HONOURABLE SRI JUSTICE A. SHANKAR NARAYANA

C.C.C.A. No.32 OF 2008

JUDGMENT:

Aggrieved over the dismissal decree dated 31.07.2007 in O.S. No.683 of 1995 passed by the learned II Senior Civil Judge, City Civil Court, Hyderabad, plaintiff preferred the present C.C.C.A., under Section 96 of Code of Civil Procedure, 1908 (for short 'CPC'), requesting to set it aside and grant the suit amount with interest as prayed for.

2. Heard Sri D. Sesha Sayana Reddy, learned counsel for the appellant, and Sri Gopal Govind Naik, learned counsel for the respondent, and perused the material on record.

3. A few facts, which are relevant for the purpose of adjudicating upon the controversy in the present appeal, are that the defendant agreed to sell an extent of 1,119 square yards with a House bearing No.8-2-686/1/66, located at Road No.12, Banjara Hills, Hyderabad, for a consideration of Rs.11,63,800/- . They thus, entered into an oral agreement on 27.04.1992, pursuant to which, a sum of Rs.1,23,800/- said to have paid to the defendant as part of sale consideration, in token of which, a receipt alleged to have passed by the defendant, but, the amounts were paid in the name of Sri M.P. Narsi Reddy and Sri K. Vijaya Kumar. It is stated that the defendant also ensured that he would get all the requisite permissions and clearances as early as possible and thereafter, he would execute a

registered sale deed. When the defendant approached on 18.05.1992, representing that he paid Rs.2,00,000/- for getting permissions and clearances from various authorities, the plaintiff alleged to have paid that amount on that day and again, the defendant approached him on 04.06.1992, requesting to pay Rs.1,00,000/-, he paid the said amount and endorsements were made o the original receipt. Thus, a total sum of Rs.4,23,800/- was said to have paid by the plaintiff to the defendant.

4. The plaintiff claims that despite his insistence to get a registered sale deed executed, the defendant went on postponing, and, therefore, he got issued a legal notice, but no answer was given. Therefore, he laid the claim for refund of Rs.4,65,484-60 paise with interest at 36% per annum thereon till 03.06.1995, which would work out to Rs.8,89,284-60 paise, which was rounded off to Rs.8,89,258/-.

5. The defendant refuted the allegations mentioned in the plaint. He claimed that the house agreed to be sold was bearing No.8-2-686/1/6, and the possession thereof was also delivered to the plaintiff on receipt of Rs.1,00,000/- on 04.06.1992. According to the defendant, plaintiff never sought registration of the subject property. He denied that he agreed to return the consideration received under the agreement with interest at 36% per annum. However, the defendant pleads that taking advantage of the detailed terms and conditions of a full-fledged agreement and surrender of possession of the house, plaintiff conveyed it to a third party.

6. The defendant claimed the very fact that no notice was issued to him before filing the suit shows that there was no failure on his part and without seeking the relief for specific performance of the alleged agreement of sale, the plaintiff is estopped from seeking the relief of refund of due besides claiming that the suit claim is barred by limitation, and, therefore, sought to dismiss the suit with exemplary costs.

7. It appears that later additional written statement was also filed stating that possession of the property was agreed to be given was given in part performance of the contract for sale as security for the consideration received and unless the plaintiff returns the property delivered, he is not entitled to return of the consideration paid and also contends that the claim is in respect of the amount paid three years prior to the date of the suit and, therefore, not within time.

8. It appears no rejoinder is filed.

9. Based on the aforesaid pleadings, the following issues were framed for trial:

> "1) Whether the plaintiff is entitled to the suit claim with interest as asked for?
>
> 2) Whether the plaintiff is estopped by his conduct in not proceeding to seek the specific performance of contract dt.27/04/1992?
>
> 3) To what relief?"

Additional Issue:

(1) Whether the suit is filed by the plaintiff is barred by limitation?

10. To substantiate his case, the plaintiff examined himself as PW.1 and marked Exs.A-1 to A-3, whereas on behalf of the defendant, he examined himself as DW.1, but, no documents were marked.

11. The Court below on the additional issue, recorded that since the suit was filed on 03.06.1995 and Ex.A-1 reflecting last payment, having taken place on 04.06.1992, it cannot be said that the suit is not within three (3) years period and thereby, held that the suit is not barred by limitation, holding the additional issue in favour of the plaintiff.

12. On issue No.1, the Court below, while narrating the case of the plaintiff, has also referred to that the plaintiff pleaded that he learnt that the suit property has been standing in the name of one Suthari and, as such, the defendant was not in a position to register the document. In relation to the said aspect, the Court below observes that except the self-serving statement of PW.1, he did not produce any document showing that the property agreed was standing in the name of Suthari and he did not even examine any other witness to substantiate it, and thereby, held that the said plea remained as plea only without any proof.

13. On the main plea of the plaintiff, the Court below observed that the burden rests on the plaintiff to prove that it was an oral agreement between himself and the defendant and for return of the amount thereunder, and in that context, the Court below would observe that though, it is the case of the plaintiff that one M.P. Narsi Reddy and K. Vijay Kumar were present at the time of payment of Rs.1,23,800/- under Ex.A-1, he did not choose to examine either of them to substantiate that plea and opined that the plaintiff failed to prove that he is entitled to file suit for refund of the amount without seeking the relief of specific performance of the contract. The Court, then refers to the judgment of this Court in **P. Prabhakara Rao v. P. Krishna** [2007 (2) ALD 665], for the proposition that in an oral agreement of sale, the burden of proof is heavier on the person pleading it when compared to the one that is in respect of a written agreement and that the *bona fides* and truthfulness of a person pleading oral agreement, put to a more stringent test than one adopted in cases of written agreements. Concerning what should be the test and what should include, as observed by this Court, the Court below refers to that an oral agreement for sale, shall include (a) identity of the property, (b) consideration for sale, (c) mode of payment thereof, (d) the timing and method of delivery of possession, (e) the period, within which the contract must be concluded; and (f) the consequences must ensue, on account of non-compliance of the conditions. Whereas in a written contract, these conditions are by and large reflect with clarity and therefore, in an oral agreement, the

aforesaid salient features ought to occur which are required to be proved through reliable evidence.

14. The Court below then observes that to entitle for refund of the amount instead of going for the relief of specific performance of contract, one has to prove that there is an agreement for refund of the amount. The Court below observed that the plaintiff failed to prove that there was an identity of mind between the parties to the suit at the time of entering into oral agreement.

15. The Court below, observed that, though, the defendant has stated that H.No.8-2-686/2/66 was the plot to be sold, the plaintiff having shown house No.8-6-686/1/66, did not evince any interest in rectifying the wrong number and for the reasons best known to him, the plaintiff has failed to establish that there was agreement for refund of the amount paid under oral agreement, and, therefore, records the finding that the plaintiff is not entitled to the suit claim.

16. The learned trial Court under Issue No.1, on the plea taken by the plaintiff that the plaint schedule property, in fact, stands in the name of one Suthari, observed that the plaintiff has not proved the said plea by examining third parties or any witnesses to prove that the suit schedule property really stands in the name of the said Suthari.

17. In regard to oral agreement set up by the plaintiff, the learned trial Judge did 0not believe it observing that the burden to

prove oral agreement between the parties was onerous and entirely casts on the plaintiff associated with the condition that the amounts paid towards advance were agreed to be repaid with interest. In that direction, the learned trial Judge observed that except putting forth the plea therefor, the plaintiff has not adduced any evidence at all and more so without claiming the relief to enforce the agreement of sale. In relation to the degree of burden cast on the plaintiff when oral agreement is set up, the learned trial Court referred to the ruling in ***P. Prabhakara Rao v. P. Krishna Rao*** [2007 (2) ALD 655] wherein this Court pointed out that in oral agreement of sale the burden of proof is heavier on the person pleading it when compared to one that is needed in respect of a written agreement and also the *bona fides* and truthfulness of a person pleading oral agreement put to a more stringent test than one adopted in cases of written agreements and this Court even observed what are the salient features that are to be present in case, one wants to prove an oral agreement of sale of immovable property, being (1) identity of the property (2) consideration for sale (3) mode of payment thereof (4) the timing and method of delivery of possession (5) the period within which the contract must be concluded, and (6) the consequences must ensue, on account of non-compliance with the conditions incorporated therein. This Court comparing with a situation where the written contract would be occurring holds since all these conditions would invariably reflected with clarity and certainty and to succeed one has to place reliable evidence.

18. In regard to the discrepancy of house number, while referring to indolent attitude of the plaintiff, would comment that though, the written statement was filed showing house number in relation to which the parties alleged to have entered into an agreement as House No.8-2-686/1/66, the plaintiff has not taken any interest even to correct the door number of the house in the plaint.

19. Concerning legal notices alleged to have been issued by the plaintiff under Exs.A2 and A3 referred to what has been stated by D.W.1 that the address mentioned in Exs.A2 and A3 do not pertain to him and in fact Exs.A2 and A3 which are the envelopes. Thus, it appears that the trial Court did not believe the plea of the plaintiff that the legal notice got issued prior to filing of the suit. With regard to one of the pleas raised by the defendant that he delivered portion of the property to the plaintiff, and unless the plaintiff returns the said property he is not entitled to demand for return of the consideration paid and the other plea put forth by the defendant in his written statement that the plaintiff took advantage of all detail terms and conditions of a full-fledged agreement surrendered possession of the site and the house conveyed to him was conveyed to a third party and thereby lost his right to ask for specific performance of contract. Thus, basing on the same, the learned trial Judge observed that the plaintiff did not rebut that plea and did not controvert in his evidence and no rejoinder was filed by the plaintiff, and, thus, disbelieved the

alleged oral agreement and negatived the Issue holding it against the plaintiff.

20. On Issue No.2, the trial Court arrived at a finding that without seeking the relief of specific performance of contract, mere relief of refund of the amount is not warranted and the plaintiff is estopped in seeking the relief of refund of the amount paid by him, and, thus, held Issue No.2 even against the plaintiff.

21. On Additional Issue No.1, the trial Court found that the suit was filed within limitation as the suit was laid on 3.6.1995 and the last payment made by the plaintiff was on 4.6.1992 and thus, claim was within the period of three years. Hence, Additional Issue was answered in favour of the plaintiff.

22. Turning to the grounds, the plaintiff agitates that though, the defendant as D.W.1 had categorically admitted in his cross-examination that he did not have any documents and filed in some other case to establish that the property stands in his name, the Court below ought not to have come to the conclusion that the property stands in the name of the respondent and possession was delivered to the appellant.

23. The next ground agitated by him is that in case the possession was delivered, the respondent should have asked the balance amount from the appellant, when such demand was not there the amount of consideration and the very fact that he has not taken

any action calling balance of sale consideration, ought to have taken notice by the Court below.

24. It is also agitated by the appellant that the respondent did not establish regarding delivery of the property to him (appellant). In fact, ground No.5 reads thus:

> "5. The lower court ought to have seen that the appellant has established making of payment for the property which has been purchased by filing a receipt, and that the respondent did not establish regarding delivery of property in favour of the appellant."

25. Further ground is that it is the respondent who has to establish that the property stands in his name by filing a document and not in the name of Suthari, when a clear averment is made by the appellant in the plaint as well as in the evidence. He, then, refers to the ruling in ***Prabhakar Rao v. P. Krishna Rao*** [2007 (2) ALD 655], and stated that identification of the property, sale consideration, mode of payment and the period, have been established by the plaintiff through his pleadings and Ex.A1, but the lower Court did not properly appreciate.

26. In regard to the demand said to have made by the plaintiff, he would refer to sending of notice under Exs.A2 and A3 and it is always open to him to file suit for recovery of money basing on oral agreement, and, therefore, filing of suit for specific performance of contract does not arise as the respondent has not holding title.

These have been the main grounds agitated in the Grounds of Appeal.

27. These grounds have been once again agitated in the submissions made by the learned counsel for the appellant, more particularly, on the main ground that the property is not standing in the name of the said Suthari, even after recording the same in the judgment, the Court below ought to have allowed the suit claim and pass a decree as prayed by the plaintiff (appellant) and ought not to have rejected the claim.

28. Now, the following points are formulated for determination.

(1) Whether the oral contract of sale pleaded by the appellant is proved, and in case the contract is not fructified earnest amount shall be refunded?

(2) Whether the suit without seeking the relief of enforcement of agreement of sale for recovery of amount is maintainable?

29. Ex.A1-cash receipt dated 27.4.1992 refers to receipt of cash of Rs.1.23,800/- by the defendant from the plaintiff. It, of course, contains the signatures of two witnesses. It is written on a Letterhead showing details of the property. In fact, it contains certain other recitals touching the very contract itself, but the question is whether the said oral contract is proved or not depends on the evidence let in by the plaintiff.

30. In this direction, the plaintiff has not examined the other two witnesses or at least one of them, whose signatures are finding

place in Ex.A1, to prove not only the agreement of sale but even the crucial term or condition which the plaintiff would plead as to refund of the amount in case of default on the part of the respondent. Except self-serving statement of the plaintiff as appellant, there is no substantiation though examination of the attestor and the scribe. substance in his cross-examination. When scrutinized the evidence of plaintiff as P.W.1, he would answer that the defendant executed sale deed but he did not file the same into Court. He expressed ignorance as to who is in possession of the property on the date when he deposed. He admits the presence of Mr. Narsireddy and Vijay Kumar at the time of execution of Ex.A1. He even answers to a question that the said Narsi Reddy was present when the endorsement was made on the reverse of Ex.A1, and denied the suggestion that Ex.A1 is a fabricated document and Exs.A2 and A3 are an after-thought. He answers to certain other questions though, he is an Income Tax Assessee he does not remember whether these amounts were shown in Income Tax returns, said to have paid under Ex.A1 transaction. He states that he came to know that the defendant was not the owner of the property, which he agreed to purchase. These have been the answers given by him certainly they do not substantiate the stand he has taken for the reason that the said Narsi Reddy, who is a crucial witness according to him, is not examined nor did he assign any reason therefor. When the plaintiff fails to substantiate that there was any condition in the oral agreement of sale or really enter into, certainly, based on Ex.A1 and endorsement on its reverse and Exs.A2 and A3 which are said to be the legal notices got issued by him, without there being anything in the direction that they were really issued as he did not file copy of legal notice even, it cannot be said that he is able to substantiate both points 1 and 2. Therefore, the findings recorded by the Court below on Issue Nos.1 and 2 cannot be disturbed for the reason that these findings were recorded basing on proper appreciation of evidence on record in accordance with evidentiary rule.

31. When the very oral agreement stood not proved and not substantiated, the question as to whether the suit is maintainable for recovery of money without seeking the relief of enforcement of alleged agreement of sale looses its significance.

32. Thus, there is no merit in the Appeal, and, accordingly, the same is dismissed. There shall be no order as to costs.

As a sequel thereto, Miscellaneous Applications, if any, pending in the present Appeal shall stand dismissed.

A. SHANKAR NARAYANA, J

February 14, 2018.

PV / gbs