

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

A.S.No.1310 of 1996

JUDGMENT:

1. The plaintiff in O.S.No.41 of 1998, on the file of the Court of the Additional District Judge, Hindupur is the appellant in the present appeal suit filed under Section 96 of the Code of Civil Procedure. This appeal challenges the Judgment and Decree, dismissing the suit.

2. The appellant herein instituted the said suit for specific performance of agreement of Sale dated 09.02.1988. Suit schedule property is the open space, admeasuring East to West 9 ½ feet, North to South 34 Feet i.e., 35 and 8/9 sq uards situated on the Southern side of Walse Road, within the limits of Hindupur Municipality.

3. According to the plaintiff, the defendant executed Ex.A.1 Sale Agreement dated 09.02.1988, agreeing to sell the plaint schedule property for a total consideration of Rs.62,500/- and he paid a sum of Rs.4,500/- as advance amount and also another sum of Rs.500/- and the defendant acknowledged the same by way of Ex.A.2 on the same date. Plaintiff further pleaded that as the defendant was not cooperating for execution of the sale deed, he got issued Ex.A.3 legal notice dated 03.05.1988, calling upon the defendant to perform his part of contract. In response to the said legal notice, defendant got issued Ex.A.44 reply dated 09.05.1988 and thereafter the plaintiff caused Ex.A.4 second notice dated 18.05.1988, asking the defendant to perform his part of contract and thereafter the defendant got issued Ex.42 reply. With the above pleadings, plaintiff/appellant herein instituted the suit on 10.06.1988 and thereafter he sought amendment of the plaint by insertion of para 13 (a) and by virtue of the orders of this Court in

C.R.P.No.126 of 1993, dated 25.06.1993, the plaint was amended. The defendant filed written statement and also additional written statement.

4. On the basis of the pleadings available, the learned Additional District Judge framed the following issues and additional issue for trial:

1. Whether the time is the essence of the contract?
2. Whether the plaintiff was always ready and willing to perform his part of the contract?
3. Whether the performance of the contract is depended upon the performance of the contract of Prabhavathamma, the defendant's sister?
4. Whether the second respondent herein can be said to be a bonafide purchaser and whether on the said ground he can non-suit plaintiff/appellant?
5. Whether the plaintiff is entitled for specific performance of contract?
6. To what relief?

Additional Issue:

Whether the plaintiff is entitled for the relief of mandatory injunction as prayed for.

5. During the course of trial, apart from examining himself as PW.1, plaintiff in order to substantiate his case also examined PW.2 and marked Exs.A.1 to A.44. Defendant examined himself as DW.1 and DW.2 was examined on his behalf and Exs.B.1 to B.15 were marked on behalf of the defendant.

6. Vide judgment and decree dated 22.12.1995, the Court below dismissed OS.41 of 1988, ordering refund of Rs.62,500/- deposited by the

plaintiff towards balance sale consideration. This appeal challenges the validity and legal sustainability of the said judgment and decree.

7. Heard Sri S.Sunder Rajan, learned counsel for the appellant and Sri Manohar Reddy for the respondent No.4 and perused the material available before the Court.

8. According to the learned counsel for the plaintiff/appellant the judgment rendered by the learned Additional District judge is erroneous, contrary to law and in total ignorance of the material available on record. It is further contended that Ex.A.1 agreement executed by the defendant is independent of the agreement executed by the sister of the defendant, as such, the execution of the sale deed in terms of the Ex.A.1 suit agreement of sale cannot be linked with the execution pursuant to the agreement executed by the sister of the defendant who has no right to convey the property as declared in Small Cause Suit No.118/1991. It is further submitted that it is incorrect to state that the site of the defendant's sister has no independent and separate way; that there are contradictions as to the reasons for the sale in between the evidence of DW.1 and the pleadings in the written statement; that time can never be treated as essence of contract and in reply to Ex.A.4 notice, defendant issued Ex.A.42 reply on 30.06.1998, giving time till 04.06.1988; that the last sentence in Ex.A.1 suit agreement of sale was inserted later, connecting the transaction with the execution of sale deed by the defendant's sister.

In support of his submissions and contentions, learned counsel for the appellant/plaintiff placed reliance on *P.SURYANARAYANA v. P. SREERAMA CHANDRAMURTHI AND ORS¹*, *BISWANATH GHOSH (DEAD) BY L.RS. AND ORS. v. GOBINDA GHOSH ALIAS GOBINDHA*

¹ AIR 1957 AP 18

*CHANDRA GHOSH AND ORS.*², *GOMATHINAYAGAM PILLAI AND OTHERS v. PALANISWAMI NADAR*³, *SMT DIPO v. WASSAN SINGH AND OTHERS*⁴ and *SYED DASTAGIR v. T.R.GOPALAKRISHNA SETTY*⁵.

10. Per contra, it is contended vehemently by the learned counsel for the respondent No.4 that there is no error nor there exists any infirmity in the impugned judgment and decree, as such, the plaintiff appellant is not entitled for any indulgence of this Court under Section 96 of the Code of Civil Procedure. It is further contended that the learned District Judge only after elaborately and meticulously considering and appreciating the oral and documentary evidence available on record, rendered the judgment under challenge, as such, the same is not amenable for any correction. It is further contended that since the plaintiff committed breach of the terms of contract and never proved his readiness and willingness and did not come forward within the time stipulated in Ex.A.1/Agreement of sale, the learned District Judge is perfectly justified in dismissing the suit. It is further contended that the recitals in the agreement of sale and the surrounding circumstances vividly disclose that time is the essence of the contract and in elaboration of the same learned counsel for the respondent No.4 maintains that the averments in the written statement and the evidence of DW.1 prove the same. It is further submitted by the learned counsel that the pleading in the plaint as to the expression of willingness and readiness is not in accordance with the provisions of Order 6 Rule 3 read with Clause (3) of Form 47 of Appendix 'A' of the Code of Civil Procedure, as such, the very frame of the suit is bad in law and on the said ground alone the plaintiff is liable to be non-suited. It is further contended that since the plaintiff failed to assail the

² AIR 2014 SC 1582

³ AIR 1967 SC 868

⁴ AIR 1983 SC 846

⁵ AIR 1999 SC 3029

very validity of the cancellation of contract by the defendants, the very frame of the suit is bad and the suit deserves to be dismissed on the said ground.

11. In support of his submissions, learned counsel places reliance on the judgments in *OUSEPH VARGHESE v. JOSEPH ALEY & ORS*⁶, *PUSHPARANI S.SUNDARAM AND OTHERS v. PAULINE MANOMANI JAMES (DECEASED) AND OTHERS*⁷, *MANJUNATH ANANDAPPA URF SHIVAPPA HANASI v. TAMMANASA AND OTHERS*⁸ and *A.S.No.318 of 2008*.

12. In the above backdrop, now the points that arise for determination by this Court under Section 96 of the Code of Civil Procedure are as under:

1. Whether the plaintiff acted in breach of recitals in Ex.A.1 agreement of sale by not requesting for enforcement of agreement executed by the sister of the defendant also in favour of the plaintiff in respect of the adjacent property.
2. Whether the parties treated the time as essence of contract?
3. Whether the plaintiff proved his readiness and willingness to perform his part of contract?
4. Whether the fourth defendant is a bonafide purchaser and whether he is entitled for any protection.
5. Whether the suit is liable to be dismissed on the ground of strict non-adherence to Clause (iii) of Form 47 of Appendix 'A' of the Code of Civil Procedure?
6. Whether the failure on the part of the plaintiff to question the cancellation of suit agreement by the defendant is fatal to the case of the plaintiff?
7. Whether the plaintiff is entitled for any relief in the present appeal suit?

⁶ 1969 (2) SCC 539

⁷ (2002) 9 SCC 582

⁸ (2003) 10 SCC 390

13. Issue No.1

Execution of Ex.A.1 agreement of sale by the defendant in favour of the plaintiff on 09.02.1988, stipulating time for parties till 18.05.1988 is absolutely not in controversy. According to the defendant, the execution of sale deed in favour of the plaintiff in terms of Ex.A.1/sale agreement dated 09.02.1988 and the execution of sale deed by the defendant's sister, Smt.Prabhavathi in respect of the adjacent property, pursuant to the agreement of sale executed by her should take place simultaneously. Resisting the same, it is the plea of the plaintiff that the performance of contract pursuant to Ex.A.1 sale agreement should never be and can never be insisted upon in such unreasonable manner as the sister of the defendant who executed an agreement of sale in respect of the adjacent property has no right to convey the said property covered by the said agreement. In order to substantiate and sustain the said plea, the plaintiff/appellant herein pressed into service Ex.A.13 judgment in Small Causes Suit No.18/1991. The said Small Causes Suit was instituted by the appellant herein against the defendant's sister, Smt. Prabhavathamma for return of the advance money paid to her in pursuance of the agreement executed by her on the ground of lack of saleable interest to her. A perusal of Ex.A.13 judgment, in manifest and vivid terms, reveals that the learned judge in the said judgment categorically found that Smt.Prabhavathamma had only life interest but not saleable interest and decreed the said suit, ordering to pay back the amount and the said Ex.A.13 judgment admittedly and undisputedly attained finality. It is also significant to note that the defendant herein as DW.1 also categorically admitted the same in his evidence. DW.1 also stated that his sister in her evidence in Small Causes Suit No.18/1991 admitted about the alternative way for her site. In the considered opinion of this Court,

insistence on the performance of Clause in the agreement which is impossible and impermissible of performance, thereby making an effort to non-suit the agreement holder, by any stretch of imagination, cannot be the object and intention of the provisions of Specific Relief Act. DW.1 also admitted during the course of cross-examination that in the Will executed by their mother, no power of alienation was given to his sister.

14. In view of the above reasons, by any stretch of imagination, it cannot be said that the plaintiff acted in breach of the recitals Ex.A.1 agreement of sale. Therefore, issue No.1 is required to be answered in favour of the plaintiff and against the defendant and is accordingly answered.

15. Issue No.2:

The learned District Judge on this issue while finding that the time is the essence of the contract and while holding that the plaintiff failed to perform his part of contract by 18.05.1988 i.e., time stipulated in Ex.A.1 agreement, declined to decree the suit. Ex.A.1 suit agreement admittedly was executed on 09.02.1988, stipulating the date 18.05.1988 as the date for performance of the agreement. Suit was admittedly instituted on 10.06.1988. Prior to the institution of the suit, plaintiff herein got issued Exs.A.3 and A.4 notices respectively on 03.05.1988 and 18.05.1988 and the defendants got issued Exs.A.42 and 44 notices. By way of Ex.A.3 notice dated 03.05.1988 the plaintiff called upon the defendant to get ready for execution on 16.05.1988 and said that he would be waiting with necessary funds in the Sub-Registrar Office, Hindupur. By way of Ex.A.4 notice dated 18.05.1988, the plaintiff indicated about the lack of right to the defendant's sister to sell the property and asked the defendant to execute the sale deed. In fact, by way of ex.A.42 notice, the defendant extended the time till 04.06.1988 and obviously called upon the plaintiff to get ready for execution

of sale deeds by the defendants and his sister. It is a settled and well established principle of law that in transactions, pertaining to immovable properties, normally the time should not be treated nor regarded as essence of contract. In this connection, it may be appropriate to refer to the judgments cited by the learned counsel for the appellant in *GOMATHINAYAGAM PILLAI AND OTHERS (supra 3)*. In the said Judgment the Hon'ble Apex Court held that if the contract relates to sale of immovable property, it would normally be presumed that time was not of the essence of the contract. Mere incorporation in the written agreement of a clause imposing penalty in case of default does not by itself evidence an intention to make time of the essence. In view of the principle laid down in the above referred judgment and having regard to the conduct of the defendant in insisting on the execution not only in respect of his property but also the property of his sister and extending the time for the same till 04.06.1988 by way of Ex.A.42, it cannot be concluded that the time was made the essence of contract and on the said ground plaintiff/appellant herein cannot be non-suited. Therefore, Issue No.2 is also answered in favour of the plaintiff and against the defendant.

16. Issue No.3:

As per the provisions of Section 16 of the Specific Relief, the person asking for enforcement of contract of sale is required not only to plead but also to prove his/her part of contract. It is also a settled proposition of law that the relief of specific performance is an equitable relief and need not be granted for mere asking. But at the same time, the refusal of the said relief should not be resorted to in an arbitrary and unreasonable manner otherwise, the persons with bonafide claim would loose confidence in the system guided by rule of law. On the aspect of willingness and readiness, it is required to be

noted that throughout the defendant pleaded that Ex.A.3 suit agreement and the agreement executed by her sister were reciprocal. The defendant throughout insisted that the execution of his document and the document pertaining to his sister should be simultaneous. But the fact remains that the defendant's sister has only right of conveyance and has only life interest. Even assuming that she is a natural guardian she cannot sell the property of her daughter unless permission of the Court is obtained. It is not the case of the defendant that such permission was obtained by the sister of the defendant prior to execution of Ex.A.3 agreement. Therefore, mistake if any cannot be thrown on the plaintiff having insisted for impossibility. By insisting on the performance of impermissible and impossible term of contract, one cannot be permitted to plead that the other party to the transaction failed to prove the readiness and willingness. In view of Ex.A.3, A.4 and Ex.42 and Ex.44 replies, it cannot be said that the plaintiff was not ready and willing to perform his part of contract. Having asked the plaintiff to perform the impossibility, in the considered opinion of this Court, it is not open for the defendant to plead and contend that the plaintiff did not prove his readiness and willingness to perform his part of contract. In the considered opinion of this Court, the plaintiff in the instant case, completely complied with the mandatory provisions of Section 16 (c) of the Specific Relief Act. Therefore, issue No.3 is also answered in favour of the plaintiff and against the defendant.

17. Issue No.4:

The defendant in support of his case also examined one Sri D.C. Fakruddin as DW.2, who stated that by Ex.A.15/Registered Sale Deed his brother purchased the present property and executed the Power of Attorney in his favour to look after the cool drink shop in the plaint schedule

site and the adjacent site purchased from the defendant's sister. During the course of cross-examination, the said Fakruddin deposed that he and his brother viz., Shafiulla came to know through the defendant that the case is pending in the Court and that they did not know at the time of purchase about the pendency of the suit. He also categorically deposed that they did not enquire the defendant as to whether there were any disputes with regard to the suit property and he also stated that one day prior to the execution of Ex.A.15 sale deed they fixed bargain with the defendant. Therefore, in the considered opinion of this Court, having failed to take any precautions and having failed to enquire as to the encumbrance if any on the subject property, it is not open for the respondent to say that he is a bonafide purchaser for valuable consideration. The finding of the learned Judge as regards the availability of the passage for the land of the defendant's sister is also contrary to the evidence of DW.1. Therefore, this issue is also liable to be answered in favour of the plaintiff and against the respondents.

18. It is the submission of the learned counsel for the fourth respondent that the pleading as to expression of willingness and readiness is not in accordance with the provisions of Order 6 Rule 3 read with Clause III of Form 47 of Appendix 'A' of the Code of Civil Procedure, as such the very frame of the suit is very bad and the plaintiff is liable to be non-suited on the said ground.

In support of the said contention, learned counsel for the fourth respondent takes the support of the Judgment of the Hon'ble Apex Court in *MANJUNATH ANANDAPPA URF SHIVAPPA HANASI (supra 8)*,

*ZARINA SIDDIQUI v. A.RAMALINGAM ALIAS R.AMARNATHAN*⁹ and
*PADMAKUMARI AND ORS. VS. DASAYYAN AND ORS*¹⁰

19. In *MANJUNATH ANANDAPPA URF SHI VAPPA HANASI* (*supra* 8),
 the Hon'ble Apex Court at paragraph No.13, held as follows:

“13. Section 16(c) of the Specific Relief Act reads thus:

"Specific performance of a Contract cannot be enforced in
 favour of a person .

who fails to aver and prove that he has performed or has
 always been ready and willing to perform the essential terms
 of the contract which are to be performed by him, other than
 terms of the performance of which has been prevented or
 waived by the defendant.

14. In terms of the aforementioned provision, it is
 incumbent upon the plaintiff both to aver and prove that he
 had all along been ready and willing to perform the essential
 terms of contract which were required to be performed by
 him.

15. Forms 47 and 48 of the Appendix A of the Code of Civil
 Procedure prescribe the manner in which such averments are
 required to be made by the plaintiff. Indisputably, the plaintiff
 has not made any averment to that effect. He, as noticed
 hereinbefore, merely contended that he called upon
 defendant No. 2 to bring defendant No. 1 to execute a
 registered sale deed. Apart from the fact that the date of the
 purported demand has not been disclosed, admittedly no
 such demand was made upon defendant No. 1. We may
 notice, at this juncture, that the plaintiff in his evidence
 admitted that defendant No. 1 had revoked the power of
 attorney granted in favour of defendant No. 2. In his
 deposition, he merely stated that such revocation took place
 after the agreement for sale was executed. If he was aware
 of the fact that the power of attorney executed in favour of

⁹ (2015) 1 SCC 705

¹⁰ (2015) 8 SCC 695

defendant No. 2 was revoked, the question of any demand by him upon the defendant No. 2 to bring the defendant No. 1 for execution of the agreement for sale would not arise at all. Furthermore, indisputably the said power of attorney was not a registered one. Defendant No. 2, therefore, could not execute a registered deed of sale in his favour. The demand, if any, for execution of the deed of sale in terms of the agreement of sale could have been, thus, made only upon the Defendant No. 1, the owner of the property. The balance consideration of Rs.10,000/- also could have tendered only to Defendant No. 1. As indicated hereinbefore, the purported notice was issued only on 8.8.1984, that is, much after the expiry of period of three years, within which the agreement of sale was required to be acted upon."

20. In *ZARINA SIDDIQUI (supra 9)*, the Hon'ble Apex Court, at paragraphs 24, 33 and 34, held as follows:

"24. It is well settled that remedy for specific performance is an equitable remedy. The Court while granting decree of specific performance exercises its discretionary jurisdiction. Section 20 of the Specific Relief Act specifically provides that Court's discretion to grant decree of specific performance is discretionary but not arbitrary. Discretion must be exercised in accordance with sound and reasonable judicial principles.

33. The equitable discretion to grant or not to grant a relief for specific performance also depends upon the conduct of the parties. The necessary ingredient has to be proved and established by the plaintiff so that discretion would be exercised judiciously in favour of the plaintiff. At the same time, if the defendant does not come with clean hands and suppresses material facts and evidence and misled the Court then such discretion should not be exercised by refusing to grant specific performance.

34. In the instant case, as noticed above, although defendant no.2 held a registered power of attorney on behalf of defendant no.1 to sell and dispose of the property, but the defendants not only made a false statement on affidavit that the power of attorney had authorized the second defendant

only to look after and manage the property but also withheld the said power of attorney from the Court in order to misguide the Court from truth of the facts. Further, by registered agreement the defendants agreed to sell the suit premises after receiving advance consideration but they denied the existence of the agreement in their pleading. Such conduct of the defendants in our opinion, disentitle them to ask the Court for exercising discretion in their favour by refusing to grant a decree for specific performance. Further, if a party to a lis does not disclose all material facts truly and fairly but states them in distorted manner and mislead the Court, the Court has inherent power to exercise its discretionary jurisdiction in order to prevent abuse of the process of law."

21. In *PADMAKUMARI AND OTHERS (supra 10)*, the Hon'ble Apex Court at paragraphs 21 and 22 held as under:

"21. The second important legal contention raised by defendant Nos. 12 to 15 is that the pleadings of the plaintiff is not in conformity with Order 6 Rule 3 CPC, clause 3 of Form No. 47 in Appendix 'A', extracted hereinabove. By a careful reading of paragraph 6 of the plaint makes it very clear that the averment as provided under clause 3 is not in stricto sensu complied with by the plaintiff. The same is evidenced from the averments made at paragraph 6 of the plaint which reads thus:

"6. The plaintiff is ready and willing to perform his part of the contract by paying the balance of sale consideration of Rs. 63,000/- and take the sale deed in accordance with the provisions of the agreement deed dated 19.04.1992."

22. Upon a careful reading of the abovesaid paragraph we have to hold that the plaintiff has not complied with the legal requirement which is mandatory as provided under Section 16 (c) of the Specific Relief Act. Section 16(c) fell for consideration and has been interpreted by this Court in a number of cases, referred to supra, upon which reliance has

rightly been placed and the said decisions are applicable to the fact situation in support of defendant Nos. 12 to 15 and, therefore, we have to hold that the concurrent finding of fact recorded by the High Court on Issue No. 1 is erroneous in law and is liable to be set aside.”

22. Coming to the judgments cited by the learned counsel for the plaintiff, in the case of *SMT DIPO (supra 4)*, the Hon'ble Apex Court at paragraph 2 held that Rules of procedure are made to advance the cause of justice and not to short circuit the decision on merits.

23. In *SYED DASTAGIR (supra 5)*, the Hon'ble Apex Court at paragraph 9, held as under:

“9. So whole gamut of issue raised is, how to construe a plea specially with reference to Section 16(c) and what are the obligations which the plaintiff has to comply with reference to his plea and whether the plea of the plaintiff could not be construed to conform to the requirement of the aforesaid Section, or does this section require specific words to be pleaded that he has performed or has always been ready and is willing to perform his part of the contract. In construing a plea in any pleading, Courts must keep in mind that a plea is not an expression of art and science but an expression through words to place fact and law of one's case for a relief. Such an expression may be pointed, precise, some times vague but still could be gathered what he wants to convey through only by reading the whole pleading, depends on the person drafting a plea. In India most of the pleas are drafted by counsels hence aforesaid difference of pleas which inevitably differ from one to other. Thus, to gather true spirit behind a plea it should be read as a whole. This does not distract one from performing his obligations as required under a statute. But to test, whether he has performed his obligations one has to see the pith and substance of a plea. Where a statute requires any fact to be pleaded then that has to be pleaded may be in any form. Same plea may be stated

by different persons through different words then how could it be constricted to be only in any particular nomenclature or word. Unless statute specifically require for a plea to be in any particular form, it can be in any form. No specific phraseology or language is required to take such a plea. The language in Section 16(c) does not require any specific phraseology but only that the plaintiff must aver that he has performed or has always been and is willing to perform his part of the contract. So the compliance of 'Readiness and willingness' has to be in spirit and substance and not in letter and form. So to insist for mechanical production of the exact words of an statute is to insist for the form rather than essence. So absence of form cannot dissolve an essence if already pleaded."

24. In the case of *B/SWANATH GHOSH (DEAD) BY L.RS. AND ORS.*

(*supra 2*), the Hon'ble Apex Court, at paragraph 26 held as follows:

"26. It is well settled proposition of law that in a suit for specific performance the Plaintiff must be able to show that he is ready and willing to carry out those obligations which are in fact part of the consideration for the undertaking of the Defendant. For the compliance of Section 16(c) of the Act it is not necessary for the Plaintiff to aver in the same words used in the section i.e. ready and willing to perform the contract. Absence of the specific words in the plaint would not result in dismissal of the suit if sufficient fact and evidence are brought on record to satisfy the court the readiness and willingness to perform his part of the contract. In the case of *Kedar Lal Seal and Anr. v. Hari Lal Seal* MANU/SC/0064/1951 : AIR (39) 1952 SC 47, this Court has held that the Court would be slow to throw out the claim on mere technicality of the pleading. The Court observed:

"51. I would be slow to throw out a claim on a mere technicality of pleading when the substance of the thing is there and no prejudice is caused to the other side, however clumsily or inartistically the plaint may be

worded. In any event, it is always open to a court to give a Plaintiff such general or other relief as it deems just to the same extent as if it had been asked for, provided that occasions no prejudice to the other side beyond what can be compensated for in costs.”

25. In *MOTILAL JAIN v. RAMDASI DEVI (SMT) AND OTHERS*¹¹, the Hon’ble Apex Court at paragraph 9 held as under:

“9. That decision was relied upon by a three Judges Bench of this Court in Syed Dastagir's case (supra), wherein it was held that in construing a plea in any pleading, courts must keep in mind that a plea is not an expression of art and science but an expression through words to place fact and law of one's case for a relief. It is pointed out that in India most of the pleas are drafted by counsel and hence they inevitably differ from one to the other; thus, to gather true spirit behind a plea it should be read as a whole and to test whether the plaintiff has performed his obligations, one has to see the pith and substance of the plea. It was observed:

"Unless a statute specifically requires a plea to be in any particular form, it can be in any form. No specific phraseology or language is required to take such a plea. The language in Section 16(c) of the Specific Relief Act, 1963 does not require any specific phraseology but only that the plaintiff must aver that he has performed or has always been and is willing to perform his part of the contract." So the compliance of "readiness and willingness" has to be in spirit and substance and not in letter and form."

It is thus clear that an averment of readiness and willingness in the plaint is not a mathematical formula which should only be in specific words. If the averments in the plaint as a whole do clearly indicate the readiness and willingness of the

¹¹ (2000) 6 SCC 420

plaintiff to fulfil his part of the obligations under the contract which is subject-matter of the suit, the fact that they are differently worded will not militate against the readiness and willingness of the plaintiff in a suit of specific performance of contract for sale.”

26. In fact, in the plaint at paragraph 12 the plaintiff pleaded as follows:

“12. The plaintiff submits that he is ready and willing to perform his part of the contract i.e., for taking a sale deed from the beginning as stated supra. In fact, the plaintiff demanded the defendant for the due execution of the sale deed number of times as stated supra by going over to Guntakal and also by means of legal notices. On the other hand the defendant is adopting all questionable tactics in the matter of the execution of the sale deed. After receipt of the notice dated. 3-5-88 issued by the plaintiff, the defendant has come forward with false plea that the suit agreement and the agreement executed by her sister M.Praabhavathamma are reciprocal and both the sale deeds are to be taken at a time. The defendant is doing all these things with the sole intention of extracting more money from the plaintiff. The defendant has no right to demand to take the sale deeds at a time. As already stated above the suit agreement and the agreement executed by the said M.Prabhavathamma have nothing to do with each other and they are two separate and different agreements. The conduct of the defendant in the matter of executing the sale deed clearly shows that she has no intention of executing the sale deed. Thus the defendant has committed breach of the contract.

27. In the considered opinion of this Court in view of the Judgments of the Hon'ble Apex Court in *SMT. DIPO (supra 4)*, *SYED DASTAGIR (supra 5)*, *BISWANATH GHOSH (DEAD) BY L.RS. AND ORS. (supra 2)* and *MOTILAL JAIN (supra 11)*, the Judgments cited by the leaned counsel for the fourth respondent would not render any assistance to the fourth

respondent in the facts and circumstances of the case. Therefore, this issue also is required to be answered in favour of the plaintiff and against the defendants and is accordingly answered.

28. Issue No. 6

It is submitted by the learned counsel for the fourth respondent that since the plaintiff failed to assail the very validity of the cancellation of contract by the defendants, the very frame of the suit is bad as such the suit is liable to be dismissed on the said ground.

In support of the said contention, learned counsel places reliance on the judgment of the Hon'ble Apex Court in *I.S.SIKANDAR (DEAD) BY LRS v. K.SUBRAMANI AND OTHERS*¹².

29. On the contrary, it is submitted by the learned counsel for the plaintiff that this said aspect was not pleaded before the Trial Court and in the absence of any foundation for the issue to the said effect, it is not open for the fourth respondent to advance such contention. And in support of the said contention, learned counsel for the plaintiff places reliance on *A.KANTHAMANI v. NASREEN AHMED*¹³.

30. This Court deems it appropriate to refer to the said judgment in *T.S.SIKANDAR (DEAD) BY LRS (supra 12)* and in the said Judgment the Hon'ble Apex Court at paragraph 37 and 38 held as under:

“37. As could be seen from the prayer sought for in the original suit, the Plaintiff has not sought for declaratory relief to declare the termination of Agreement of Sale as bad in law. In the absence of such prayer by the Plaintiff the original suit filed by him before the trial court for grant of decree for specific performance in respect of the suit schedule property

¹² (2013) 15 SCC 27

¹³ (2017) 4 SCC 654

on the basis of Agreement of Sale and consequential relief of decree for permanent injunction is not maintainable in law.

38. Therefore, we have to hold that the relief sought for by the Plaintiff for grant of decree for specific performance of execution of sale deed in respect of the suit schedule property in his favour on the basis of non existing Agreement of Sale is wholly unsustainable in law. Accordingly, the point No. 1 is answered in favour of the Defendant No. 5.”

31. In the case of *A.KANTHAMANI (supra 13)* cited by the leaned counsel for the plaintiff, the Hon’ble Apex Court at paragraph 30 to 30.4 held as under:

“30. Coming first to the submission of the learned counsel for the appellant about the maintainability of suit, in our considered view, it has no merit for more than one reason.

30.1) First, as rightly argued by learned counsel for the respondent, the objection regarding the maintainability of the Suit was neither raised by the defendant in the written statement nor in first appeal before the High Court and nor in grounds of appeal in this Court.

30.2) Second, since no plea was raised in the written statement, a fortiori, no issue was framed and, in consequence, neither the Trial Court nor the High Court could render any finding on the plea.

30.3) Third, it is a well-settled principle of law that the plea regarding the maintainability of suit is required to be raised in the first instance in the pleading (written statement) then only such plea can be adjudicated by the Trial Court on its merits as a preliminary issue under Order 14 Rule 2 of the CPC. Once a finding is rendered on the plea, the same can then be examined by the first or/and second appellate Court.

30.4. Fourth, the decision relied on by the learned counsel for the appellant in the case of *I.S. Sikander (supra)* turns on the facts involved therein and is thus distinguishable.

30.5. Lastly, the suit filed by the respondent seeking specific performance of the agreement dated 05.03.1989 was maintainable for the reason that the cause of action to file the suit arose on the expiry of period mentioned in the agreement (31.12.1989) for its performance as provided in [Article 54](#) of the [Limitation Act](#) and it was rightly filed immediately within 10 days on 10.01.1990. ‘

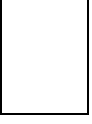
32. In the instant case also, the aspect of failure to question the notice of cancellation of Ex.A.3 was neither pleaded nor the same fell for consideration by way of the issue under Order 14 before the Court below and for the first time, in the considered opinion of this Court, cannot be raised in view of the above decision of the Hon’ble Apex Court in *A.KANTHAMANI (supra 13)*.

33. Another significant aspect which needs mention in this context is that Ex.A.42 is a conditional one but not the cancellation by itself. In view of the law laid down in *A.KANTHAMANI (supra 13)* the contention of the learned counsel for the fourth respondent is liable to be rejected and is accordingly rejected by holding that on the ground of failure to question the cancellation the plaintiff cannot be non-suited.

34. For the aforesaid reasons, appeal is allowed, setting aside the judgment and decree dated 22.12.1995 passed by the Court of the Additional District Judge, Hindupur in O.S.No.41 of 1988 and consequently O.S.No.41 of 1988 is decreed, directing execution of sale in favour of the plaintiff and in view of the above findings the sale transaction covered by Ex.A.15 in favour of the second respondent herein is hereby declared as null and void. As a sequel, the miscellaneous petitions, if any, shall stand disposed of. There shall be no order as to costs.

A.V.SESHA SAI, J

Date:13.12.2017
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THE HON'BLE SRI JUSTICE A.V.SESHA SAI



A.S.No.1310 of 1996

Dated:13.12.2017

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