

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

+ A.S.No.2490 of 1999

% 14-12-2017

Sakriya Krishna Bai (died)
per LR

... Appellant/
Plaintiff No.3

Vs.

\$ Syed Ismail (died)
Per LRs.

... Respondents/
Defendants

! Counsel for the appellant: C. Ramesh Sagar

Counsel for the Respondents: K.V. Bhanu Prasad

< Gist:

> Head Note:

? Cases referred:

¹ AIR 1983 SC 114

² AIR 1971 SC 1949

³ AIR 1988 SC 1796

⁴ (2010) 1 SCC 277

⁵ AIR 2008 SC 2866

⁶ AIR 1979 SC 14

⁷ AIR 1996 SC 1140



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

A.S.No.2490 of 1999

JUDGMENT:

This appeal is filed by the third plaintiff against the judgment and decree dated 05.03.1999 passed in O.S.No.82 of 1983 by the Additional Senior Civil Judge, Warangal.

2. For the sake of convenience, as this is a first appeal, the parties are hereinafter referred to as the plaintiff and defendants only.

3. The suit is filed for specific performance to direct the defendants to obtain necessary permission from the Urban Land Ceiling Authorities and to execute a sale deed in respect of the suit schedule property or in the alternative for refund of Rs.40,000/- with interest @ 12% per annum and for damages of Rs.5,000/-.

4. The brief facts of the case are that the third plaintiff is the adopted son of plaintiffs 1 & 2. The first plaintiff is the wife of second plaintiff. The first defendant is the owner of house No.14/23 (new No.4-4-154) situated at Mandibazar. The first plaintiff was living as tenant in the suit house. One Munsaruddin, the father-in-law of first defendant was looking after the suit house and the plaintiffs took it on lease in 1966 as rent of Rs.15/- per month. Later, the first defendant authorized his father-in-law, Munsaruddin to sell the suit house. The second plaintiff agreed to purchase the same; on the price being settled by elders on 15.01.1979 he

paid an advance of Rs.5,000/-. The first defendant was to obtain permission from the Urban Land Ceiling Authorities and was to bear 1/3rd of the conveyance charges. Even though the plaintiffs paid substantial sum leaving a balance of Rs.2,000/-, they received to their utter surprise a legal notice from the first defendant with false allegations as to the quantum of rent, breach of terms etc. Hence, the suit for specific performance and other reliefs.

5. During pendency of the suit, plaintiffs 1 & 2, who are wife and husband died and their alleged adopted son was brought on record as plaintiff No.3. The first defendant also died and defendants 2 to 11 were brought on record as his legal representatives. The third defendant filed his written statement, which was adopted by the defendants 2 & 4 to 11 by filing a memo.

6. In the written statement, it is stated that the third plaintiff is not the adopted son of plaintiffs 1 & 2 and as such, he has no *locus standi* to maintain the suit. The defendants allege that the suit has also abated. The plaintiffs suppressed the factum of their falling due rents claimed in R.C.C.No.47 of 1992 by the first defendant. The second plaintiff approached the first defendant with an offer to purchase it and entreated to sell the suit house to him. The first defendant and the second plaintiff negotiated the deal for a sum of Rs.30,000/- and the second plaintiff paid advance of Rs.5,000/- and got executed agreement of sale in January, 1979 in favour of the

first plaintiff. Since then, the plaintiffs did not perform their part of contractual obligation and were paying paltry amounts and in total paid a sum of Rs.14,000/-. The first defendant executed an agreement on 12.05.1979 agreeing that he would pay the remaining amount of Rs.16,000/- by 10 a.m. on 20.05.1979 lest the agreement stood cancelled and that advance amount of Rs.14,000/- would be forfeited. However, the plaintiffs did not pay the balance amount. Therefore, the first defendant issued notice to the plaintiffs making the time essence of contract. They state that the plaintiffs are not entitled to the reliefs claimed.

7. Based on the said pleadings, the lower Court framed the following issues for trial.

- i) Whether the third plaintiff can specifically enforce the agreement of sale, dated 15.01.1979 against the defendant?
- ii) Whether the alleged additional agreement dated 12.05.1979 set up by the defendant is true, valid and binding?
- iii) Whether the suit contract was abandoned by the plaintiffs as acclaimed by the defendants?
- iv) Whether the suit had abated and cannot be revived as claimed by the defendants?
- v) Whether the stipulation of liquidated damages claimed by the plaintiffs disentitles them to enforce the agreement of sale?
- vi) Whether the deceased first plaintiff was always ready and willing to perform her part of contract under the agreement of sale deed dated 15.01.1979?
- vii) To what relief?

8. During the course of trial, the third plaintiff examined himself as PW.1 and also examined his natural mother as PW.2 and the attestor of sale agreement as PW.3. He marked Exs.A.1 to A.10. The son of first defendant, who is the third defendant, was examined as DW.1 and younger brother of second defendant was examined as DW.2. The defendants marked Exs.B.1 to B.6.

9. After considering the entire oral and documentary evidence, the lower Court dismissed the suit and directed the defendants to deposit the advance of Rs.14,000/- into the court by 01.04.1999 with interest @ 12% p.a. from the date of receipt of the amount till deposit in the court. It is this judgment and decree that is assailed in the present appeal.

10. Heard Sri C. Ramesh Sagar, learned counsel for the appellant/third plaintiff and Sri K.V. Bhanu Prasad, learned counsel for the respondents/defendants.

11. As mentioned in the narrated facts, the suit is initially filed by Sri Sakriya Krishnna Bai and by her husband-Sariya Balaji. Later, after the death of plaintiffs 1 & 2, Sariya Jayanarayan joined as the plaintiff No.3 and continued the litigation. In the written statement filed, the defendants have raised a plea that the suit has abated. They have raised another plea that the third plaintiff is not the legal representative nor does he the adopted son of plaintiffs 1 & 2. The lower Court also was conscious of this issue and that is why the first issue is to the effect whether the third

plaintiff can specifically enforce the agreement of sale dated 15.01.1979 against the defendants.

12. A fact that is very conspicuous in this case is the contention of third plaintiff. He states he is the adopted son of the deceased-plaintiffs 1 & 2, but he did not plead or gave details of the alleged adoption, neither the date nor the details of the adoption are pleaded in the plaint. When the third plaintiff sought to join the suit by filing the application to bring him on record as the legal representative and adopted son, he had an option to plead about the adoption and place the particulars about the adoption before the Court. He did not choose to give any details whatsoever about the adoption. Therefore, it is contended by the learned counsel for the respondent that no evidence can be let in about the facts which are not pleaded. As per him, this burden of proving a valid adoption is not discharged at all in this case.

13. As pointed out by the learned counsel for the respondents/defendants, as per the decision of **Madhusudan Das v. Smt. Narayani Bai** and others¹ for a valid adoption, the physical act of giving and taking a child is an essential requisite. In some cases of adoption a “datta homam” is also considered necessarily. In para-19 of the said judgment, their Lordships of the Hon’ble Supreme Court have clearly held as follows:

“19. It is well settled that a person who seeks to displace the natural succession to property by alleging an adoption

¹ AIR 1983 SC 114

must discharge the burden that lies upon him by proof of the factum of adoption and its validity. **A Raghavamma v. A. Chenchamma** AIR 1964 SC 136. It is also true that the evidence in proof of the adoption should be free from all suspicion of fraud and so consistent and probable as to give no occasion for doubting its truth. **Kishori Lal v. Chaltibai** (1959) Supp 1 SCR 698; (AIR 1959 SC 504). None the less the fact of adoption must be proved in the same way as any other fact.”

14. This is the law that has been in vogue even till date. There are absolutely no details about the adoption in the plaint. In the absence of pleadings, no evidence can be let in. Still to prove the adoption, the third plaintiff filed Exs.A.8 to A.10. Exs.A.8 to A.10 are a date of Birth certificate of a school, a progress report of the same school and a marriage invitation. None of these documents are issued by the public offices nor are they from the public records. In view of this, the lower Court rightly rejected the said documents. Further, when the truth of the contents of documents itself is an issue, it is settled law that the author of the document should be examined. **Bishwanath Rai v. Sachhidanand Singh**² is relevant in this context. Nobody was examined to prove these documents.

15. The date of birth noted in a private school is not a valid proof of date of birth unless the person who gave the date or made the entry is examined. **Birad Mal Singhvi v. Anand Purohit**³ is the relevant case. The original date of birth entry that is made may have some probative value, but the same was not produced. It is admitted fact that all the parties

² AIR 1971 SC 1949

³ AIR 1988 SC 1796

in this case are residents of Warangal town at that time. Despite this, the third plaintiff did not produce his date of birth certificate. Therefore, the lower Court rightly rejected these documents. Even otherwise, the date of birth certificate can only be used to prove the date of birth of a child or a person. It cannot be used as proof of adoption. Similarly, Ex.A.9 is also a progress report of a school. This is not also acceptable as piece of evidence to prove the alleged adoption. Ex.A.10-marriage invitation is again not supported by any oral testimony. Nobody who attended the marriage was examined nor was a person who received the said card examined. There is no proof that the marriage took place on that date at all. The lower Court also expressed an opinion that when the card was marked in evidence that it was not mailed or posted and that a bare look at the card gave the lower Court impression that it was printed before it was filed into the Court. The very same judgment cited i.e., **Madhusudan Das**'s case (1 supra) sounds a note of caution to the appellate Court to bear in mind that the findings of fact arrived at by a trial Court should be normally allowed to prevail unless there is an irregularity etc. or misreading of evidence etc. The fact remains that there is no proof that this invitation card was in fact circulated or actually printed and sent to various people. All these three documents in the opinion of this Court are self-serving documents.

16. The second witness for the plaintiff/PW.2 speaks about the adoption. She is the natural mother of third plaintiff. She states that the child was given in adoption. However, in cross-examination, she states that she does not remember the date of adoption, that she does not remember the name of priest who officiated the ceremony nor does she remember the names of witnesses who were present at the so-called adoption. She states that the priest and the witnesses who were present at the time of adoption are dead. Thus nothing conclusive is spoken by this witness. Therefore, this Court is of the opinion that the lower Court rightly rejected the evidence in this witness. This Court thus concurs the opinion of the lower Court on the first issue and holds that the third plaintiff cannot seek specific performance of the agreement of sale, as he did not prove that he is the 'adopted' son of the deceased plaintiffs.

17. The learned counsel for the respondent also argued that as the third plaintiff is not the adopted son of plaintiffs 1 & 2, consequent on the death of plaintiffs 1 & 2, the suit has abated and the third plaintiff cannot continue the suit. The learned counsel for the appellant, however, argued that in an application filed under Order XXII Rule 4 CPC, the lower Court permitted the appellant/third plaintiff to come on record and therefore, it is his contention that further enquiry is not permissible into the issue of "legal representative". This argument is not correct because at the

stage of allowing a person to enter the record as legal representative, the Court does not go into elaborate oral evidence nor does it hold a 'trial' to decide on the fact that the legal representative is a correct legal representative or not. It only forms a *prima facie* opinion, except in cases where a very strong objection that the proposed legal representative is not the legal representative at all does the Court embark on this enquiry. It is also settled law that an opinion found nor an opinion expressed at the interlocutory stage can always be reversed/disagreed that during the course of main hearing when elaborate evidence is let in. It is only when a detailed enquiry is conducted under Order XXII Rule 5 CPC that certain finality is attached to the finding on the question who is the legal representative. The decision of the Hon'ble Supreme Court of India in ***Dashrath Rao Kate v. Brij Mohan Srivastava***⁴ is squarely on the point.

18. The learned counsel for the respondents/defendants also drew the attention of this Court to a judgment reported in ***Jaladi Suguna v. Satya Sai Central Trust***⁵, wherein the Hon'ble Supreme Court held finding in para-10 as under:

"10.The determination as to who is the legal representative under Order 22 Rule 5 will of course be for the limited purpose of representation of the estate of the deceased, for adjudication of that case. Such determination for such limited purpose will not confer on the person held to be the legal representative, any right to the property

⁴ (2010) 1 SCC 277

⁵ AIR 2008 SC 2866

which is the subject matter of the suit, vis-à-vis other rival claimants to the estate of the deceased.”

Therefore, this Court holds that the argument of the learned counsel for the appellant/third plaintiff is not correct. The Court can still decide on the validity of the adoption even if the LR application is allowed. As per the settled law on this subject, the Court proceeded to discuss the other issues, despite the findings of issue Nos.1 & 4.

19. The next issue that is to be decided is whether the agreement of sale dated 15.01.1979 is valid and has been implemented by the third plaintiff and whether the additional agreement dated 12.05.1979 set up is true. It is the case of the third plaintiff that there was an agreement of sale of the suit schedule property for a sum of Rs.30,000/-. After the initial agreement to sell was entered into on 25.12.1978 on 15.01.1979 (Ex.A.1 and its translation Ex.A.2) another agreement was concluded which is admitted by both the parties. This agreement was also attested by notary advocate (Ex.A.3). Thereafter, Ex.A.4 receipt was passed by the defendant for a sum of Rs.9,000/- paid by the plaintiffs. These documents are not in dispute. The payment under these documents is not in dispute and the sum total of all payments made under Exs.A1. to A.4 is Rs.14,000/- only. The dispute is about the other Rs.16,000/-. The third plaintiff produced two receipts Ex.A.5 and A.6 stating that they paid further sum of Rs.4,000/-. These two receipts were

held to be false and forged by the lower Court, which embarked on an enquiry about these documents; compared the signatures and came to the conclusion that the said reports are forged. It is noticed that the signatures were not sent to a handwriting expert.

20. The learned counsel rightly drew the attention of this Court to two important judgments on this issue reported in ***State (Delhi Administration) v. Pali Ram***⁶ and ***O. Bharathan v. K. Sudhakaran and another***⁷. ***Pali Ram*** (6 supra) is the first important judgment on this subject, wherein their Lordships held as follows:

“Although there is no legal bar to the Judge using his own eyes to compare the disputed writing with the admitted writing, even without the aid of the evidence of any handwriting expert, the Judge should, as a matter of prudence and caution, hesitate to base his finding with regard to the identity of a handwriting which forms the sheet-anchor of the prosecution case against a person accused of an offence solely on comparison made by himself. It is, therefore, not advisable that a Judge should take upon himself the task of comparing the admitted writing with the disputed one to find out whether the two agree with each other; and the prudent course is to obtain the opinion and assistance of an expert.

It is not the province of the expert to act as Judge or Jury. The real function of the expert is to put before the Court all the materials, together with reasons which induce him to come to the conclusion, so that the Court, although not an expert may form its own judgment by its own observation of those materials. Ordinarily, it is not proper for the Court to ask the expert to give his finding upon any of the issues, whether of law or fact, because, strictly speaking, such issues are for the Court or jury to determine. The handwriting expert's function is to opine after a scientific comparison of the disputed writing with the proved or admitted writing with regard to the points of similarity and

⁶ AIR 1979 SC 14

⁷ AIR 1996 SC 1140

dissimilarity in the two sets of writings. The Court should then compare the handwritings with its own eyes for a proper assessment of the value of the total evidence.”

21. While Section 73 of the Evidence Act does bar the judge from ultimately deciding whether the signatures are forged or not still as a rule of prudence in disputed cases, it is always desirable that a Court should secure the opinion of quality handwriting expert on the subject. After the opinion of the expert, is introduced into the evidence as required by law and the Court can come to a conclusion.

22. Even if this Court holds that if the two receipts Exs.A.5 & A.6 are valid, still the question remains about the payment of sale consideration and the action/inaction of the third plaintiff in a suit for specific performance. It is settled law that the plaintiff should prove continuous readiness and willingness to perform the agreement of sale at all relevant points of time in this case. There is no clear proof to show that the balance sum of Rs.16,000/- was arranged or it was tendered to the defendants. In fact, the evidence of PW.1, who is prosecuting the suit, as third plaintiff, is as follows:

“I have no personal knowledge about the suit contract and about this litigation. I have no personal knowledge about the things spoken by me except the evidence touching upon adoption.”

23. In the light of this categorical admission; only the payments that are admitted by the defendants can be said to be proved. The other payments which are disputed have not

been validly proved. Therefore, the available evidence in this case that only a sum of Rs.14,000/- has been paid. Even if the two receipts Ex.A.5 & A.6 are held to be valid receipts, the only cover a sum of Rs.4,000/- and for the balance there is no proof at all. The third plaintiff also did not take the first step of issuing a notice demanding specific performance. On the contrary, the record shows that the first lawyers notice in this case was issued by the defendants canceling the agreement on the ground that the plaintiffs did not adhere to the terms and conditions of the agreement and also failed to pay the money as agreed under Ex.B.1. Ex.B.1 is a document which is executed by the first plaintiff in favour of the father of the defendants. Ex.B.1 clearly states that the balance amount of Rs.16,000/- will be paid by 20.05.1979. DW.1 identified the signatures of the deceased first plaintiff; of the attesting witnesses and also the handwriting of the scribe of Ex.B.1. He also states that the document was executed by the deceased first plaintiff in the presence of the witnesses. In the cross-examination, nothing was much elicited from this witness. He states that he had no personal knowledge about the third plaintiff. He identifies the signatures of the parties on Exs.A.1 to A.4, but denies the signatures on Exs.A.5 & A.6. He states that the signature of second plaintiff was obtained as he was the main purchaser. Only suggestions are made that Ex.B.1 was created by forging the signature of second plaintiff. However, no further steps were taken to

prove or to disprove this theory of forgery. The next witness was examined as DW.2, who is an attestor of Ex.B.1. He also identifies the signatures of other witnesses and also the handwriting of the scribe of Ex.B.1. In the light of this cross-examination and the evidence of the witnesses, this Court is of the opinion that Ex.B.1 is proved as required under law. The contents of Ex.B.1 if they are intrinsically examined also support the case of the defendants.

24. This Court, therefore, holds that vide Ex.B.1 time was made the essence of contract and it was agreed therein that the balance amount will be paid by 20.05.1979 and before 10 a.m. on that date. It is also stipulated that by the said date and time, if the balance is not paid, the defendant is at liberty to sell the house bearing No.14-4-154 to anybody else. This Court, therefore, holds that the time was made the essence.

25. In conclusion, this Court holds that as the plaintiff could not prove the payment of sums agreed both under Exs.A.1 & A.3 original agreements and also under Ex.B.1, the third plaintiff is not entitled for specific performance. Hence, the main relief cannot be granted to the plaintiff. This finding of the lower Court is, therefore, correct. Hence, issues 1, 2 & 3 are held in favour of the respondents/defendants and against the appellant/ third plaintiff.

26. As far as issue No.4 is concerned, this Court also agrees with the finding of lower Court that the third plaintiff

did not prove that he is the adopted son and that he has the right to continue with the suit. Therefore, on the death of plaintiffs 1 & 2, the suit has been abated. As far as issue No.5 is concerned, the law is also clearly well settled that the mere fact that a clause for liquidated damages is provided under the contract, it cannot be said that the third plaintiff is not entitled to relief for specific performance. As far as issue Nos.2 & 3 are concerned, they relate to the validity of the agreement, which is marked as Ex.B.1, dated 12.05.1979. As mentioned in the earlier part of the judgment, this Court also holds that Ex.B.1 has been proved by the defendants and that DWs.1 & 2 in their evidence have proved that this document is validly executed.

27. The learned counsel for the respondents also argued that on the basis of **Madhusudan Das's** case (1 supra), the mere fact that the second witness is a relative of first witness/defendant, it cannot be said that he is either a partisan or interested witness. The judgment of the Supreme Court is totally applicable to the facts and circumstances of the present case. Therefore, this Court also agrees with the findings of the lower Court in this matter.

28. As far as the amount paid by the defendants to the third plaintiff is concerned, this Court is of the opinion that the finding of the lower Court is correct. As the suit is held to be abated and as there are no heirs for the deceased-

plaintiffs 1 & 2, the lower court rightly ordered that the amount should be deposited to the credit of the Government.

29. For all the above reasons, the appeal is dismissed and the judgment and decree dated 05.03.1999 passed in O.S.No.82 of 1983 by the Additional Senior Civil Judge, Warangal, is hereby confirmed. However, there shall be no order as to costs. Miscellaneous Petitions, if any, pending in this appeal shall stand closed.

Date: 14.12.2017
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Note: L.R. Copy marked.

D.V.S.S. SOMAYAJULU, J

