

HON'BLE Dr. JUSTICE SHAMEEM AKTHER

APPEAL SUIT No.157 OF 1998

JUDGMENT:

1. This Appeal, under Section 96 of Code of Civil Procedure, 1908 (for short, 'the C.P.C.'), has come up from judgment and decree 24.10.1997 passed in O.S. No.495 of 1993 on the file of the I Additional Subordinate Judge, Ranga Reddy District at Saroornagar, Hyderabad (for short, 'the trial Court'), wherein the trial Court rejected the suit for specific performance of agreement of sale dated 21.08.1990 and the claim to declare the sale deed dated 09.06.1993 executed by respondent Nos.1 to 3 in favour of respondent No.4 as null and void. The trial Court decreed the suit for refund of Rs.75,000/- in favour of the appellant and against respondent Nos.1 to 3 with interest at 12% per annum.

2. Heard the learned counsel for the appellant, learned counsel for the respondents and perused the material available on record.

3. For the sake of convenience, the parties hereinafter are referred to as arrayed before the trial Court.

4. Learned counsel for the appellant-plaintiff would submit that the finding of the trial Court under issue No.1 that the time is essence of contract is contrary to the agreement of sale entered in between the parties marked as Ex.A.2; as per clauses-8 and 9 of the agreement of sale, the plaintiff is entitled to pay the part sale consideration within three years from the date of agreement; the appellant is ready and willing to pay the remaining sale consideration; the trial Court has not appreciated all the facts and circumstances of the case and erroneously rejected the claim to decree the suit for specific performance; the trial Court having held that the suit agreement was not legally cancelled by defendants 1 to 3, the suit

ought to have been decreed as prayed for; the trial Court ought not have upheld the alienation made in favour of defendant No.4 by defendant Nos.1 to 3; the trial Court ought to have disbelieved the evidence of D.W.1 that he borrowed money for treatment from his mother; the trial Court ought not have appreciated the evidence of D.W.4 with regard to purchasing half of the suit schedule property under the original of Ex.A.6; and ultimately prayed to set aside the judgment and decree and decree the suit for specific performance of the agreement of sale.

5. On the other hand, learned counsel for respondent Nos.1 to 3- defendant Nos.1 to 3 would submit that the trial Court had appreciated all the facts and circumstances of the case; time is the essence of contract, the same is specifically mentioned in clauses-1 and 9 of the agreement of sale dated 21.08.1990 marked as Ex.A.2; to meet the dire necessities, defendant Nos.1 to 3 have alienated half portion of the property under the original of Ex.A.6 in favour of defendant No.4; the findings of the trial Court are based on facts of the case and law; there are no circumstances to interfere with the impugned judgment and decree; and ultimately, prayed to dismiss the appeal.

6. In view of the contentions putforth by both sides, the following points have come up for consideration:

(1) Whether the plaintiff is entitled for a claim of specific performance of agreement of sale dated 21.08.1990?

(2) Whether the impugned judgment and decree passed by the trial Court is liable to be set aside?

7. To substantiate the case, the plaintiff examined his general power of attorney holder as P.W.1 and marked Ex.A.1-G.P.A. executed by him, Ex.A.2-agreement of sale dated 21.08.1990, Ex.A.3-registered sale deed

dated 09.06.1993, Ex.A.4-office copy of the legal notice dated 26.06.1993, Ex.A.5-xerox copy of reply to Ex.A.4, Ex.A.6-certified copy of sale deed executed by defendant Nos.1 to 3 in favour of defendant No.4 and Exs.A.7 & A.8-encumbrance certificates. On behalf of the defendants, D.Ws.1 to 4 were examined and Ex.B.1-bunch of papers pertaining to P.W.1's mother, Ex.B.2-tax receipt, Ex.B.3-proceedings of E.O., Ex.B.4-new tax assessment order dated 31.03.1995 and Ex.B.5-original demand notice for tax dated 31.10.1995 were marked.

8. **POINTS:** The case of the plaintiff is that he entered into agreement of sale dated 21.08.1990 to purchase suit schedule house for Rs.2,83,800/- from late Rukmini Bai and paid an amount of Rs.75,000/- as advance. Ex.A.2 is the agreement of sale entered between the parties. Thereafter, the plaintiff requested Rukmini Bai orally many times to receive balance sale consideration, i.e., Rs.2,08,800/-, and execute conveyance but she did not do so on some pretext or the other and died on 07.06.1992. Defendants 1 to 3 are her children. The plaintiff has also requested defendants 1 to 3 to receive the balance sale consideration and execute proper conveyance deed in his favour. The defendants also did not do so on one reason or the other. Thereafter, a legal notice dated 26.06.1993 was issued to the defendants 1 to 3 and they gave reply to that notice throwing the blame on the plaintiff. Thereafter, defendants 1 to 3 sold away half portion of the suit schedule house to defendant No.4 on 09.06.1993 and registered the same in favour of the purchaser. In reply, the defendants have conceded the execution of agreement of sale under Ex.A.2 by Rukmini Bai, mother of defendants 1 to 3, and also acknowledged the receipt of Rs.75,000/- as part sale consideration. The defendants 1 to 3 contended that their mother several times demanded the plaintiff to pay the balance sale consideration and obtain proper

conveyance in his favour. The plaintiff did not choose to do so within the stipulated time. The defendants also contended that as per clauses-1 and 9 of the agreement of sale marked as Ex.A.2, the balance sale consideration is required to be paid in 12 months from the date of agreement. The plaintiff failed to pay the same in spite of several demands. There is also mention with regard to deposit of the balance sale consideration in Court in the event of any dispute as per Ex.A.2. The plaintiff did not choose to comply any of the two conditions. Time is the essence of the contract. Therefore, at any point of time the plaintiff was not ready and willing to pay sale consideration, as per the terms of the agreement. Therefore, the plaintiff is not entitled for a decree of specific performance against the defendants and they have rightly sold the property to defendant No.4 under the original of Ex.A.6.

9. The plaintiff to substantiate his averments and his contentions examined his general power of attorney holder as P.W.1. On the other hand, defendants deposed as D.Ws.1 to 4 to substantiate their contentions. The whole case is based on Ex.A.2-agreement of sale dated 21.08.1990 and the parties are relying mainly on clauses-1, 8 and 9 of the said agreement. Therefore, it is appropriate to extract the said clauses hereunder:

"1. The Balance Sale Consideration of Rs.2,08,800/- (Rupees Two Lakhs Eight thousand Eight hundred only) will be paid by the said Vendee to the Vendor within a period of (12) Twelve Months from the date of this sale Agreement.

.....

8. The Vendor herein declares she will not re-sale, gift, will, mortgage the schedule of the property to any other person or persons during the period of this sale agreement.

9. The Vendor herein declares if the Vendee fails to pay the balance sale consideration within a period of this sale agreement for any reason of the Vendee shall deposit the balance sale consideration in the court and got the sale deed registered through the court."

10. As seen from the clause-1, the balance sale consideration, i.e., Rs.2,08,800/- is required to be paid within 12 months from the date of agreement of sale. The agreement of sale was entered by the parties on 21.08.1990. Therefore, the last date of payment of balance sale consideration was 20.08.1991. There is also mention in clause-9 that for any reason, the balance sale consideration is not paid, in terms of the agreement, the same is required to be deposited by the Vendee before the Court to get a sale deed registered through the Court. As seen from the entire evidence and the documents placed on record, neither the plaintiff had paid the balance sale consideration within 12 months from the date of agreement of sale nor he deposited the same in terms of clause-9 of the agreement of sale.

11. Learned counsel for the plaintiff would submit that time is not essence of contract. The limitation to file the suit for specific performance is three years. Therefore, the plaintiff has three years time to pay the balance sale consideration. Even the balance sale consideration of Rs.2,08,800/- was not deposited on the date of suit, i.e., on 20.07.1993. As per the evidence on record, when the clauses-1 and 9 of the agreement of sale are read together, it can be safely concluded that the time is the essence of contract. There is also evidence to believe that in spite of several demands, the plaintiff had not paid the sale consideration within the time agreed by the parties. There is also evidence to believe that the mother of the defendants 1 to 3 was ill and the defendants have spent substantial amount as mentioned in Ex.B.1-bunch of papers. There

is no breach of contract on the part of Rukmini Bai or on the part of defendants 1 to 3. There is no evidence to believe that the plaintiff demanded Rukmini Bai to receive sale consideration and register a sale deed in favour of the plaintiff as contended. There is also no evidence to believe that the plaintiff approached the defendants 1 to 3 to receive the balance sale consideration. It is pertinent to note that Sri K. Ananthaiah, GPA Holder of the plaintiff-B.Madhukar has deposed as P.W.1 in this case. Even the plaintiff did not choose to depose before the trial Court to substantiate the contentions raised by him.

12. Learned counsel for the plaintiff has relied on a decision of this Court in ***Pothepalli Nagabhushanam v. Ravipati Subba Rao and others*¹**, wherein it was held that the defendants 2 and 3 were fully aware of the agreement of sale, even than purchased property from the 1st defendant under a registered sale deed, time is not the essence of contract, merely a recital is made in the agreement of sale specifying some time that by itself would not make time essence of contract, the suit was filed within limitation, the dismissal of the suit by the trial Court was set aside and the suit was decreed by the appellate court assigning reasons, the order of the appellate court was upheld. When clauses-1 and 9 are read together, the plaintiff was required to pay the balance sale consideration within 12 months from the date of agreement. In case of any dispute, he is required to deposit the same in competent civil court within the stipulated time. Therefore, it cannot be said that time is not the essence of contract. In the circumstances of the case, the above decision has no application to the case on hand.

13. The trial Court while dealing with the subject matter of the suit, had elaborately dealt all the facts and circumstances of the case and rightly

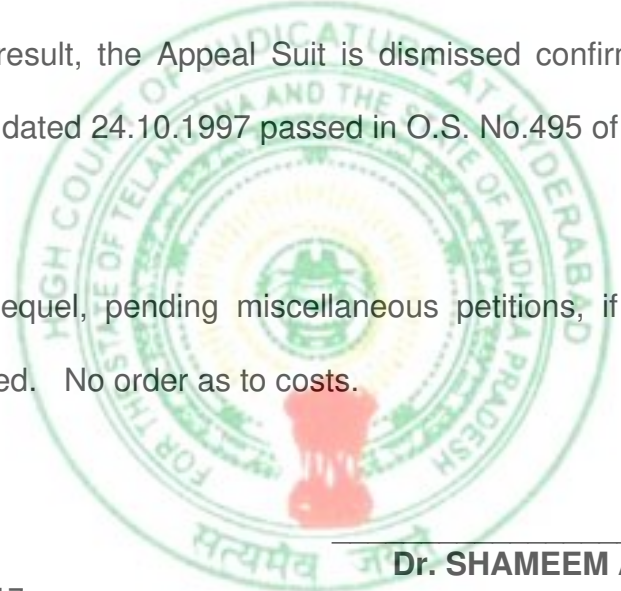
¹ 2008(3) ALD 599

rejected the suit for specific performance. The sale deed executed by the defendants 1 to 3 in favour of defendant No.4 cannot be declared as null and void. Certainly, the defendants are entitled to enter into a contract and alienate the subject matter of the suit partially in favour of defendant No.4. Therefore, the plaintiff is not entitled for any such relief. The trial Court has rightly ordered the defendants 1 to 3 to refund Rs.75,000/- with interest at 12% per annum to the plaintiff. Therefore, the plaintiff is not entitled for any variation or modification in the impugned judgment and decree passed by the trial Court. The appeal is devoid of any merits and it is liable to be dismissed.

14. In the result, the Appeal Suit is dismissed confirming the decree and judgment dated 24.10.1997 passed in O.S. No.495 of 1993 by the trial Court.

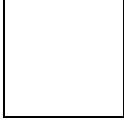
15. As a sequel, pending miscellaneous petitions, if any, shall also stand dismissed. No order as to costs.

Date: 05.10.2017.
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Dr. SHAMEEM AKTHER, J

HON'BLE Dr. JUSTICE SHAMEEM AKTHER



APPEAL SUIT No.1200 OF 1999

Date. 05.10.2017

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