

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.934 OF 2012

JUDGMENT:

This Second Appeal is filed by the unsuccessful plaintiff No.2 assailing the decree and judgment dated 08.06.2012 in A.S.No.31 of 2009 on the file of the Court of the XIII Additional District Judge, Narasaraopet, wherein and whereby the decree and judgment dated 16.04.2009 in O.S.No.44 of 1996 on the file of the Court of the Additional Senior Civil Judge, Narasaraopet, dismissing the suit for specific performance and consequential relief of permanent injunction, was confirmed.

2. For the sake of convenience, the parties will hereinafter be referred to as they were arrayed before the trial Court, to avoid confusion.

3. The facts leading to filing of the present appeal are briefly as follows: The first defendant, who is the absolute owner of the suit schedule property, executed an agreement of sale in favour of the plaintiffs on 24.10.1992 agreeing to sell the suit schedule property for a total consideration of Rs.1,50,000/- and received advance money of Rs.20,000/-. As per the terms and conditions of the agreement of sale, the first defendant has to execute the registered sale deed in favour of the plaintiffs after receiving the balance consideration of Rs.1,30,000/- on or before 24.08.1993. The plaintiffs are in possession and enjoyment of the suit schedule property. The plaintiffs came to know that the first defendant executed a General Power of Attorney in favour of Yelamakannu Tirupathi Venkateswara Shyam Prasad in respect of the suit schedule property. The G.P.A. holder of the first defendant

executed a registered sale deed on 06.04.1996 in favour of the second defendant. Hence, the plaintiffs filed the suit for specific performance. During pendency of the suit, the plaintiffs filed I.A.No.316 of 2005 and the same was allowed on 09.04.2013 and the plaintiffs are permitted to amend the plaint seeking alternative relief of refund of the money to them. During pendency of the suit, the plaintiffs also filed I.A.No.419 of 2006 and the same was allowed on 07.07.2008 permitting the plaintiffs to amend the plaint taking a plea that the first plaintiff relinquished his right in favour of the second plaintiff vide relinquishment deed dated 15.01.2008.

4. The first defendant filed written statement denying all the averments made in the plaint *inter alia* contending that the agreement of sale dated 24.10.1992 purported to have been executed by him is a forged one. This defendant never delivered the suit schedule property to the plaintiffs at any point of time. Peda Masthan, who is the alleged witness on the agreement of sale, is the employee of the husband of the second plaintiff. This defendant executed a General Power of Attorney in favour of Tirupathi Venkateswara Shyam Prasad on 11.11.1994. The G.P.A. holder of the first defendant executed a registered sale deed in favour of the second defendant on 06.04.1996 and put him in possession of the suit schedule property. Hence, the suit is liable to be dismissed.

5. The second defendant filed written statement denying all the averments made in the plaint *inter alia* contending that the agreement of sale dated 24.10.1992 is a forged one. This defendant purchased the suit schedule property from the G.P.A.

holder of the first defendant under a registered sale deed dated 06.04.1996. This defendant spent huge amount to convert the suit schedule property into agricultural land. The name of this defendant was mutated in the revenue records. Chitirala Subrahmanyam, who is the husband of the second plaintiff, got filed the suit through the plaintiffs. Hence, the suit may be dismissed.

6. Basing on the above pleadings, the trial Court framed the following issues:

1. Whether the alleged sale agreement dated 24.10.1992 executed in favour of the plaintiff by first defendant is true, valid on the defendants?
2. Whether the plaintiff is entitled for the specific performance of sale of contract dated 24.10.1992 as prayed for?
3. Whether the plaintiff is entitled for permanent injunction as prayed for?
4. To what relief?

7. Before the trial Court, on behalf of the plaintiffs, PWs.1 to 4 were examined and Exs.A.1 to A.6 were marked. On behalf of the defendants, DWs.1 and 2 were examined and Exs.B.1 to B.3 were marked.

8. After considering the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the plaintiffs failed to prove the execution of the agreement of sale dated 24.10.1992 thereby, they are not entitled for the relief of specific performance and consequently, dismissed the suit. Feeling aggrieved by the decree and judgment dated 16.04.2009 in O.S.No.44 of 1996 on the file of the Court of the Additional Senior Civil Judge, Narasaraopet, the unsuccessful plaintiff No.2 filed A.S.No.31 of 2009 on the file of the Court of the XIII Additional

District Judge, Narasaraopet. The learned XIII Additional District Judge, after reappraising the oral and documentary evidence available on record, without being influenced by the findings recorded by the trial Court, arrived at a conclusion that the plaintiffs failed to prove the execution of agreement of sale; therefore, they are not entitled for the relief of specific performance and dismissed the appeal. Hence, the second appeal is preferred by the unsuccessful plaintiff No.2.

9. Heard the learned counsel for the appellant, the learned counsel for respondent Nos.2, 5, 6 and 8, and perused the grounds of appeal and other material available on record.

10. Basing on the submissions made by the learned counsel for both parties and also the material available on record, the questions of law that arise in this second appeal are as follows:

1. Whether the Courts below are justified in drawing adverse inference for non-examination of the first plaintiff?
2. Whether the Courts below are justified in not drawing adverse inference for non-examination of the first defendant? and
3. Whether the findings recorded by the Courts below are perverse?

11. Point Nos.1 to 3 are intertwined with each other; hence, this Court is inclined to address both the points simultaneously in order to avoid recapitulation of facts and evidence.

12. To substantiate the case, the second plaintiff examined herself as PW.1. PW.2 is the scribe of Exs.A.2 and A.5. PW.3 is the husband of second plaintiff. PW.4 is the attesor of Exs.A.1, A.5 and A.6. To demolish the case of the plaintiffs, the first

defendant examined himself as DW.1, but his evidence was eschewed and the second defendant examined himself as DW.2.

13. It is an admitted fact that the first defendant is the absolute owner of the suit schedule property. The entire controversy revolves around Exs.A.1 to A.6. Section 20 of the Specific Relief Act confers a discretionary power on the Courts either to grant or reject the relief of specific performance. The Court has to exercise its discretionary power judiciously basing on sound principles of law. It is a settled principle of law that the relief of specific performance is a discretionary relief. It is needless to say that a person, who seeks the discretionary relief, must come to the Court with clean hands by placing all facts much less material facts. Establishment of following two conditions is *sin qua non* to grant the relief of specific performance in favour of the plaintiffs:

1. The agreement of sale dated 24.10.1992 (Ex.A.1) was executed by first defendant in favour of plaintiffs after receiving a sale consideration, and
2. Exs.A.2 to A.6 are executed by the first defendant after receiving the part payments from the plaintiffs.

Therefore, the initial burden lies on the plaintiffs to prove their case. Once the plaintiff proves his case, the onus of proof automatically shifts on the defendant to establish his case.

14. Let me consider the facts of the case on hand on the touch stone of the above legal principles.

15. It is the case of the plaintiffs that the first defendant executed an agreement of sale Ex.A.1 on 24.10.1992 in favour of the plaintiffs agreeing to sell the suit schedule property for a valid consideration of Rs.1,50,000/- after receiving advance money of

Rs.20,000/-. It is the further case of the plaintiffs that the first defendant received the remaining sale consideration of Rs.1,30,000/- under Exs.A.2 to A.6. PW.2 is the scribe of Exs.A.1 and A.5. PW.3 is the husband of PW.1. PW.4 is the attester of Exs.A1 and A.5. As per the testimony of PW.1, the first plaintiff paid the advance sale consideration of Rs.20,000/- to the first defendant. Her testimony further reveals that in fact herself and first plaintiff wanted to pay an amount of Rs.40,000/- to the first defendant, but on his request, they paid only Rs.20,000/- at the time of execution of agreement of sale. If the testimony of PW.1 is taken into consideration, the first plaintiff paid advance amount of Rs.20,000/- to the first defendant. As per the observations made by the Courts below, originally advance amount is shown as Rs.40,000/- in Ex.A.1 and thereafter, they struck off the amount and then mentioned as Rs.20,000/-. PW.1, in her cross-examination, expressed her inability to say who has made such corrections in Ex.A.1. The fact remains that an amount of Rs.20,000/- was not paid by PW.1 to the first defendant. At one stage, she deposed that her husband used to look after her affairs. She has given different versions in the cross-examination with regard to the scribe and attestors of Exs.A.1 to A.6. Likewise, PW.3 has also given different versions with regard to the scribe and attestors of Exs.A.1 to A.6. PW.4 is one of the attestors of Ex.A.1 agreement of sale and Ex.A.5 endorsement. In the cross-examination, PW.3 deposed that PW.4 is an employee. In the cross-examination, PW.2 in unequivocal terms deposed that PW.4 is an employee of the automobile shop of PW.3. PW.3 denied the suggestion that PW.2 is his relative. On the other hand, PW.2 in

unequivocal terms deposed that he is close relative of PW.1 and PW.3. All the above facts clearly reveal that PWs.1 to 4 are interrelated with each other one way or other. In such circumstances, the Court has to scrutinise their testimony meticulously so as to eliminate exaggerations. There is no consistency in the testimony of these witnesses with regard to the execution of Ex.A.1 agreement of sale and part payment endorsements, Exs.A.1 to A.6. Each witness has given his own versions. As seen from the testimony of PW.2, he is the scribe of 30 documents pertains to PW.3. His testimony further reveals that PW.3 has been doing real estate business.

16. PW.2 categorically deposed that he is in the habit of preparing documents even in the absence of executant. He further deposed that if the executant is absent, then he will put 'X' mark at the place of 'executant'. Ex.A.1 indicates 'X' mark at the place meant for the name of the executant. The testimony of PW.2 clinchingly establishes that the first defendant was not present at the time of execution of Ex.A.1 agreement of sale. As per the testimony of PWs.1, 3 and 4, the first defendant was present at the time of execution of Ex.A.1. If really the first defendant was present at the time of execution of Ex.A.1, what prompted PW.2 to put 'X' mark on Ex.A.1 at the place of executant. The material placed before the Court clinchingly establishes that the first defendant was not present at the time of execution of Ex.A.1. The plaintiffs approached the Court by suppressing the facts much less the material facts for the reasons best known to them.

17. During pendency of the suit, the plaintiffs amended the plaint and introduced a new version. The first plaintiff given up

his right in favour of the second plaintiff by executing relinquishment deed dated 15.01.2008. The relinquishment deed alleged to have been executed by the first plaintiff in favour of the second plaintiff has not seen the light of the day till date. Therefore, the Courts below justified in disbelieving the stand taken by the second plaintiff. The first plaintiff is the competent person to say whether he paid an amount of Rs.20,000/- to the first defendant on the date of execution of agreement of sale. Likewise, the first plaintiff is competent person to say whether he has executed relinquishment deed in favour of the second plaintiff during pendency of the suit. Basing on the facts pleaded and proved, the Courts below are justified in drawing adverse inference for non-examination of the first plaintiff as one of the witnesses.

18. A perusal of the record reveals that the first defendant filed his chief examination affidavit as DW.1. Thereafter, the matter was posted for cross-examination of DW.1 on several occasions. For the reasons best known, the plaintiffs did not choose to cross-examine DW.1. Having no other alternative, the trial Court made endorsement that the cross-examination of DW.1 as NIL. Thereafter, the plaintiffs filed an application to recall DW.1 and the same was allowed, but DW.1 did not turn up for cross-examination. Hence, his evidence was eschewed. Suffice it to say that if a party to the proceedings intentionally and wilfully abstains himself/herself from entering into the witness box, to substantiate his/her case and offer himself/herself for cross examination by the apposite party, the court can draw an adverse inference, in view of Section 114 of the Indian Evidence Act. In the instance case, as observed earlier, the first defendant filed his chief examination

affidavit as DW.1. Therefore, it is not a fit case to draw an adverse inference against the first defendant. The plaintiffs have admitted that the first defendant executed a registered sale deed in favour of the second defendant. Admitted facts need not be proved. In the instant case, the plaintiffs failed to prove Ex.A.1 agreement of sale was executed by first defendant in their favour. The plaintiffs also failed to prove that Exs.A.2 to A.6 endorsements were made by the first defendant. If the findings recorded by the Courts below are based on no evidence or based on any evidence, which is not legally admissible, then such findings can be termed as perverse. Once this Court comes to a conclusion that the findings recorded by the Courts below are perverse, certainly this Court can set aside the same while exercising the jurisdiction under Section 100 of C.P.C. In the instance case, the findings recorded by the Courts below are based on evidence much less legally admissible evidence. The findings recorded by the Courts below are based on logical conclusions and sound principles of law. Therefore, I am unable to accede to the contention of the learned counsel for the appellant-second plaintiff that the findings recorded by the Courts below are perverse and hence, liable to be set aside.

19. In **Municipal Committee, Hoshiarpur v. Punjab SEB**¹, while dealing with the scope of Section 100 of C.P.C., the Hon'ble apex Court held at paragraph No.16 as follows:

16. A second appeal cannot be decided merely on equitable grounds as it lies only on a substantial question of law, which is something distinct from a substantial question of fact. The court cannot entertain a second appeal unless a substantial question of law is involved, as the second appeal does not lie on the ground of erroneous findings of fact based on an appreciation of the relevant evidence. The existence of a substantial question of law is a

¹ (2010) 13 SCC 216

condition precedent for entertaining the second appeal; on failure to do so, the judgment cannot be maintained. The existence of a substantial question of law is a sine qua non for the exercise of jurisdiction under the provisions of Section 100 CPC.

20. Having regard to the facts and circumstances of the case and also the principle enunciated in the case cited supra, I am of the considered view that the questions of law urged by the learned counsel for the appellant will not fall within the ambit of Section 100 of C.P.C. There is no question of law much less substantial question of law is involved in this appeal. Hence, the appeal is liable to be dismissed.

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

Date: 24.11.2017
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T. SUNIL CHOWDARY, J

