THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.568 of 2014

JUDGMENT:

This appeal is filed by the plaintiff assailing the judgment and decree dated 27.03.2012 in A.S.No.192 of 2005 on the file of the Court of II Additional District Judge, West Godavari District at Eluru, wherein and whereby the judgment and decree dated 21.04.2005 in O.S.No.767 of 2001 on the file of the Court of I Additional Junior Civil Judge, Eluru, dismissing the suit filed for specific performance, was confirmed.

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

3. The facts leading to filing of the second appeal are briefly as follows:

First defendant is the sister and the second defendant is the wife of third defendant. Defendants 1 and 3 are daughter and son of late Md.Shariff. The husband of the plaintiff and late Shariff were close friends. Defendants 1 and 2 purchased the plaint schedule property from one Kammula Nagabhushanam under two separate registered sale deeds dated 06.04.1985 of an extent of 266 1/3 sq. yards each (total 532 2/6 sq. yards), which includes suit schedule property. At the time of purchase of vacant sites by defendants 1 and 2 and another vacant site by third defendant, in the presence of elders, including late Md.Shariff and third defendant, the plaintiff was asked to advance money to a tune of Rs.53,400/- with an understanding that out of the total extent of two vacant sites purchased by defendants 1 and 2, they should execute and register a sale deed in favour of the plaintiff for an extent of 356 sq. yards. Defendants 1 and 2 executed an agreement of sale in favour of the plaintiff on 08.04.1985. The plaintiff is always ready and willing to obtain a regular sale deed for 356 sq. yards. In the first week of August 2001, the plaintiff's husband approached the third defendant and asked him about the execution of sale deed, but he gave evasive reply. The plaintiff got issued a notice dated 10.08.2001 to the defendants 1 and 2 asking them to execute a registered sale deed. The third defendant is aware of the suit agreement. Defendants 1 and 3 collusively brought into existence sham and nominal gift deed dated 09.04.1999 as if the first defendant gifted her property to the third defendant. The alleged gift deed is not valid and binding on the plaintiff. Hence, the plaintiff filed the suit for specific performance of agreement of sale.

4. Defendants 1 and 2 filed written statement denying all the averments made in the plaint, *inter alia* contending that the plaintiff's husband was the auditor of late Md.Shariff for a long time and he also acted as auditor of third defendant till 1993. Defendants 1 and 2 purchased the schedule property as stated in the plaint. Defendants 1 and 2 did not receive Rs.53,400/- from the plaintiff and did not execute agreement of sale in her favour. The alleged agreement of sale is a fabricated one. The third defendant discontinued the services of the plaintiff's husband as an auditor in the year 1993 and engaged another auditor from Vijayawada. Hence, the plaintiff's husband bore grudge against

the third defendant and filed the present suit. The suit is barred by limitation, hence the suit is liable to be dismissed.

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

1. Whether the suit agreement of sale dated 08.04.1985 is true, valid and binding on the defendants?
2. Whether the plaintiff is entitled for specific performance of suit agreement of sale and for possession of the schedule property as prayed for?
3. To what relief?

Additional Issues:

1. Whether the registered settlement deed dated 09.04.1999, executed by 1st defendant in favour of 3rd defendant is true, valid and binding on the plaintiff?
2. Whether the 3rd defendant became as absolute owner by virtue of registered settlement deed dated 09.04.1999, executed by 1st defendant?

6. During the course of trial, on behalf of the plaintiff, P.Ws.1 to 3 were examined and Exs.A1 to A4 were marked. On behalf of the defendants, D.Ws.1 to 3 were examined and Exs.B1 to B5 were marked.

7. After having a thoughtful consideration to oral, documentary evidence and other material available on record, the trial Court came to a conclusion that the plaintiff failed to prove the execution of Ex.A.1 by the defendants 1 and 2 in her favour and hence the same is not true, valid and binding on the defendants and accordingly dismissed the suit. Feeling aggrieved by the judgment and decree dated 21.04.2005 in O.S.No.767 of 2001, the plaintiff preferred A.S.No.192 of 2005 on the file of the Court of II Additional District Judge, West Godavari, at Eluru. The first appellate Court after reappraising the oral, documentary evidence and other material available on record, dismissed the appeal

concurring with the findings recorded by the trial Court. Hence, the unsuccessful plaintiff preferred the present second appeal.

8. Heard the learned counsel for the appellant-plaintiff, the learned counsel for the respondents-defendants and perused the material available on record.

9. The questions of law that arise for consideration in this appeal are as follows:

> "1. Whether the Courts below are justified in dismissing the suit even though the defendants admitted their signatures on Ex.A1 agreement of sale?
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> 2. Whether P.W.2 was not competent to give evidence on behalf of the plaintiff?"

10. Both the questions are intertwined with each other and hence this Court is inclined to answer both the questions simultaneously to avoid recapitulation of facts and evidence.

11. The following admitted facts can be culled out from the pleadings and evidence of both parties.

Defendants 1 and 2 purchased an extent of 266 1/3 square yards each from one Kammula Nagabhushanam under registered sale deeds dated 06.04.1985 and 09.04.1985 under originals of Exs.B3 and B4. Defendants 1 and 2 executed a gift deed in favour of third defendant under original of Ex.B5.

12. To substantiate his argument, learned counsel for the appellant-plaintiff has drawn the attention of this Court to ***MANJUNATH ANANDAPPA URF.SHIVAPPA HANASI v.***

TAMMANASA AND OTHERS[1] wherein it was held at paras 30 to 32 as follows:

> "30.There is another aspect of the matter which cannot be lost sight of. The plaintiff filed the suit almost after six years from the date of entering into the agreement to sell. He did not bring any material on records to show that he had ever asked defendant No.1, the owner of the property, to execute a deed of sale. He filed a suit only after he came to know that the suit land had already been sold by her in favour of the appellant herein. Furthermore, it was obligatory on the part of the plaintiff for obtaining a discriminatory relief having regard to Section 20 of the Act to approach the court within a reasonable time. Having regard to his conduct, the plaintiff was not entitled to a discriminatory relief.
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> 31. In Veeravee Ammal v. Seeni Ammal MANU/SC/0667/2001 : AIR2001SC2920 the law is stated in the following terms:
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> "11. When, concededly, the time was not of the essence of the contract, the appellant-plaintiff was required to approach the court of law within a reasonable time. A Constitution Bench of this Hon'ble Court in Chand Rani v. Kamal Rani MANU/SC/0285/1993: AIR 1993 SC 1742 held that in case of sale of immovable property there is no presumption as to time being of the essence of the contract. Even if it is not of the essence of contract, the court may infer that it is to be performed in a reasonable time if the conditions are (i) from the express terms of the contract; (ii) from the nature of the property; and (iii) from the surrounding circumstances, for example, the object of making the contract. For the purposes of granting relief, the

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[1] MANU/SC/0248/2003

reasonable time has to be ascertained from all the facts and circumstances of the case.

12. In K.S.Vidyanandam v. Vairavan MANU/SC/0404/1997 : AIR 1997SC1751 this Court held:

"Even where time is not of the essence of the contract, the plaintiff must perform his part of the contract within a reasonable time and reasonable time should be determined by looking at all the surrounding circumstances including the express terms of the contract and the nature of the property."

13. The word "reasonable" has in law prima facie meaning of reasonable in regard to those circumstances of which the person concerned is called upon to act reasonably knows or ought to know as to what was reasonable. It may be unreasonable to give an exact definition of the word "reasonable". The reason varies in its conclusion according to idiosyncrasy of the individual and the time and circumstances in which he things. The dictionary meaning of the "reasonable time" is to be so much time as in necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case. In other words it means, as soon as circumstances permit. In P.Ramanatha Aiyar's The Law Lexicon it is defined to mean:

"A reasonable time, looking at all the circumstances of the case; a reasonable time under ordinary circumstances; as soon as circumstances will permit; so much time as is necessary under the circumstances, conveniently to do what the contract requires should be done; some more protracted space than 'directly'; such length of time as may fairly, and properly, and reasonably be allowed or required, having regard to the nature of the act of duty and to the attending circumstances; all these convey more or less the same idea."

> 32. In Lourdu Mari David and Ors, v.Louis Chinnaya Arogiaswamy and Ors., reported in MANU/SC/0726/1996 : AIR1996SC2814 this Court observed:
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> "2. It is settled law that the party who seeks to avail of the equitable jurisdiction of a court and specific performance being equitable relief, must come to the court with clean hands. In other words the party who makes false allegations does not come with clean hands and is not entitled to the equitable relief....."

13. Let me consider the facts of the case on hand in the light of the above legal principle.

14. The entire controversy revolves around Ex.A1 agreement of sale. It is the case of the plaintiff that defendants 1 and 2 executed an agreement of sale in favour of the plaintiff on 09.04.1985 after receiving an amount of Rs.53,400/- towards advance. To substantiate the case of the plaintiff, P.Ws.1 to 3 were examined. P.W.2 is none other than the husband of the plaintiff. A husband is entitled to depose evidence on behalf of his wife, if he is well acquainted with the facts of the case in view of Section 120 of the Indian Evidence Act. It is not in dispute that P.Ws.2 and 3 are neither scribe nor attesters of Ex.A1. The fact remains that any person, who is connected with Ex.A1 was not examined by the plaintiff. A perusal of the record reveals that the defendants have admitted their signatures on Ex.A1 agreement. The defence of the defendants is that P.W.2, who is the auditor of father of defendants 1 and 3, used to obtain their signatures on different papers for submitting the income tax returns. The fact remains that till 1993 P.W.2 was the auditor of the third defendant and also to the father

of defendants 1 and 3. In the plaint, it is mentioned that P.W.2 is the close friend of father of defendants 1 and 3. The evidence placed before the Court is otherwise. The relationship between P.W.2 and the father of defendants 1 and 3 is only professional relationship of auditor and client.

15. 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 to the Court with clean hands by placing all facts much less material facts. Establishment of execution of agreement of sale dated 08.04.1985 (Ex.A.1) by the defendant Nos.1 and 2 in favour of the plaintiff, after receiving a sale consideration, is *sine qua non* to grant the relief of specific performance. Therefore, the initial burden lies on the plaintiff to prove her case. Once the plaintiff proves her case, the onus of proof automatically shifts on the defendants to establish their case.

16. In the instant case, P.W.1 filed her chief-examination affidavit on 17.08.2004. On 21.09.2004, the counsel for the plaintiff filed a memo to eschew her chief-examination affidavit on the ground that she is suffering with obsessive compulsive disorder. Except the self-served testimony of P.W.2, there is no other convincing evidence to prove that at the relevant point of time, the plaintiff was suffering with mental ill-health. Simply because the defendants admitted their signature on Ex.A1, it does

not absolve the liability of the plaintiff to prove execution of Ex.A1 agreement of sale by the defendants after receiving sale consideration.

17. As per the averments made in the plaint, the plaintiff paid the sale consideration to the defendants when they purchased the property in the year 1985. As per the averments made in the plaint, the plaintiff paid the sale consideration to the defendants. As per the testimony of P.W.3 one Somisetti Venkata Rao paid the sale consideration to the defendants. For the reasons best known the plaintiff did not choose to examine the said Somisetti Venkata Rao under which circumstance he paid the alleged sale consideration to the defendants on behalf of the plaintiff. There is no consistency in the testimony of P.Ws.2 and 3 with regard to the payment of consideration to the defendants. The plaintiff has not afforded reasons much less cogent and convincing reasons for such a vital discrepancy. If a party to the suit fails to enter into the witness box to substantiate his or her stand by offering himself or herself for cross-examination by the opposite party, then the Court can draw an adverse inference. In the instant case, the plaintiff is the competent person to speak about the execution of agreement of sale by defendants 1 and 2 in her favour as well as payment of consideration. For the reasons best known, the plaintiff did not choose to offer herself for cross-examination. Hence it is a valid ground to draw adverse inference against the plaintiff.

18. It is the case of the plaintiff that the defendants executed the agreement of sale in her favour in the year 1985. From 1985 to

2001, the plaintiff has not taken any steps for obtaining regular sale deed. After lapse of sixteen years, simply because she is entitled to file a suit for specific performance, the plaintiff got issued a notice Ex.A2 dated 10.08.2001. As per the averments made in the plaint, the plaintiff requested the father of the defendant Nos.1 and 3 to execute the sale deed. It is an admitted fact that the father of the defendant Nos.1 and 3 is not a party to Ex.A1 agreement of sale. If that is so, the plaintiff has not requested defendants 1 and 3 to execute a sale deed till issuance of Ex.A.2.

19. As per the principle enunciated in the case cited supra the suit for specific performance has to be filed within the reasonable time. In the case cited supra, the Hon'ble Apex Court observed that the suit for specific performance, filed after lapse of six years from the date of execution of agreement of sale, is not maintainable. In the instant case, the alleged agreement of sale was executed in the year 1985 and the suit was instituted in the year 2001. The plaintiff did not evince any interest to obtain sale deed for a period of 16 years. The plaintiff has not assigned reasons, much less cogent and valid reasons, for not taking any steps to obtain sale deed for such a long period of 16 years. In normal circumstances, one has to file suit within three years from the date of execution of the agreement of sale, if the other side will not cooperate. The material placed before the Court clinchingly establishes that the plaintiff has not approached the Court within the reasonable time. The Court shall not lose sight of this vital aspect while appreciating the contention of the plaintiff. It is a settled principle of law that this Court shall not lightly interfere

with the discretionary orders passed by the courts below. A perusal of the record reveals that the Courts below exercised the discretionary power judiciously basing on sound principles of law. In view of the facts and circumstances of the case and as observed supra, this Court cannot lightly interfere with the concurrent findings recorded by the Courts below. If the findings recorded by the courts below are based on no evidence or based on evidence which is not legally admissible, such findings can be termed as perverse. In the instant case, the findings recorded by the Courts below are supported by oral and documentary evidence. I am fully endorsing with the findings recorded by the courts below that the plaintiff failed to prove execution of Ex.A1 agreement of sale. Viewed from any angle I am unable to accede to the contention of the learned counsel for the appellant that the findings recorded by the first appellate Court are perverse. There is no question of law much less substantial question of law involved in this appeal.

20. In the result, the Second Appeal is dismissed at the stage of admission. There shall be no order as to costs. As a sequel, miscellaneous petitions pending, if any, shall stand closed.

T.SUNIL CHOWDARY, J

4th December, 2017
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