

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

A.S.No.2632 of 1999

JUDGMENT:

This appeal is filed by the unsuccessful defendant against the judgment and decree dated 17.08.1999 passed in O.S.No.98 of 1987 by the Senior Civil Judge, Kadiri, Anantapur District.

The suit is filed for specific performance of a contract of sale dated 24.06.1987 for Rs.37,000/-, for possession of the schedule mentioned property and for costs. The brief averments of the plaint are that the defendant is the owner of the schedule mentioned property. He agreed to sell the same for Rs.37,000/- on 24.06.1987 and executed an agreement of sale after receiving Rs.5,000/- from the plaintiff. The balance was agreed to be paid within one month. The plaintiff is ready and willing to perform his part of contract, but the defendant has not performed his part. The plaintiff got issued a legal notice and waited at the office of Sub-Registrar, Tanakal on 23.07.1987 till 5.00 p.m. but the defendant did not turn up. He also gave a reply with false allegations. Hence, the suit for specific performance.

The brief averments of the written statement of the defendant are that the suit is not maintainable, as the defendant is not exclusive owner of the suit properties. He has not executed the suit agreement as alleged. The plaintiff's mother-in-law by name Ramalakshamma is the aunt of the

defendant. Their lands are adjacent to each others. The plaintiff was trying to sell the land of his mother-in-law. He prevailed upon the plaintiff to execute the suit document with a view to appreciate the value of the land of his mother-in-law and the defendant being innocent, fell into the said trap and executed the suit document. The plaintiff got issued a legal notice to which the reply was given by the defendant. Specific performance cannot be ordered in this suit. The suit claim is false and he prayed that the suit be dismissed with costs.

Basing on the pleadings, the lower Court framed the following issues:

- i) Whether the plaintiff is entitled to specific performance of suit agreement?
- ii) To what relief?

The parties thereafter went to trial. For the plaintiff, PWs.1 to 3 were examined and Exs.A.1 to A.4 were marked. The defendant was examined as DW.1 and Exs.B.1 & B.2 were marked. After a full trial, the lower Court came to a conclusion that the plaintiff is entitled to a decree as prayed for and directed specific performance of the agreement. It is this judgment that is assailed in the present appeal.

This Court has heard Sri M.V. Suresh, learned counsel for the appellant/defendant and Sri C.V. Mohan Reddy, learned counsel for the respondent/plaintiff.

The essential contest that is raised by the learned counsel for the appellant/defendant is that there is a material

alteration in the agreement of sale. The averments in the written statement make it clear that the defendant signed on the agreement of sale which is marked as Ex.A.1. However, the contention as can be seen from the written statement is that the plaintiff with an ulterior motive and to boost the rates of the neighbouring lands belonging to his mother-in-law created Ex.A.1 as an agreement of sale at a higher rate. Page-5 of the written statement states that as the plaintiff who is a veteran litigant wanted to sell the adjacent land at higher rate, he prevailed upon the defendant to execute the present agreement, so that he can show the same to other parties and sell the lands of his mother-in-law at higher rates. Therefore, the defendant's plea is that the agreement of sale is not supported by consideration and is a sham and nominal document. This is the original plea that is raised by the defendant in this suit. Later, the defendant filed another amended written statement stating that the original agreement contains certain extrapolations in survey numbers and extents and that in view of the said interpolations, the agreement is not enforceable. The defendant also pleads that in the reply lawyers notice, the interpolations were not pleaded by oversight and that the said agreement was not before the defendant. This amendment was allowed by vide orders dated 01.08.1997 in I.A.No.149 of 1997. It appears that earlier one more IA was filed and vide orders dated 25.10.1989 in IA No.282 of 1999 the defendant raised a plea

that he is not aware of the scribe or the attester and that he never scribed his signature in the presence of so-called persons.

The lower Court dealt with all these issues in issue No.1 and pronounced his judgment. Hence, in the course of hearing of the appeal, the learned counsel for the appellant and the respondent relied upon the so-called interpolations in the agreement of sale and argued about the same. The concentration of the learned counsel was on the interpolations which are contained in Ex.A.1. The lower Court underlined with green ink the 'interpolations' pointed out in page-2 of Ex.A.1 (the last two lines). In page-3 i.e., the schedule, line-3 relating to Ac.9.22 cents and Survey No.1700/1 is also underlined.

Issue No.1 as framed by the lower Court is a comprehensive issue and it takes into fold the averments about the corrections etc. in Ex.A.1. This Court is of the opinion that the following two points essentially arise for decision in this case:

- i) whether Ex.A.1-agreement of sale is correct and whether the 'interpolations' pointed out are made later or not; and
- ii) whether the plaintiff proved his readiness and willingness to get a decree for specific performance, in case point No.1 is answered as correct.

The learned counsel for the appellant/defendant relies on PW.1's evidence. He points out that in the cross-examination the witness says that there are interpolations in Ex.A.1 'subsequently'. Hence, he states that Ex.A.1 is not a document to be relied upon nor can it be enforced in view of the interpolation. However, it is noticed that immediately, thereafter the witness denies that the words in the last two lines of Ex.A.1 and with regard to Survey No.1700/1 in the last page of Ex.A.1 are in different inks.

In reply to this, the learned counsel for the respondent argued that in addition to PW1, PW.2 who is the attesor and PW.3 the scribe were also examined. The learned counsel points out that the attesor clearly spoke about the fact that Ex.A.1 was written in one stretch and that thereafter the witnesses attested the document. Similarly, the scribe deposed that the contents of Ex.A.1 were read over to the parties to the suit and thereafter the defendant scribed his signature to the same. The witness also deposed in his cross-examination that the terms and conditions with regard to the schedule property were settled in his presence and then Ex.A.1 was written. The witness denied his suggestion that the words underlined by the court in page-1 of Ex.A.1 and in page-3 of Ex.A.1 were interpolated subsequently. The learned counsel therefore points out that if the entire evidence of PWs.1 to 3 were read together, it shows that Ex.A.1 was executed with the consent of the defendant only. The learned

counsel for the respondent also points out that in the evidence of DW.1 also, he stated that interpolations were made subsequently. In the cross-examination the witness admits that in the reply notice that he has issued to the plaintiffs notice for specific performance, he did not mention that the land within the boundaries mentioned in Ex.A.1 does not exist and that he did not mention about the survey numbers. He also admits that he executed Ex.A.1-agreement of sale for one survey number. The learned counsel for the respondent also points out that at one stage the witness states that he did not receive any legal notice from the plaintiff. Therefore, it is the submission of the learned counsel that the defendant is not a trustworthy witness and his evidence should not be relied upon.

This Court also notices that Ex.A.2 lawyers notice clearly mentioned the extents and the boundaries of the suit schedule property. Survey No.1700/1 is item-2 of the schedule in Ex.A.2. Out of the lands in Survey Nos.1458/1 and 1700/1, Ac.4.05 cents was agreed to be sold. The boundaries of the land to be sold are given with clarity. Despite the receipt of this notice, the defendant did not deny the fact that he has not agreed to sell the land as described in the notice.

As rightly pointed out by the learned counsel, Ex.A.3 reply notice does not speak anything about the land covered by Survey No.1700/1. If the theory advanced by the plaintiff

is correct, this Court is of the opinion that the defendant should have denied at the very inception that the land covered by Survey No.1700/1 is not part of the lands agreed to be sold. Besides, the details of the land with boundaries measuring Ac.4.05 cents are clearly mentioned in the agreement Ex.A.1 and in the lawyers notice. If really this land in Survey No.1700/1 is included by subsequent interpolation, then the defendant could have introduced evidence to show that this land will not fit into the boundaries mentioned in Ex.A.1 or of the plaint schedule. If the extent in Survey No.1700/1 is added subsequently, the mis-match between the boundaries and the physical land on ground could have been pointed out. The fact that absolutely no evidence is let in makes it clear that the land with the four boundaries mentioned Ex.A.1 and in the plaint comprises of the land in Survey No.1458/1 and 1700/1. Therefore, this Court is of the opinion that a) because of the failure to reply that survey No.1700/1 in Ex.A.3 reply and failure to lead evidence to show that if land in Sy.No.1700/ is included later it will not fit within the four boundaries lead this Court a conclusion that the 'so-called interpolations' did not materially alter the Ex.A.1-agreement.

In addition, this Court notices that this plea of material alteration and interpolation were not taken at the outset. In 1989, the defendant amended the plaint by filing IA No.282 of 1989, which was allowed on 25.10.1989. The plea taken was

that he is not aware of the scribe or the attestors. Later, IA No.149 of 1997 was filed and the same was allowed on 01.08.1997. The plea of interpolation was taken at this stage. By then the evidence of PWs.1, 2 & 3 completed in April, 1994. This Court is therefore of the opinion that this plea of interpolation is an after thought and the explanation given that the defendant was not aware of the interpolation till much later does not appear to be correct.

In the written statement, it is also noticed that the execution of the agreement is admitted, but the defendant says that he executed it nominally. In addition, on 24.06.1999 in the chief examination, the defendant as DW.1 states that he executed Ex.A.1 nominally for an extent of Ac.1.50 cents. Later in the cross-examination, he states that he executed Ex.A.1 nominally for one survey number only. He also admits that he did not verify that the boundaries of that land were mentioned in Ex.A.1 by the time he signed it.

This Court notices the varying stands taken by the defendant at various points of time. Ac.1.50 cents is not the schedule property at all. Even if survey No.1700/1 is included, the total extent agreed to be sold is Ac.4.05 cents. If Ex.A.1 is executed nominally for one survey number, the defendant had a duty to state that he executed Ex.A.1 for one particular survey number only and the land comprising the second survey number was included by the plaintiff behind his back. None of these are proved. The scribe and the

attestors were also examined, but detailed cross-examination was not done. In the cross-examination of DW.1, no suggestions were put to this effect that the sale deed for Ac.1.50 cents is in one survey number only. The lower Court also noticed the fact that the defendant did not get an advocate commissioner appointed to demarcate the land on ground in furtherance of the theory that the land in one survey number alone is agreed to be sold.

In addition to this, this Court also notices that the defendant did not prove what is pleaded by him viz., that there are other owners to the suit property and their consent was not taken. This is a fact eminently within the knowledge of the defendant. He could have proved the same. In his written statement, the defendant states that he is entitled to Ac.0.49 cents only. He states that the mother of the defendant and the defendant got divided the suit property orally. The total property is said to be Ac.3.92 cents. Therefore, his share according to the defendant is Ac.1.96 cents along with family members. There is no whisper in the written statement about a registered partition deed. However, in the cross-examination of DW.1 on 07.07.1999 he clearly states that they got divided the property under a registered document.

The defendant merely filed Exs.B.1 & B.2, which are extracts of 10 (1) account and 10 (2) account respectively. No title deed, partition deed or other documents were filed. Both

these exhibits are issued in the year 1994, whereas the suit was filed in 1987 itself. These are *ante litem motam* documents. It was held by the Hon'ble Supreme Court of India in number of cases that the documents prepared during the course of pendency of the suit are to be viewed with caution, as the element of personal interest cannot be ruled out. Even otherwise, these documents do not support the case of the defendant as they are not documents of title nor do they prove the case pleaded.

In view of all the above, this Court is of the opinion that the pleas set up by the defendant are not correct. No requisite steps were not taken for identification of the suit land on ground. In the written statement, the defendant clearly admits that he executed the document. He could not prove 'nominal' nature of the suit document. The bar under Section 92 of the Indian Evidence Act also applies to the evidence. The defendant could not prove that the entire document was a sham and was not meant to be acted upon. The varying defences taken at the different points of time coupled with the fact that the execution of Ex.A.1 is admitted leads this Court to a conclusion that the defendant is meant upon avoiding the enforcement of Ex.A.1 agreement. This Court is of the opinion that the defendant is not entitled to do so.

The admission of the defendant that Ex.A.1 was executed coupled with the evidence of the plaintiff, the scribe or the attester leads this Court to come to a conclusion that

Ex.A.1 was willingly and voluntarily executed and that there are no material alterations in the same which would vitiate the entire agreement and enable the defendant to avoid the suit transaction. This Court therefore holds that Ex.A.1 agreement of sale is a correct and a valid document. Point No.1 is answered in favour of the plaintiff and against the defendant.

The case law cited by the learned counsel for the appellant/defendant is as follows:

i) ***Dharmabiri Rana v. Pramod Kumar Sharma (dead), their LRs***¹ wherein the Hon'ble Supreme Court held that the specific performance can be ordered only when the person executing the agreement as the right of transferring the property. In the case on hand, the defendant admitted the execution but stated it was nominal. As noticed earlier, there is no proof of the fact that there are other co-owners. Neither any documentary evidence or credible oral evidence was introduced to prove the same. Hence, the ratio of this decision is not applicable to the facts of the present case.

ii) The next decision cited by the learned counsel for the appellant is ***M. Veera Raghaviah v. M. China Veeraiah***². In this case, this Court held that property belonging to coparceners cannot be sold by one coparcener without the consent of others. In the case on hand, the evidence of coparcenery or joint owners is lacking.

¹ 2018 (1) ALD 98 (SC)

² AIR 1975 AP 350

iii) ***V. Basavayya v. M. Venkayya (died) per LRs***³ is another decision of this Court cited by the learned counsel for the appellant/defendant. In para-16 of the said judgment, a learned single Judge held that because a material alteration to an agreement amounts to a cancellation of the agreement. This Court on a review of the evidence on record is of the opinion that the material alteration is not proved in this case and that the agreement is not vitiated in any manner because of the same.

The other point that survives for consideration is whether the plaintiff proved his readiness and willingness. In the case on hand, the sequence of events reveals that Ex.A.1-agreement of sale was executed on 24.06.1987 and within one month from the said date, on 13.07.1987 the plaintiff gave a lawyers notice demanding specific performance, which is marked as Ex.A.2. In the lawyers notice, the plaintiff asked the defendant to be present at the concerned Sub-Registrar's office on 23.07.1987. The balance sale consideration was also shown to be available and as per the depositions, the amount is also deposited into the Court. Therefore, the readiness and willingness of the plaintiff in the suit is proved. This fact of deposit of the balance sale consideration was asserted both in the chief examination and also in the cross-examination of PW.1.

³ 1997 (3) ALT 583

Therefore, for all these reasons, this Court is of the opinion that the plaintiff is entitled to a decree as prayed for. The point No.2 is also held in favour of the plaintiff/present respondent in the appeal.

On a review of all the facts, evidence and law, this Court is of the opinion that there are no infirmities in the judgment and decree passed by the lower Court warranting interference in the appeal. This Court concurs with the findings of the Court below on both the issues framed and decided.

Hence, the judgment and decree dated 17.08.1999 passed in O.S.No.98 of 1987 by the Senior Civil Judge, Kadiri, are confirmed and the appeal is accordingly dismissed. In the circumstances of the case, there shall be 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: 29.06.2018
Isn