

THE HON'BLE SRI JUSTICE M. SEETHARAMA MURTI

Appeal Suit No.1284 of 1998

JUDGMENT:

This first appeal suit, under Section 96 of the Code of Civil Procedure, 1908, by the unsuccessful plaintiff is directed against the decree and judgment, dated 31.03.1998, of the learned Senior Civil Judge, Rajampet, passed in OS.No.1 of 1995.

2. I have heard the submissions of Sri P.R.Prasad, learned counsel representing Ms. Y.N. Lohitha, learned counsel appearing for the appellant-plaintiff, and of Sri S. Suman, learned counsel appearing for the respondent-defendant. I have perused the material record.

3. The parties in this appeal shall hereinafter be referred to as the plaintiff and the defendant as arraigned in the original suit for convenience and clarity.

4. Before proceeding further, it is necessary to refer to the cases of the parties.

5. The case of the plaintiff, in brief, is this: - 'The defendant, having agreed to sell Ac.6.64 cents of land (hereinafter referred to as 'the plaint schedule property') for a consideration of Rs.1,50,116/- [Rupees One Lakh Fifty Thousand One Hundred and Sixteen only], received an advance of Rs.10,000/- and executed an agreement of sale, on 05.08.1994, in favour of the plaintiff. Under the said agreement, the defendant agreed to receive the balance of sale consideration and execute a registered sale deed in favour of the plaintiff. The plaintiff approached the defendant with the balance of sale consideration and made a request to receive the same and execute a registered sale deed in his

favour. The defendant received Rs.30,000/- only since her husband is unavailable and stated that the presence of her husband is required to execute the document and directed the plaintiff to come with balance sale consideration within a week. As desired by the defendant, the plaintiff approached her with Rs.1,10,116/- and asked her to comply with the terms of the agreement of sale. The defendant, without giving proper reply, evaded to receive the balance of sale consideration and execute the registered sale deed. Thereafter, the plaintiff got issued a notice, dated 02.09.1994, calling upon the defendant to receive the balance of sale consideration and execute the registered sale deed. The defendant issued a reply, dated 14.09.1994, admitting the execution of the agreement of sale, but, denying the receipt of Rs.30,000/- and, however, further expressing her willingness to receive the amount within ten days and execute the registered sale deed. The said reply was received by the plaintiff on 21.09.1994. The plaintiff again got issued another notice, dated 27.09.1994, requesting the defendant to inform the date and time of registration. There was no communication from the defendant. The defendant falsely denied the receipt of Rs.30,000/- from the plaintiff towards part of sale consideration. As a matter of fact, Mavilla Chalapathi of Kodur was present at the time of payment of Rs.30,000/- to the defendant at Kadapa. The defendant is bound to give credit to the said payment made towards part of sale consideration. Though the plaintiff was and is always ready and willing to perform his part of the contract, the contract of sale could not be enforced due to the dubious attitude of the defendant. For the reasons best known to the defendant, she failed to intimate the date and time convenient to her for

registration of the sale deed. Since the defendant is avoiding to perform her part of the contract, the suit is filed for specific performance.'

6. The defence, in brief, is as follows: - 'The material allegations in the plaint are false. It is true that this defendant executed the suit contract of sale, dated 05.08.1994, and received Rs.10,000/- on the same day from out of the total consideration of Rs.1,50,116/-. It is false to say that the plaintiff approached the defendant with the balance amount and requested to receive the same and execute the registered sale deed in his favour and that this defendant received Rs.30,000/- only and directed him to come with the balance amount after a week. The said allegations are invented by the plaintiff for a wrongful gain. It is absolutely false to say that the plaintiff approached the defendant with Rs.1,10,116/- and asked her to comply with the terms of the suit contract of sale. The said allegation is also invented. After the suit contract of sale, the defendant approached the plaintiff several times requesting to pay the balance of sale consideration, but, the plaintiff postponed the matter on one pretext or the other. The plaintiff orally requested the defendant that he will pay the balance sale consideration of Rs.1,40,116/- within few days but issued a notice on 02.09.1994 with false allegations. The story of part payment of Rs.30,000/- stated in the notice is evidently a patent false story. The notice is bald and the plaintiff has not given details of part payment and the reasons for not getting the same endorsed on the contract of sale. Since the plaintiff failed to perform his part of the contract, the suit contract of sale stands cancelled. The plaintiff has no capacity to pay the balance of sale consideration. The plaintiff issued notice, dated 27.09.1994, with false allegations, to fix date for registration and orally canvassed that he

will use his rowdy elements and get the sale deed registered. Hence, due to fear, the defendant could not fix up the date for registration. The plaintiff is a seasoned litigant and is having support of goondas. If really the plaintiff has got capacity and is willing to perform his part of the contract, the Court (trial Court) may be pleased to direct the plaintiff to deposit Rs.1,40,116/- into Court immediately. And, on the plaintiff doing so, this defendant will execute the registered sale deed as per the orders of the Court. Since the plaintiff failed to pay the balance consideration within the time stipulated, the same stands cancelled. The suit is filed with ulterior motives. Hence, the suit may be dismissed.'

7. Having regard to the above pleadings, the trial Court framed the following issues for trial.

1. Whether the part payment of Rs.30,000/- is true?
2. Whether the plaintiff is always ready and willing to perform his part of the contract?
3. Whether the time is essence of the contract?
4. Whether the suit agreement is enforceable?
5. To what relief?

8. At trial, the plaintiff was examined as PW1 and exhibits A1 to A6 were marked on his side. The husband of the defendant was examined as DW1 and the notices exchanged during the pendency of the suit were exhibited as exhibits B1 & B2.

9. As noted, on merits and by the judgment impugned, the trial Court dismissed the suit of the plaintiff. Hence, the plaintiff is before this Court.

10. The points that arise for determination in this first appeal suit are – (i) Whether the plea of the plaintiff that a part payment of Rs.30,000/- was made to the defendant towards part of sale consideration is true? (ii) Whether the plaintiff had no capacity to pay the balance of sale consideration of Rs.1,40,116/- as contended by the defendant? And, whether the plaintiff was and is not ready and willing to perform his part of the contract? (iii) Whether the decree and judgment are unsustainable under facts and in law as being contended by the plaintiff? And, (iv) To what relief?

11. I shall deal with the contentions of both sides while dealing with the above points settled for determination.

12. **POINT No.1:** To begin with, it is to be noted that the execution of exhibit A1-the suit contract of sale by the defendant in favour of the plaintiff and the terms thereof are admitted. The total consideration agreed to under exhibit A1 is Rs.1,50,116/-. Under exhibit A1, the plaintiff paid Rs.10,000/- to the defendant and the balance sale consideration payable was Rs.1,40,116/- is also admitted. However, the case of the plaintiff, as stated in exhibit A2 notice, dated 02.09.1994, is that when he approached the defendant with the said balance of sale consideration, the defendant received only Rs.30,000/- as her husband was unavailable and his presence is required for execution of the document and requested him to pay the balance within one week thereafter and that, therefore, the plaintiff again approached the defendant three days prior to exhibit A2 notice, with the balance sale consideration and requested her to receive the same and register the sale deed but, the defendant did not give proper reply and sent him away. However, in exhibit A3 reply notice, the defendant specifically denied the above said allegations made in exhibit A2

notice of the plaintiff and stated that the plaintiff never approached her with the balance of sale consideration and never paid Rs.30,000/- and that the entire balance amount of Rs.1,40,116/- payable under exhibit A1 is due. In the oral evidence, the plaintiff asserted his case and the husband of the defendant asserted the defence of the defendant.

12.1 In this backdrop, learned counsel for the plaintiff forcefully contended that non examination of the defendant, who received the said Rs.30,000/- and who is a material witness, is fatal to the defence and that the plaintiff could have cross examined the defendant and elicited the truth from her had she been examined as a witness in the suit and that for her non examination, an adverse inference has to be drawn and the evidence of the plaintiff regarding payment of Rs.30,000/- has to be accepted and that the trial Court erroneously held that the plaintiff failed to prove the said part payment. In reply, learned counsel for the defendant contended that the husband of the defendant, who was examined as DW1, got drafted the written statement of the defendant by giving instructions on behalf of his wife and that he is a competent witness under Section 120 of the Indian Evidence Act, 1872, and that he categorically deposed that except the advance of Rs.10,000/-, no other amount was received by his wife, and that the contention of the plaintiff that a part payment of Rs.30,000/- is made is false and that in the facts and circumstances of the case, the non examination of the defendant is not fatal to the defence.

12.2 As rightly pointed out, it is not even suggested to DW1, the husband of the defendant, that the defendant is being intentionally withheld from being examined as a witness lest truth would come out. In the absence of such a suggestion given to DW1 and in the light of the evidence of DW1, this Court

finds that the contention of the plaintiff with regard to non examination of the defendant needs no countenance. Further, either in exhibit A2 notice or in the plaint, there is no mention of the date on which the plaintiff approached the defendant with the balance of sale consideration and paid Rs.30,000/- to her. However, PW1 in his evidence for the first time stated that ten days after execution of exhibit A1, contract of sale, he tendered the balance of sale consideration but the defendant received Rs.30,000/- only by asking him to come after a week on the ground that her husband is not in the village and that he paid the said sum in the presence of one Koduru Chalapathy. Nonetheless, in exhibit A2 notice, there is no mention that the said sum of Rs.30,000/- was paid in the presence of the said witness. Despite a suggestion to PW1 that no such part payment was made in the presence of the said person and that his evidence in that regard is false, the plaintiff failed to examine the said M. Chalapathy of Kodur as a witness to corroborate his version. Further, the said part payment pleaded by the plaintiff is not endorsed on the reverse of the exhibit A1, suit contract of sale. Not even a receipt was obtained in respect of the said payment. It is borne out by evidence that the plaintiff is well versed in litigation. No reasons are forthcoming from the plaintiff for not obtaining an endorsement of part payment on the reverse of exhibit A1 or a receipt. Therefore, the contention that he paid Rs.30,000/- towards part of sale consideration even without obtaining an endorsement on the reverse of exhibit A1 or obtaining a receipt cannot be accepted. No explanation is also forthcoming for non examination of the said Chalapathy.

12.3 On careful analysis of the evidence and for all the above reasons, this Court finds itself in agreement with the well considered finding of the trial

Court that the contention of the plaintiff that he paid Rs.30,000/- to the defendant towards part of sale consideration is not proved. The point is accordingly answered against the plaintiff.

13. **POINT No.2: -**

13.1 The contention of the plaintiff is that he is having capacity and was & is always ready and willing to perform his part of the contract, but, the defendant evaded to perform her part of the contract having denied receipt of Rs.30,000/- towards part of sale consideration. Per contra, the case of the defendant is that even before the exchange of notices, the defendant approached the plaintiff and requested the plaintiff to pay the balance sale consideration and take a registered sale deed and that even in the reply notice, she expressed her willingness to execute the sale deed provided payment was made within ten days and that the plaintiff without making the payment issued a further notice under exhibit A4 and that she also stated in the written statement that if really the plaintiff has got capacity and willing to perform his part of the contract the Court may direct the plaintiff to deposit Rs.1,40,116/- into Court immediately and that on that she will execute a registered sale deed and that inspite of such offers given by the defendant from time to time, the plaintiff failed to pay the balance sale consideration and take the registered sale deed and hence, it is apparent that the plaintiff is not having capacity and is not ready and willing to perform his part of the contract.

13.2 It is to be noted that the defendant, in her reply notice, dated 14.09.1994, under exhibit A3, having denied the alleged part payment of Rs.30,000/- expressed her willingness to receive the balance amount and execute the sale

deed and called upon the plaintiff to pay the balance amount within ten days of the said notice. The plaintiff, who admittedly received the said exhibit A3 notice, on 21.09.1994, issued a further notice (rejoinder), dated 27.09.1994, under exhibit A4, calling upon the defendant to intimate the date on which she will come to the Registrar's Office, Chitvel, by stating in the said notice that he is ready with the balance consideration. However, the plaintiff, despite exchange of notices, did not tender the balance consideration by way of banker's cheque or demand draft to show his *bona fides* and readiness with the money. Even after the defendant came up with her defence in the written statement, the plaintiff did not deposit the balance of sale consideration into Court to show his capacity and readiness and willingness. The learned counsel for the plaintiff however contended that since there is no direction from the Court, the amount is not deposited into Court. Nevertheless, in the absence of a direction from the Court, the plaintiff ought to have sought permission and deposited the balance sale consideration into Court. The plaintiff did not do so. It is also to be noted that the learned counsel for the plaintiff contended that the readiness and willingness need not be to the extent of depositing the amount into the Court either with the plaint or during the pendency of the suit and that there is no obligation under law to deposit the balance of sale consideration into Court in order to show readiness and willingness on the part of the plaintiff and that it is not essential for the plaintiff to tender to the defendant or to deposit into Court any money except when so directed by the Court and that the plaintiff must aver performance of, or readiness and willingness to perform the contract according to its true construction in view of the explanation to clause (c) of Section 16 of the Specific Relief Act, 1963,

and that, therefore, for non tendering the amount to the defendant and not depositing the amount into Court, an inference cannot be drawn that the plaintiff has neither capacity to pay the balance of sale consideration nor is ready and willing to perform his part of the contract. No-doubt, it is not essential for the plaintiff to tender the money or deposit the same into Court but it is for the plaintiff to show that he is having the financial capacity at all relevant times to raise the balance of sale consideration for payment to the vendor under the agreement and that he is ready and willing to perform his part of the contract at all relevant times from the date of the contract. In the case on hand, when the defendant specifically pleaded that the plaintiff has no capacity and is not ready and willing to perform his part of the contract, the plaintiff did not produce any reliable evidence about his readiness with the money or his capacity to raise and pay the balance of sale consideration. PW1 admitted in his evidence that he did not file any document to show that he was ready to pay the amount and get the registered sale deed within ten days from exhibit A3 reply notice. Even when it is suggested that he has no means or capacity to pay the balance of sale consideration and hence, he deliberately postponed the payment of the same and that he is not ready and willing to perform his part of the contract, he did not whisper in his evidence about his readiness with the money or his capacity to raise the balance of sale consideration. In-fact, DW1 deposed that when his wife demanded the plaintiff in his presence to pay the balance amount and take the sale deed, the plaintiff pleaded his inability on the ground that he has no money. Be that as it may. It is pertinent to note that the plaintiff recalled himself and in his further examination in chief, on 06.03.1998, filed his bank pass book related to S.B A/c

in Syndicate Bank, Rajampet, to show that he has cash in his account during the year 1996-97. The said account was opened on 17.06.1996, that is, after the institution of the suit; and, as pointed out in the judgment of the trial Court, at no point of time, the amount in the account exceeded Rs.50,000/- till 23.12.1997. It is evident from the said pass book, exhibit A6, that the plaintiff deposited Rs.1,00,000/- on 23.12.1997; Rs.30,000/- on 24.12.1997; and, another Rs.10,000/- on 26.12.1997 and that, therefore, a total deposit of Rs.1,40,236/- was made by 26.12.1997, that is, after the arguments in the suit were heard on 22.12.1997 and after the suit was reopened on an application filed for amendment of the schedule of the plaint. Thus, after the arguments in the suit were heard on 22.12.1997 by the trial Court, a belated attempt was made to show that the plaintiff is having money. Therefore, this belatedly introduced evidence is of no avail to the plaintiff. Thus, no evidence much less of reliable character was brought on record to show that the plaintiff is having capacity to pay the balance of sale consideration and is ready and willing to perform his part of the contract at all relevant times. Hence, this Court holds that the plaintiff failed to establish that he is having capacity to pay the balance of sale consideration and is ready and willing to perform his part of the contract.

13.3 Before taking up the next points, it is pertinent to note that the learned counsel for the appellant-plaintiff also contended that exhibit A1 is enforceable as the same has not been cancelled by the defendant and that in view of the rise in prices of immovable properties, a false defence was raised. He also contended that in view of the rise in prices of immovable properties, the plaintiff may also be directed by this Court to pay additional consideration

while granting a decree for specific performance. It is true, as rightly held by the trial Court, time is not the essence of the contract in this case. Further, there are no circumstances to hold that exhibit A1 is cancelled. However, in view of the findings on points 1 & 2 supra, it follows that the plaintiff is not entitled to the equitable relief of specific performance and hence, the above contentions of the plaintiff deserve no consideration, in the facts and circumstances of the case.

14. **POINT No.3: -**

As a sequel to the findings of this Court on points 1 & 2 supra, it is to be held that the contention of the appellant-plaintiff that the decree and judgment of the trial court are unsustainable under facts and in law is devoid of merit and is liable for rejection. The said contention is accordingly rejected.

15. **POINT No.4:**

Learned counsel for the plaintiff alternatively contended that in case this Court holds that the plaintiff is not entitled to the relief of specific performance, the plaintiff may be granted a decree for refund of the advance amount of Rs.10,000/- with interest from the date of payment, that is, 05.08.1994. However, while fairly conceding that only a relief of specific performance of suit contract of sale was sought in the plaint and that no relief alternatively is claimed for refund of the advance amount, he placed reliance on the decision of the Supreme Court in **Satish Kumar v. Karan Singh and another** [2016(2) ALD 188 (SC)] and further contended that this Court is empowered to grant refund of the advance amount even in the absence of a relief in that regard in the plaint. I have gone through the decision. In the

cited decision, the Supreme Court having found that the suit contract of sale is invalid and unenforceable, consequently directed the appellant to refund the amount paid by the respondents together with interest @ 6% per annum; but, no binding proposition as canvassed by the learned counsel for the plaintiff was laid down in the cited decision. Further, under Section 22 of the Specific Relief Act, 1963, in case of refusal of claim for specific performance, no relief including the refund of any earnest money or deposit paid or made by the vendee under the agreement shall be granted by the Court unless it has been specifically claimed. Hence, the plaintiff is not entitled to the refund of the advance amount.

16. On the above analysis and for the findings recorded on the points supra, this Court finds that the appeal suit which is devoid of merit is liable for dismissal.

17. In the result, the appeal suit is dismissed. No costs.

Miscellaneous petitions pending, if any, shall stand closed.

M. SEETHARAMA MURTI, J

02.02.2018

Note: LR copy to be marked.

[B/o]

Vjl