants filed O.S.No.80 of 2001 on the file of the Principal Junior Civil Judge's Court, Chodavaram. Ex.B.1 is copy of the plaint in the said suit.

18 The entire controversy revolves around Ex.A.1 - agreement of sale dated 22.02.2001. It is the case of the plaintiff that on 22.02.2001 the defendants executed an agreement of sale in his favour, after receiving the earnest money of Rs.20,000/-, agreeing to execute a sale deed within a period of three months. It is the case of the defendants that Ex.A.1 is an out and out forgery.

19 The relief of specific performance is a discretionary relief. The court can exercise its discretionary power basing on sound principles of law. Establishment of the following two conditions are *sine qua non* to grant the relief of specific performance in

¹⁰ AIR 2014 SC 1582

favour of the plaintiff: 1) the plaintiff has approached the court with clean hands, and 2) Ex.A.1 agreement of sale is legally enforceable. To non-suit the plaintiff, the defendants have to establish that Ex.A.1 agreement of sale is a forged one. A legal duty is cast on the plaintiff to prove that the defendants have executed Ex.A.1 and the same is supported by consideration. Once the plaintiff proves the execution of Ex.A.1 by the defendants, the onus of proof shifts on the defendants to establish that Ex.A.1 is a forged document.

20 To substantiate the case, before the trial Court, the plaintiff examined himself as P.W.1 and got marked Exs.A.1 to A.3. P.W.2 is scribe and P.W.3 is attester of Ex.A.1. P.Ws.4 and 5 were examined to prove that the plaintiff is always ready and willing to perform his part of contract. To demolish the case of the plaintiff, the first defendant examined himself as D.W.1 and got marked Ex.B.1. D.Ws.2 and 3 were examined to establish that the defendants never executed Ex.A.1 in favour of plaintiff.

21 The testimony of P.W.1 clearly establishes that the defendants executed the Ex.A.1 in his favour on 22.02.2001. P.W.2 who is the scribe and P.W.3 who is the attester of Ex.A.1 also deposed on the same lines with that of P.W.1. The overall appreciation of the testimony of these witnesses clinchingly establishes that the defendants executed Ex.A.1 in favour of the plaintiff agreeing to sell the suit schedule property.

22 Further, in the case on hand, by marking Ex.A.2 and examining P.Ws.4 and 5, the plaintiff has succeeded in

establishing that he is ready and willing to perform his part of the contract for getting a regular sale deed by paying the balance of sale consideration, which is mandatory in view of Section 16 (c) of the Specific Relief Act.

23 In the instant case, the defendant put a suggestion to the plaintiff and his witnesses that the plaintiff obtained the signature of the first defendant on Ex.A.1 when he was in an intoxicated condition. D.W.3 deposed that the plaintiff obtained the signature of D.W.1 on Ex.A.1 when he was in an intoxicated condition. The Courts below have considered these suggestions along with the other material available on record. There is no pleading in the written statement that the plaintiff obtained the signature of the first defendant while he was in intoxicated condition and the said version was introduced for the first time by D.W.1 and D.W.3 in their evidence. The very purpose of cross examination of a witness is to test the veracity of his chief examination. The admission made by the party to the proceedings in the cross examination is relevant piece of evidence and the Court can place reliance on it. Truth can be elicited in the cross examination of a witness by way of putting suggestions. Any admission made or anything elicited in the cross examination of the witness can be used to discredit the version of such witness or to improbabilize the stand of the opposite party. The version put forth by the first defendant during the course of trial is contrary to the stand taken by him in the written statement. Suffice it to say that the defendant is entitled to take any number of inconsistent pleas. However, the defendant is not

entitled to take mutually self-destructive pleas. If Ex.A.1 is forged one as alleged by the defendants, the question of obtaining signature of D.W.1 on it when he was in drunken stage does not arise. By putting such type of suggestions, the first defendant, if not directly, but by necessary implication, admitted his signature on Ex.A.1. In the cross examination D.W.1 did not hesitate even to deny his own signature on the vakalat and the written statement. This itself indicates the mindset of the first defendant, which is a relevant factor, in order to come to a just conclusion, whether he is speaking truth or false.

24 In the cross examination of P.Ws.1 to 3, nothing is elicited to create any doubt or suspicion about the execution of Ex.A.1. During the course of evidence, the defendants introduced a new version that one Demudu Naidu is the person behind the litigation. The written statement is conspicuously silent on this aspect i.e. the present litigation is the brain child of the said Demudu Naidu. Any amount of oral or documentary evidence, in the absence of specific pleading is of no avail. Apart from D.W.1, the second defendant is the competent person to say whether Ex.A.1 bears his signature or not. For the reasons best known to him, the second defendant did not choose to enter into the witness box to deny his signature on Ex.A.1. This fact also in one way strengthens the case of the plaintiff.

25 Had the courts below decreed the suit solely basing on the version put forth by the defendants, during the course of cross examination, that the plaintiff obtained the signature of the first

defendant when he was in intoxicated condition, even though the plaintiff fails to prove the execution of Ex.A.1 in all probabilities, there may be some justification in the argument advanced by the learned counsel for the defendants. On the other hand, the plaintiff proved execution of Ex.A.1 agreement of sale by the defendants and the same is supported by consideration by letting cogent and convincing evidence, much less legally admissible evidence. In such circumstances, the Court can place reliance on Ex.A.1. The findings recorded by the Courts below are supported by oral and documentary evidence. Both the courts below have exercised the discretionary power judiciously basing on sound principles of law keeping in mind the scope of Section 20 of the Specific Relief Act. Neither the trial Court nor the first appellate court has exercised the discretionary power capriciously as contended by the learned counsel for the defendants. The decisions Nos.1 to 6 relied on by the learned counsel for the defendants are no way helpful to their case. The point is answered accordingly.

POINT No.2:

26 The next contention of the learned counsel for the defendants is that survey number of the suit schedule property was not mentioned in the plaint.

27 In the grounds of appeal before the first appellate court as well as this court, the defendants have taken a plea that the survey number is not mentioned in the agreement of sale. It appears that instead of plaint schedule, it was referred as

agreement of sale in the grounds of appeal inadvertently. This Court carefully scanned the written statement in order to ascertain whether the survey number is not mentioned in the plaint schedule or in the agreement of sale. To clarify this aspect, it is not out of place to extract hereunder para No.9 of the written statement, which reads that: **“The plaint schedule does not disclose the survey number of the suit schedule property.”** Nowhere in the entire written statement it is pleaded that neither Ex.A.1 agreement of sale nor Ex.A.2 legal notice disclose the survey number.

28 There is no doubt, originally, survey number was not mentioned in the plaint schedule. At the time of arguments, the learned counsel for the plaintiff submitted that during the pendency of the suit, the plaintiff filed an interlocutory application for amendment of the plaint to include the survey number in the plaint schedule and the same was allowed. Of course, he has not filed the order passed in the said I.A.

29 In para No.11 of the judgment, the trial Court made the following observations:

“.....On this aspect the perusal of the plaint goes to show that originally survey number was not mentioned by the plaintiff in both the items of the plaint schedule. But subsequently the survey numbers were noted. The plaintiff furnished the local names of both items of schedule property and also the boundaries of the lands. The identity of the land is not disputed by the defendants at any point of time.”

30 The above para clearly demonstrates that during the pendency of the suit, the plaint was amended by adding the survey number of the suit schedule property. The above said

aspect was also supported by the ground No.15 of the grounds of appeal, which reads thus:

“15. The First appellate Court ought to have seen that there is no survey number in Ex.A.1 Agreement of Sale but the Survey Number was added subsequently in the plaint as such the suit is liable to be dismissed because the plaintiff is not willing to perform the contract as it originally stood.”

31 Admittedly, the defendants did not challenge the orders passed by the trial Court while amending the plaint. Without challenging the same, the defendants are not entitled to take such a plea at the stage of second appeal.

32 The learned counsel for the defendants vehemently submitted that the plaintiff has not mentioned the correct boundaries, therefore, he is not entitled to the equitable relief of specific performance and that aspect was not considered by the courts below in right perspective. He further submitted that wrong mentioning of boundaries is a question of law that can be urged for the first time in the second appeal even without taking such a plea in the written statement or in the grounds of appeal before the first appellate court. He further submitted that there is no need under law to take a plea in the written statement that the boundaries mentioned in the plaint are not correct. The defendants are the competent persons to say whether the boundaries as mentioned in the schedule are correct or not. When the plaintiff has not mentioned the correct boundaries in the plaint schedule, the defendants ought to have taken such a specific stand in the written statement, if necessary, by mentioning the correct boundaries, thereby to non-suit the plaintiff. In the grounds of appeal also, the same is not urged as

one of the grounds. Whether the boundaries, as mentioned in the plaint schedule, are correct or not, is purely a question of fact. Mentioning of wrong boundaries is not a question of law as urged by the learned counsel for the defendants. It is very easy to swallow the submissions made by the learned counsel for the defendants, but it is very difficult to digest them. Suffice it to say, the court cannot glibly swallow the submissions made by the learned counsel without considering whether the same will withstand judicial scrutiny or not. If the submission of the learned counsel for the defendants is accepted, the word question of law much less substantial question of law will lose its significance. Therefore, I am unable to accede to the contention of the learned counsel for the defendants that the defendants are entitled to urge about the correctness of the boundaries for the first time even at the stage of second appeal.

33 The testimony of D.W.1 clearly reveals that immediately after receipt of notice – Ex.A.2, he filed suit O.S.No.80 of 2001. At para No.4 of the written statement, the first defendant has taken a specific plea, which reads as under:

“4. The plaintiff entertained an evil thought to grab the Plaint Schedule Property and tried to occupy the Pliant Schedule land during the year 2001. On that this defendant filed a suit in O.S.No.80/2001 on the file of the Principal Junior Civil Judge’s Court, Chodavaram for permanent injunction in respect of the Plaint Schedule Property against plaintiff and three others and the Hon’ble Court is pleased to grant injunction in favour of this defendant in the said suit and the suit is pending.”

34 This clearly indicates that the suit schedule property in the present case and the suit schedule property in O.S.No.80 of 201 is one and the same. The first defendant himself, in unequivocal

terms, has taken a specific plea in the written statement that the suit schedule property in this suit and the suit schedule property in O.S.No.80 of 2001 is one and the same. There is no dispute with regard to the identity of the suit schedule property. Both the parties have entered into the witness box knowing fully well that there is no dispute with regard to the identity of the suit schedule property. In such circumstances, taking a plea that the plaintiff mentioned wrong boundaries that too at the stage of arguments in the second appeal, is not permissible. Permitting to take such pleas at the stage of second appeal will, certainly, fall outside the purview of Section 100 CPC. Therefore, the ratio relied upon by the learned counsel for the defendants in cases 7 to 9 cited supra are no way helpful to the case of the defendants.

35 It is needless to say that if the concurrent findings of fact recorded by two courts below are neither found to be contrary to the pleadings nor the evidence or any provisions of law, or so found perverse, then, in my considered view, such concurrent findings of fact cannot be interfered with. I find no merit in any of the arguments advanced by the learned counsel for the appellants, which are only based on facts and evidence. This Court cannot reappreciate the evidence again *de novo* while hearing this second appeal.

36 In **Municipal Committee, Hoshiarpur v. Punjab SEB**¹¹, while dealing with the scope of Section 100 of C.P.C., the Hon'ble apex Court held at paragraph No.16 as follows:

¹¹ (2010) 13 SCC 216

16. A second appeal cannot be decided merely on equitable grounds as it lies only on a substantial question of law, which is something distinct from a substantial question of fact. The court cannot entertain a second appeal unless a substantial question of law is involved, as the second appeal does not lie on the ground of erroneous findings of fact based on an appreciation of the relevant evidence. The existence of a substantial question of law is a condition precedent for entertaining the second appeal; on failure to do so, the judgment cannot be maintained. The existence of a substantial question of law is a sine qua non for the exercise of jurisdiction under the provisions of Section 100 CPC.

37 Having regard to the facts and circumstances of the case and also the principles enunciated in the case cited supra, I am of the considered view that no question of law much less substantial question of law is involved in this second appeal and accordingly the same is liable to be dismissed.

38 For the foregoing discussion, the Second Appeal is dismissed at the stage of admission. There shall be no order as to costs. Consequently, Miscellaneous Petitions, if any, pending in this Second Appeal shall stand closed.

Date: 24-11-2017
Kvsn

T. SUNIL CHOWDARY, J.