

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

A.S.No.1817 of 1995

JUDGMENT:

This appeal is filed against judgment and decree dated 30.11.1994 in OS.No.78 of 1982 passed by the Subordinate Judge, Kadapa.

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

The suit in OS.No.78 of 1982 was filed for the specific performance of two agreements of sale dated 31.03.1975 directing the defendants to execute a registered sale deed in favour of the plaintiff in respect of the suit schedule land and for other reliefs. According to the averments of the plant, for items 1 to 4 of the plaint schedule property, defendant No.1 executed an agreement of sale in favour of the plaintiff and for item No.5 defendants Nos.2 and 3 executed an agreement of sale. The total area of the land was Acs.7.60 cents. The land was to be laid out into plots, a layout was to be developed and the plots sold. As per the agreement, the defendants were to be paid Rs.240/- per square yard, but the plaintiff was at liberty to sell the land to others at his own rate. According to the plaintiff, in addition

to cash consideration, the defendants were also entitled to four plots of land measuring Acs.0.40 cents in all.

The case of the plaintiff is that the time is not the essence of the contract and that the land was progressively sold to third parties and ultimately, a small bit measuring Acs.0.80 cents was left out as not sold. The plaintiff states that he is ready and willing to complete the transaction even with respect to balance land and is prepared to pay the balance sale consideration. As the defendants refused to execute the sale deed, the suit is filed for specific performance.

In reply to this, the defendants have pleaded that the plaintiff has failed in his endeavour to develop and sell the property. They also pleaded that time was extended till 19.06.1998 and finally mediation was held in the presence of DW.2 and the parties agreed to bring the agreement to a close. Because of this understanding, the original agreements of sale Exs.A1 and A2 were handed over to the defendants. Therefore, they plead that the plaintiff is not entitled to specific performance. In addition, they pleaded that the suit is also barred by time.

On the basis of these pleadings, the following six issues were framed by the Court below:

1. Whether the plaintiff is entitled for specific performance of the agreements dated 31.03.1975?

2. Whether the suit is barred by time?
3. Whether the agreement is cancelled as pleaded by the defendant?
4. Whether the court fee paid is not correct?
5. Whether the plaintiff is entitled for injunction?
6. To what relief?

On behalf of the plaintiff, PW.1 was examined and Exs.A.1 to A.5 were marked. For the defendants, DWs.1 and 2 were examined and Exs.B1 to B.6 were marked. After the trial, the plaintiff's suit was dismissed. The plaintiff has filed the present appeal impugning the judgement of the lower Court.

This Court has heard Mr.Y.Neelalohitha Sastry, learned counsel for the appellant and Mr. Y.N.Lohita, Mr.R.Subba Rao, M/s. Bharadwaj Associates, Mr.S.Lakshminarayana Reddy and Mr.C.V.Rudra Prasad, learned counsel for the respondents.

The facts that are not in dispute are the execution of the two agreements, which are marked as Exs.B.3 and B.4 both dated 31.03.1975. It is also admitted that although the agreements state that the time of performance is only upto 05.06.1976, the parties by consent extended the time for performance. The execution of the sale deeds to various third parties up to June, 1978 is admitted. Even in the written statement, in paragraph 8, it is admitted that the

defendants granted time till 19.06.1978. Therefore, both in view of the settled case law on the subject, which says that time is not the essence in sale of immovable properties and also in view of the admissions and the conduct of the parties, this Court is of the opinion that time was not strictly made the essence in this case.

After considering the pleadings, evidence and submissions, this court is of the opinion that the three points that essentially arise for consideration in this case are the following: (1) whether the plaintiff was ready and willing to perform his part of the contract (2) whether the agreement was cancelled in June, 1978 as pleaded. (3) whether the suit is barred by limitation.

READINESS and WILLINGNESS- As the suit is filed for specific performance of the contract, the plaintiff will have to prove his readiness and willingness. This is both a legal requirement under the Specific Relief Act and also a factual aspect to be proven by the plaintiff in the suit.

Learned counsel for the respondent cited the following judgements on the subject and argued on the question of readiness and willingness.

(1) N.P.Thirugnanam v. Dr.Jagan Mohan Rao and others¹

(2) Sita Ram and others v. Radhey Shyam²

¹ (1995) 5 SCC 115

(3) Pukhraj D.Jain v. G.Gopalakrishna³

(4) P.R.Deb and Associats v. Sunanda Roy⁴

(5) K.S.Vidyanadam v. Vairavan⁵

(6) Koyana Suryanarayana Reddy v. C.Chellayamma⁶

(7) Citadelfine Pharmaceuticals v. Ramaniyam Realestates Private Limited⁷

The essence of all these judgements is that there should be continuous readiness and willingness on the part of the plaintiff. This continuous readiness and willingness is a prerequisite or a condition precedent for granting of the relief of specific performance. Readiness has been interpreted by the Hon'ble Supreme Court as availability of the funds from the date of the execution of the plaint till the date of decree and the willingness has been interpreted to be the conduct of the party in seeking specific performance. As the case law is so well settled, this Court is not going into each of the citations separately.

The argument of the learned counsel for the appellant is that the agreement is for the total property measuring Acs.7.60 cents, out of which Ac.4.17 have been sold over a period of time ending with up to June, 1978. The learned counsel also argued that the entire land has been developed

² (2007) 14 SCC 415

³ (2004) 7 SCC 251

⁴ (1996) 4 SCC 423

⁵ (1997) 3 SCC 1

⁶ Air 1989 AP 276

⁷ (2011) 9 SCC 147

into plots, a layout has been established and a majority of the plots have been sold. What is left is only Ac.0.80 cents which is the subject matter of the suit. Therefore, the learned counsel for the appellant argued that the readiness and willingness of the plaintiff is clearly established in this case.

In reply to this, the learned counsel for the respondents/defendants argued that the readiness and willingness which is a continuous readiness and willingness, is not established in this case, particularly after June, 1978 and till the filing of the suit. Learned counsel contends that the last sale admittedly was made in June, 1978. The counsel pointed out that as per Ex.B1-Book, which is admitted by the plaintiff himself in his cross examination, the last plot was sold in 1978. He also pointed out that after this sale, there is virtually no activity on the part of the plaintiff and that the lawyer's notice was issued demanding specific performance vide Ex.A.3 only on 16.11.1981. He points out in this period of three years, there is virtually no activity and only after the prices of real estate have risen, Ex.A.4 was issued.

This Court, on an examination of the rival claims and the submissions, notices that Ex.B1 is admitted by the plaintiff himself in the cross-examination as a book maintained by the defendant No.1 and signed by the

plaintiff. This book shows that various sales and payments made, and the last entry in Ex.B1 is on 19.06.1978. The witness admits in his cross-examination the contents of Ex.B.1. The learned counsel pointed out that thereafter there was no action from the plaintiff from June, 1978 till he issued Ex.A3 notice in 1981. Therefore, the learned counsel pointed out that the continuous readiness and willingness which is required is not proven. He also argues that in reply to Ex.A3, they have issued Ex.A4 notice, pointing out their version of the case and also strongly urging that the case is barred by time. After receipt of this notice, a suit is filed on 09.04.1982. Learned counsel relying upon judgments reported in **K.S.Vidyanandam** (5 supra) clearly states that inaction for a period of 2 ½ years clearly proves that the plaintiff was not ready and willing so as to claim specific performance. In line with the other judgements of the Supreme Court also, this Court notices that continuous readiness and willingness that is required to be exhibited by the plaintiff is not proved, particularly with regard to the last bit of land measuring Ac.0.80 cents. The lawyer's notice was issued in November, 1981 whereas the last transaction admitted by both the parties was in June, 1978. Even after the notice in 1981, it took the plaintiff another four months to file the suit. Therefore, the gap of three years prior to the notices and the gap of four months after the exchange of

notices, in the submission of the learned counsel for the defendants, does not prove readiness and willingness.

This Court concurs with the first half of the submission of the learned counsel on this point. The delay of three years between the last transaction and the lawyers notice clearly shows that plaintiff was not continuously ready and willing as is required under law. The time gap between the notices and the suit is not too long in the opinion of this Court.

CANCELLATION OF AGREEMENT- The second point that arises for consideration is, whether the agreement has been cancelled. The admitted fact is that the original agreements are not in the custody of the plaintiff. The defendants produced the original agreements, which are marked as Exs.B.3 and B.4. In Ex.A.4 reply notice, the defendants specifically raised a plea that there was mediation on 19.06.1978 and in view of the mediation, it was decided that the plaintiff had to return the agreements executed by him. Pursuant to the said mediation, the agreements were returned. After the reply notice was issued referring to this, the plaintiff filed the suit. But in the plaint he did not speak anything about the settlement that has been mentioned by the plaintiff. On the other hand, he pleads in paragraph 5 that the original agreements were taken away by the defendants in connection with a dispute

with one Rukminamma. The defendants in their written statement reiterated that a settlement was effected and about the surrender of these two documents. They took the plea that the agreements stood cancelled.

After the pleadings were filed, the parties went to trial. The plaintiff did not prove that there was a dispute with Rukminamma and that the defendants took the sale agreements away for filing in the suit. The defendants, however, examined DW.2, who is the mediator by name Mr. Subbaiah. He clearly deposed in his evidence that in his presence the documents were surrendered and the original agreements were abandoned. There is no effective cross-examination of this witness on the said surrender of the documents. In fact, no suggestion was put to DW.2 that the documents were taken away in view of the dispute of the defendant with Rukminamma. In view of this pleading and evidence, this Court holds that Exs.B.3 and B.4 agreements of sale were voluntarily surrendered by the plaintiff to the defendants in June, 1978 in the presence of the mediator. Therefore, it is clear that no further action was contemplated by the parties on these two agreements and they were treated as abandoned. Learned counsel for the respondents argued that no formal notice of cancellation was given and that therefore it cannot be treated that the agreements of sale are cancelled. The learned counsel for the respondents/defendants argued that the issuance of notice

of cancellation is not a mandatory requirement as per law. No case law or citation was produced also to support this conclusion by the plaintiff. This Court holds that there is no legal requirement that a separate notice must be issued for cancellation of the agreement of sale. By the conduct of the parties also the cancellation can be inferred as in this case.

In the facts and circumstances of this case, this Court holds that the production of these two documents by the defendants and the evidence of DW.2 clearly supports the theory of the settlement before DW.2.

LIMITATION: The third point that arises in this case is limitation. The defendants have specifically taken a plea that the suit is barred by limitation. The defendants have also pointed out that in their pre-suit reply lawyers notice itself, which is marked as Ex.A.4, they have taken the plea that the claim is barred by time. They argue that the suit is filed long after the last transaction and after the mutual agreement to cancel the same.

The plea of the plaintiff on the other hand is that under Article 54 of the Limitation Act, when time is not made the essence of the contract, limitation begins only if there is a specific refusal to perform the contract. Learned counsel argued that the reply to Ex.A.3 notice is Ex.A.4 dated 24.11.1981. It is his contention that only after Ex.A.4, the plaintiff was aware that the defendants would not

perform the contract. Therefore, he argues that the period of three years should be reckoned from this date and hence, the suit is in time.

After considering both the submissions, this Court notices that the last transaction in this case took place in June, 1978 as per the entries in Ex.B.1. The mediation between the parties took place in the presence of DW.2 in June, 1978. After that, the case of the defendants is that the agreements were surrendered. No further transactions were took place nor was any notice issued by the plaintiff. The defendants were very clear that the mediation was held only to bring the agreement to an end.

This Court on an examination of the evidence also comes to the conclusion that in June, 1978 a mediation was held to bring the agreement to an end. The purpose of having a mediation through DW2 was to close the dealings between the parties. This was actually done and the original agreements of sale were surrendered by the plaintiff. Therefore, the plaintiff was aware that after June, 1978, the defendants would not be performing their obligations. This Court is, therefore, of the opinion that limitation begins from June, 1978 pursuant to the last sale and also the mediation between the parties. In view of the fact that limitation began from June, 1978 the suit that is filed in 1982 is clearly barred by time.

This Court, therefore, holds that the plaintiff is not entitled to any relief as prayed for.

In addition, the plaintiff has also prayed for injunction. In view of the fact that the plaintiff failed to prove his case or his possession of the property, this Court is of the opinion that the plaintiff is not entitled to relief of injunction as prayed for.

It also came out in the evidence that during the pendency of the suit, the plaintiff transferred the property in favour of his son vide Ex.B.6-a partition deed. This Court is of the opinion that the transfer during the pendency of the suit will not in any way effect the rights of the parties. The doctrine of *lis pendens* squarely applies to the fact of the case and the said document Ex.B.6 is not binding on the defendants, plus the plaintiff has no 'title' to the property to pass on to his son. This action of transferring the property during the suit is also a factor showing the conduct of the plaintiff. This conduct of the plaintiff disentitles him from seeking an equitable relief. In view of this finding a copy of this judgement is directed to be sent to the concerned Sub-Registrar to make a note about this finding. This power is exercised under Order 41 Rule 33 CPC, to do justice between the parties.

For all the above reasons, the appeal is dismissed and the plaintiff/appellant is held to be not entitled to any relief as prayed for. No order as to costs.

As a sequel, miscellaneous petitions, if any, pending in this appeal shall stand closed.

D.V.S.S.SOMAYAJULU, J

Date: 30.07.2018

KLP

