

THE HON'BLE Dr. JUSTICE SHAMEEM AKTHER

SECOND APPEAL No.332 of 2012

JUDGMENT:

This Second Appeal, under Section 100 of C.P.C., is preferred against the judgment and decree dated 13.12.2011 passed in A.S.No.16 of 2010 by the Senior Civil Judge, Kothapeta, East Godavari District, setting aside the judgment and decree dated 31.03.2010 passed in O.S.No.15 of 1996 by the Principal Junior Civil Judge's Court, Kothapeta, by granting a decree for specific performance.

2. Heard Sri K. Chidambaram, learned counsel for the appellants/defendants and Sri P. Radha Krishna, learned counsel for the respondent/plaintiff.

3. The parties hereinafter are referred to as arrayed before the trial Court.

4. The plaintiff filed suit against the defendants for specific performance of agreement of sale dated 10.04.1993 or in the alternative grant of decree for a sum of Rs.14,400/- with subsequent interest towards damages for breach of contract. She stated that the first defendant had agreed to sell the suit schedule property for a sum of Rs.14,400/- to her and executed an agreement of sale on 10.04.1993 by receiving a sum of Rs.8,800/- towards advance with an agreement to receive the balance sale consideration on or before 19.10.1993 and to execute the registered sale deed in her favour.

However, the first defendant, for one reason or the other, failed to do so. Hence, she filed the suit.

5. During pendency of the suit, the first defendant died and his legal representatives were brought on record as D2 to D4 vide order dated 25.06.2009 in I.A.No.910 of 1997.

6. The 4th defendant filed written statement denying the averments made in the plaint and contended that the alleged agreement of sale is a forged and fabricated document by taking advantage of the death of the first defendant; that even as per Ex.A1-agreement of sale, time is essence of contract, but the plaintiff failed to pay the balance sale consideration within the stipulated time and prayed to dismiss the suit.

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

1. Whether the agreement of sale deed dated 10.04.1993 is true, valid and binding on the defendant?
2. Whether the plaintiff is entitled for directing the defendants to execute the sale deed in favour of the plaintiff in respect of the schedule property and get it registered at her expenses and for delivery of the schedule property to her?
3. Whether the plaintiff is ready and willing to perform her part of contract?
4. Whether the plaintiff is entitled for alternative relief of damages for sum of Rs.14,400/- together with interest?
5. Whether the valuation of the suit is not correct?
6. Whether the schedule property was assigned land?
7. Whether the signatures of D1 were forged by the plaintiff?

8. Whether the suit is not maintainable under law?
9. Whether the defendants are entitled for exemplary costs?
10. To what relief, if any, is the plaintiff entitled for?

8. During trial, on behalf of the plaintiff, P.Ws.1 to 4 were examined and Exs.A1 and A2 were got marked. On behalf of the defendants, D.Ws.1 and 2 were examined, but no document was marked on their behalf.

9. The trial Court, after considering the evidence and the documents, dismissed the suit insofar as relief of specific performance is concerned, but directed defendants 2 to 4 to pay a sum of Rs.14,400/- with subsequent interest @ 6% per annum from the date of filing of the suit till the date of payment. Challenging the said judgment and decree, the defendants preferred the appeal in A.S.No.16 of 2010 and the plaintiff preferred cross-objections. The appellate Court, vide the impugned judgment and decree, was pleased to dismiss the appeal while allowing cross-objections and accordingly decreed the suit for specific performance.

10. Aggrieved by the dismissal of the appeal, the defendants preferred the present Second Appeal contending that the judgment and decree passed by the appellant Court is perverse without there being any oral or documentary evidence and prayed to set aside the same.

11. Learned counsel for the appellants-defendants would submit that in Ex.A1, there is a specific mention that time is essence of

contract as the plaintiff had to pay the balance sale consideration of Rs.5,600/- on or before 09.10.1993; that the plaintiff failed to pay the balance of sale consideration within the time stipulated. He would further submit that the Courts below failed to see that the suit was filed on 06.02.1996, on which date, the first defendant died and therefore, the suit is not maintainable against a dead person.

12. Learned counsel for the respondent-plaintiff would contend that though the plaintiff was ready and willing to pay the balance sale consideration, the first defendant, without any justifiable reason, failed to receive the same within the stipulated time and later, he died on the date of filing of the suit i.e, 06.02.1996 and subsequently, the legal representatives were brought on record, but they are not the witnesses to the sale transaction under Ex.A1 and that the appellate Court, after elaborately considering the material on record, has rightly decreed the suit for specific performance. He would further contend that no substantial questions of law would arise for determination of the present appeal and prayed to dismiss the appeal.

13. While dealing with the subject matter of the present appeal on 28.03.2012, this Court was pleased to admit the Second Appeal on the following substantial questions of law:

- a. Whether the lower appellate Court is right in allowing the cross-objections by granting the primary relief of specific performance without there being any evidence to show that the first defendant has executed an agreement of sale dated 10.04.1993 and advance sale consideration was passed under the said agreement.

b. Whether the Courts below are right in upholding the execution of the agreement of sale dated 10.04.1993 and passing of consideration on it without there being any pleadings with regard to settlements of terms of sale, place of execution of the agreement and details of the witnesses of the said agreement and without there being any evidence to prove those contentions.

c. Whether the Courts below are right in determining the suit claim without deciding whether the suit has been instituted properly since the first defendant died on the date of presentation of plaint and the suit was instituted against dead person.

d. Whether the finding of the Court below that the time is not the essence of the contract and the plaintiff has established that she is ready and willing to perform her part of contract are not perverse since based on no evidence.

14. Under the above circumstances, the following points would arise for consideration in this appeal;

1. Whether the findings of the appellate Court are perverse?

2. Whether any substantial questions of law would arise for consideration in this appeal?

3. Whether the judgment and decree dated 13.12.2011 passed in A.S.No.16 of 2010 by the Senior Civil Judge, Kothapeta, East Godavari District, is liable to be set aside?

15. **POINTS:**

The appellate Court, having elaborately dealt with the evidence of P.Ws.1 to 4 and the recitals in Ex.A1-agreement of sale, given number of reasons by holding that there was a transaction between the plaintiff and the deceased first defendant and there is also specific evidence of P.Ws.1 to 4 with regard to execution of

Ex.A1 by the deceased first defendant and also held that the terms of contract and other circumstances would not indicate that time was not essence of contract.

16. Under Ex.A1, it was specifically mentioned that the suit schedule property was agreed to be purchased by the plaintiff from the deceased first defendant for a sum of Rs.14,400/- and on the date of agreement i.e., 10.04.1993, the deceased first defendant had received a sum of Rs.8,800/-towards advance and the balance sale consideration was agreed to be paid on or before 09.10.1993. It is pertinent to note that the time stipulated for payment of balance sale consideration expired on 09.10.1993. The legal notice under Ex.A2 was issued on 30.01.1996 i.e., after expiry of the time agreed by the parties under Ex.A1. The suit was filed on 06.02.1996. The appellate Court held that as the wife of the deceased first defendant predeceased him, he had no shelter and therefore, he postponed the receipt of balance sale consideration within the time stipulated. This finding recorded by the appellate Court is neither on the basis of the pleadings nor on any evidence on record.

17. Further, as per Ex.A1, the balance sale consideration has to be paid on or before 09.10.1993, which was not considered by the appellate Court. The legal notice under Ex.A2 got issued by the plaintiff on 30.01.1996 clearly indicates the lapse on her part to show her readiness and willingness to pay the balance sale consideration. The relief of specific performance is an equitable relief and the plaintiff has to approach the Court with clean hands without

suppressing the material facts. Under these circumstances, the appellate Court ought not to have decreed the suit for specific performance of agreement of sale and such relief granted by the appellate Court is perverse. In view of the same, the judgment and decree passed by the appellate Court is liable to be set aside.

18. As seen from the entire evidence on record, the plaintiff had proved the payment of a sum of Rs.8,800/- to the deceased first defendant under Ex.A1 and she is entitled to get back the said amount. While decreeing the suit for alternative relief, the learned trial Judge directed defendants 2 to 4 to pay Rs.14,400/- , which includes the advance sale consideration and damages, together with subsequent interest @ 6% per annum thereon from the date of filing of the suit till the date of payment, and further observed that to that extent charge is created over the schedule properties. In the circumstances, the trial Judge is justified in passing the said order. There is no infirmity.

The points are answered accordingly.

19. In the result, the Second Appeal is allowed and the judgment and decree dated 13.12.2011 passed in A.S.No.16 of 2010 by the Senor Civil Judge, Kothapeta, East Godavari District, are set aside while confirming the judgment and decree dated 31.03.2010 passed in O.S.No.15 of 1996 by the Principal Junior Civil Judge, Kothapeta. No order as to costs.

20. As a sequel, pending miscellaneous petitions, if any, shall stand closed. No order as to costs.

24th September, 2018.
SJ/DRK

Dr. SHAMEEM AKTHER, J

