

HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU

A.S.No. 532 of 1999

ORDER:

This is an appeal filed by the unsuccessful defendants in the suit challenging the decree of specific performance dated 11.12.1998 in O.S.No.381 of 1991 on the file of the Court of the I Additional Senior Civil Judge, Ranga Reddy District.

The case of the plaintiff is that defendant No.1 is the owner of the suit schedule property, which is Plot No.52 admeasuring 1200 square yards situated at Atomic Energy Employees Co-operative Housing Society, Kapra Municipality. Defendant No.1, the owner, offered to sell the suit schedule property and authorized defendant No.2 to receive the sale consideration. According to the plaintiff, as per the understanding, he paid Rs.45,000/- on 01.07.1980 and a further sum of Rs.55,000/- on 25.08.1990 to the defendant No.2 and on behalf defendant No.1 and defendant No.2 passed a receipt dated 01.07.1980. The second payment was also endorsed on the reverse of the said the receipt. Subsequently, as per the averments in the plaint, there was some discussion and the price for square yard was enhanced from Rs.270/- to Rs.325/- and later the defendants demanded Rs.400/- per square yard, which was not acceptable to the plaintiff. They state that they issued a notice demanding registration but the defendants did not

respond. Hence, the suit is filed for specific performance of the oral agreement of sale for the suit schedule property. Defendants in their written statement have pleaded that there is no privity of contract between the plaintiff and defendant No.1. However, they agree that there was an understanding between the plaintiff and defendant No.2. The defendants state that the plaintiff failed to fulfill his part of bargain. They also state that there was no concluded agreement between the parties and that the question of plaintiff's father requesting the defendant No.1 to standby to an earlier agreement or to register the sale deed is not correct. The defendants state that in the absence of concluded agreement, which is legally enforceable, specific performance cannot be granted.

Both the parties went to trial and the lower Court framed 4 issues which are to the following effect:

- (i) Whether the plaintiff is entitled for the specific relief against the defendants 1 and 2 as prayed for by him, in respect of the plaint schedule property?
- (ii) Whether the plaintiff is entitled for consequential relief of injunction as prayed for by him?
- (iii) Whether the plaintiff is entitled for the alternative relief i.e., refund of the sale consideration of Rs.1,00,000/- with interest as prayed for by him?

On behalf of the plaintiff, P.Ws.1 and 2 were examined and on behalf of the defendants, two witnesses i.e. D.Ws.1

and 2 were examined. For the plaintiff, Exs.A.1 to A.8 were marked.

After considering the documentary and oral evidence, the lower Court decreed the suit in favour of the plaintiff and against the defendants holding that the plaintiff shall pay the consideration at the rate of Rs.325/- per square yard and get the sale deed executed.

It is this order that is assailed in this appeal. Atleast, 22 written grounds were filed challenging the judgment.

In the course of argument, however, the learned senior counsel Sri VLNGK.Murthy, appearing for the appellants, essentially concentrated on the four points mentioned hereunder:

- (a) Whether defendant No.2 was authorized to deal on behalf of defendant No.1 and offered the property for sale?
- (b) whether there is a concluded contract at all between the parties, which would entitle the plaintiff to seek specific performance?
- (c) whether the tape recorded evidence was acceptable and contents thereof are proved?
- (d) whether the evidence of P.W.2 can be accepted as he died during the course of cross-examination?

Point (d): The learned counsel pointed out that the evidence of PW.2 was abruptly closed as he collapsed due to a heart condition during the course of cross-examination in the

Court. The learned Judge noted at the time this incident occurred as “to be continued”, but in the next line, the learned Judge endorsed the following: “cross-examination is concluded, but the witness collapsed, lost consciousness due to heart complaint. Therefore, his signature could not be obtained.” However, the deposition is certified.

Learned counsel for the appellants argued that the cross-examination was not completed and the words “to be continued” clearly indicated the same. The latter part of the endorsement made by the Court that the cross-examination is concluded is only for the purpose of certification by the Court. As the signature of the deponent could not be obtained, the learned Judge himself signed the deposition after the certification. Therefore, the learned counsel argued that the evidence is not completed in all respects and cannot be treated as concluded.

The learned counsel for the respondent, Sri Prakash Reddy, brought to the notice of this Court two judgments in ***G.Gopalakrishna (since died) per LRs, v. G.Venugopal and another***¹ and ***Dever Park Builders Pvt. Ltd., v. Madhuri Jalan and others***², wherein it was held that the evidence of a witness that is partly recorded cannot be eschewed in its totality although the witness died during the course of the examination. In ***Dever Park Builders'*** case (2 supra), it is clearly held that the evidence that is partly

¹ 2013 (4) ALT 295

² AIR 2002 Calcutta 281

recorded before death of a witness cannot be totally expunged or rejected altogether. It was further held that the evidence shall be considered, however, how much weight shall be attached to the evidence should be decided considering the other facts and circumstances of the case.

In the case on hand, it is not anybody's case that the witness did not appear for the examination. If the witness does not appear for the examination, then consequences could have follow, but in this case, the witness collapsed in the Court during cross-examination and died later. It is for this reason, the cross-examination could not be proceeded with.

Therefore, this Court is of the opinion that the evidence of the deceased witness, which was partly recorded in chief and cross-examination, can be considered; whether the contents of the evidence are to be accepted or not is a different matter. Therefore, this Court holds that the partially recorded cross-examination of a witness, who died at the time of cross-examination, cannot be eschewed altogether.

Point (C): The second important question that arises is about the tape recorded cassette and the transcript of the same. It is an interesting fact that the plaintiff's father Sri P.Sudhakar Raju had a telephonic conversation with the defendants, which was recorded on a cassette tape and the transcript of the recording were filed as suit documents 2 and 9. There is a pleading about the same in paragraph 5. The

defendants did not deny the recording or the content in their written statement. However, in reply to paragraph 5, they merely plead the following:

“The allegation in the plaint that the defendant had informed the father of the plaintiff on telephone that he had sent the signed agreement of sale to the second defendant and that he was not agreeable for Rs.325/- per square yard as agreed earlier is false and self contradictory. There was no concluded agreement at all between the concerned parties and consequently the question of the plaintiff's father requesting the first defendant over telephone to stand by the earlier agreement and to register the plot does not arise.”

It is also argued by the learned senior counsel for the respondent that tape recorded statements are to be considered as evidence and cannot be shut out totally. He relies upon ***K.S.Mohan v. Sandhya Mohan***³ and ***R.M.Malkani v. State of Maharashtra***⁴. In Para 23 of the said judgment, the Supreme Court held that tape recorded evidence is admissible, provided (a) the conversation is relevant to the matters in issue (b) there is identification of the voice and (c) the accuracy of the tape recorded conversation is proved by eliminating the possibility of tampering with the tape. To the same effect is the judgment of the Madras High Court, which relied upon another

³ AIR 1993 Madras 59

⁴ (1973) 1 SCC 471

judgment of the Supreme Court reported in **Ram Singh v. Palmal Ram Singh**⁵, wherein the following principles were laid down:

(a) the voice of the speaker must be duly identified by the maker of the record or by others who were aware of the voice. (b) the accuracy of the tape recorded statement has to be proved. (c) the possibility of tampering with the tape or eraser should be ruled out. (d) the statement must be relevant according to the rules of the Evidence Act. (e) the cassette must be sealed and kept in official custody. (f) the voice of the speaker should be audible.

Relying on these judgments, the learned senior counsel submits that the matter pleaded was not denied in the written statement. The tape recorder cassette was annexed to the plaint and the contents of the same were not denied and finally he states that when documents were tendered in evidence, no objection was raised for marking the same on any of the grounds considered by the Supreme Court in the two judgments he relied upon. Therefore, his contention is that the documents were validly received in evidence and the same can be relied upon.

This Court finds a considerable force in the submission. The cassette in which the recording is made is filed with the plaint and the transcript of the conversation was filed as a plaint documents. Therefore, the defendants were fully aware

⁵ AIR 1986 SC 3

of the contents of the same. In the written statement, they did not raise any issue about the transcript or the cassette. At the time of examination of PW.1, they did not object marking of the same nor did they point out the tests laid down by the Supreme Court are applicable and therefore, the tape or the transcript cannot be considered as a trustworthy evidence. Therefore, this Court holds that these two documents are validly taken on record.

Points (a) and (b): The main contention of the learned counsel for the appellants is that the agreement of sale is an oral agreement of sale. He agrees that an oral agreement of sale is valid. However, in view of the fact that there is no document admittedly evidencing the same, he states that a heavy burden lies upon the plaintiff to prove that there is *consensus ad idem* between the parties.

Learned senior counsel for the appellants relies upon the judgment of ***K.Nanjappa V. R.A.Hameed and Others***⁶, wherein it was held by the Hon'ble Supreme Court that a heavy burden lies upon the plaintiff to prove that there was a concluded contract and *consensus ad idem* between the parties in order to enforce an oral agreement of sale. He also relies on the passage of the judgment of the Supreme Court, which says whether there was a concluded contract or not is a matter of fact to be decided in each case.

⁶ 2016 (1) SCC 762

Learned counsel is right in his submission on this. In fact, in every case of specific performance, whether there is oral agreement or a written agreement, consensus should be established before the Court is called upon to grant a decree for specific performance. Therefore, the finding of the lower Court on issue No.1 is now being examined.

Essential questions that are relevant to decide this point are: a)whether defendant No.2 was authorized by defendant No.1 to sell the suit schedule property. b)whether there is an agreement of sale that can be enforced.

It is the case of the plaintiff that defendant No.2 negotiated on behalf of defendant No.1, who is the actual owner of the suit schedule property. However, the learned counsel for appellant pointed out certain discrepancies about who negotiated the deal etc. and argued that there is no clarity at all in the issue. It is a fact that the families of both parties are known to each other. All the parties to the transaction are well educated people. So the conduct of the parties, the documents and evidence are to be seen as a whole to ascertain this point. A critical piece of evidence is Ex.A1. This is a receipt dated 01.07.1980, which begins with the sentence “cash receipt given by Dr T.S.Krishnan on behalf of his brother Narayanaswamy to Dr P.V.Sudharkar Raju.” It clearly states that his brother owns plot No.52 in Anupuram (Kapra) measuring 1200 Sq yards and he wants to sell the

said plot at Rs.275/- (Rupees Two hundred and seventy five) per square yard. On the reverse of Ex.A1, there is another stamped receipt for Rs.55,000/-. This endorsement clearly acknowledges the earlier payment also and is issued in continuation of Ex.A1 as can be seen from the language used “Received a further amount of Rs.55,000/- (Fifty five thousand) on 25.08.1990.” Therefore, Exs.A.1 and A.2 read together show that the plot was offered for sale at Rs.275/- per square yard and an advance of Rs.1,00,000/- in all was received also by defendant No.2. The receipt of this amount is in the knowledge of defendant No.1, who deposed as DW.1 in the suit. In his chief-examination, he clearly deposes that his brother informed him of Ex.A.1 receipt and the further payment marked as Ex.A.2. In his cross-examination, he clearly deposes that Ex.A.1 is the receipt issued by his brother and that he did not take any action against defendant No.2 for receiving amounts under Ex.A.2. In almost the last lines of his cross-examination he states that he has not taken any action against defendant No.2 till date. Similarly, DW.2 (defendant No.2) in the suit admits to the execution of Ex.A.1 in his chief-examination. He also states that he informed DW.1 (defendant No.1) about the payments covered by Exs.A.1 and A.2 immediately on the same day or next day. It is thus clear that the actions of defendant No.2 are fully within the knowledge of defendant No.1, but he did nothing to nullify the same if they were not as per his instructions. He

admits that he did not take any action against defendant No.2. He also admits that he did not issue any written notice to PW.1 (plaintiff) to take back the amounts. He also clearly admits in his cross-examination as follows: “Ex.A.1 is the receipt passed by my brother. The contents under Ex.A.1 are correct”. It is thus clear that defendant No.1 was aware of the action taken by defendant No.2. The conduct of defendant No.1 clearly reveals that he agreed to and also ratified the action taken by defendant No.2 on his behalf as an agent. Hence, by virtue of these admissions it is clear that the owner of the plot (defendant No.1) was aware of the actions taken by his brother (defendant No.2). His conduct particularly his admissions clearly estopes him from denying the legality of the actions of his brother.

The next question is: whether there is an agreement of sale between the parties that is enforceable.

The learned senior counsel for appellants during the course of his arguments pointed out various discrepancies in the pleadings; lawyer notice; evidence etc. He pointed out that in the plaint it is stated that the plaintiff and defendant No.1 entered to an agreement to purchase the plot for Rs.2,90,000/- at Rs.275/- per square yard, while in the notice it was stated that the negotiations were between Dr T.S.Krishnan (defendant No.2) and P.W.2 (father of plaintiff). Learned senior counsel also pointed out that the rate was not

decided, that it kept on changing from Rs.275/- to Rs.325/- and then to Rs.400/- per square yard; that there are discrepancies on who exactly made the tape recording; transcript etc.

In reply, the learned senior counsel for respondent argued that the so called discrepancies are not very material and the overall evidence namely the documentary and oral evidence read together would show that there was an agreement that is enforceable. He points out that the contents of Ex.A.1 point out to a clear understanding which is reinforced by Ex.A.2 endorsement. He laid great stress on the admission of DW.1, wherein he admits that Ex.A.1 is the receipt passed by his brother and the contents of Ex.A.1 are correct. He also states that the contents of Ex.A.1 are also certain as to price, there is no dispute about the extent of the land and the balance was agreed to be paid and the plot was to be registered as para 1 of Ex.A.1 dated 01.07.1980 itself. He also points out that a formal agreement of sale was agreed to be entered into after one month. This period of one month was given a go by as per the learned counsel as Ex.A.2 payment was received on 25.08.1990 and DW.1 agreed that he did not take any action after the expiry of one month. (last line of cross-examination on 27.08.1998 at page 4 and the first line of page 5). The learned counsel argued that there was a variation of one term of the agreement, namely the

increase in price from Rs.275/- per square yard to Rs.325/- per square yard. He emphasised the distinction between variation of a term in the contract and novation of the entire contract. In this case as per him there is a variation of one term (price) and not a novation of the entire contract.

This Court is also of the opinion that there is considerable force in the contention of learned senior counsel for the respondent. The contents of Exs.A.1 and A.2 along with the conduct of the defendants make it clear that there was a concluded contract at Rs.275/- per square yard. This price was enhanced to Rs.325/- and the parties agreed to the same. This is the only variation. PW.1 also deposed to the effect that the price fixed under Ex.A.1 was increased to Rs.325/-. He also states that as defendant No.2 is a close friend for 20 years, he did not feel it necessary to obtain a document with the new price. The transcript of the tape recorded conversation which is marked as Ex.A.8 also supports this submission and the passage extracted by the lower Court in para 29 at page 10 of the judgment bears this out. In the written statement also as per the learned counsel for respondent, there is an implied admission that only the price was varied. He points out that in para 5 at page 6, the defendant pleaded as follows: “to put an end to the matter; this defendant had offered to sell the land at Rs.400/- per

square yard when he was in Hyderabad in July 1999. The plaintiff refused to accept it.”

Therefore, this Court is of the opinion that there was a concluded agreement and a term of the agreement alone was varied. The tape recorded cassette and the transcript also supports this conclusion. Therefore, this Court concurs with the judgment of the lower Court on these issues. The reasoning is given by the Court below in paras 18 to 31 of the judgment.

The plaintiff proved his readiness and willingness by proving two payments totalling Rs.1,00,000/-. They also offered to pay further sum of Rs.1,00,000/- and the defendants admit in their written statement that as this amount was tendered in November 1990 to defendant No.1; the same was refused (page 3 of written statement). In addition, the plaintiff issued Ex.A.6-letter dated 26.06.1991 intimating their readiness and willingness. They also filed the suit for specific performance soon thereafter. Their readiness to complete the transaction and their willingness to get the land transferred are thus clearly made out as required by law.

Hence, for all these reasons, this Court is of the opinion that the plaintiff is entitled to specific performance and defendant No.1 is directed to execute a registered sale deed in favour of the plaintiff for the suit schedule property. The sale consideration calculated at Rs.325/- per square yard shall be

deposited by the plaintiff in the lower Court within 30 days. In case, the defendants fail to register the sale deed as directed, the plaintiff is at liberty to approach the Court below to do the needful. The findings on the other issues given by the lower Court are also confirmed and in fact issues 2 and 3 decided by the lower Court were not the subject matter of the submissions at all.

In the result, the appeal is dismissed. In the circumstances of the case; each party to bear their own costs.

Consequently, miscellaneous petitions, if any, pending in this appeal shall stand closed.

Date: 24.11.2017
KLP

D.V.S.S. SOMAYAJULU, J

