

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL Nos.1355 and 1365 OF 2012

COMMON JUDGMENT:

S.A.No.1355 of 2012 is filed, by the unsuccessful plaintiff, under Section 100 of C.P.C., assailing the judgment and decree dated 19.07.2012 passed in A.S.No.91 of 2011 on the file of the Court of I Additional District Judge, Rajahmundry, wherein and whereby the judgment and decree dated 15.06.2011 passed in O.S.No.697 of 2010 on the file of the Court of the Principal Senior Civil Judge, Rajahmundry, dismissing the suit filed by the plaintiff for specific performance, was confirmed.

2. S.A.No.1365 of 2012 is filed, by the defendant, under Section 100 of C.P.C., assailing the judgment and decree dated 19.07.2012 passed in A.S.No.87 of 2011 on the file of the Court of I Additional District Judge, Rajahmundry, wherein and whereby the judgment and decree dated 15.06.2011 passed in O.S.No.221 of 2003 on the file of the Court of the Principal Senior Civil Judge, Rajahmundry, decreeing the suit filed by the plaintiffs for recovery of the suit schedule property with future profits, was confirmed.

3. The parties to both the suits are *vice versa*. Plaintiffs in O.S.No.221 of 2003 are defendants in O.S.No.697 of 2010 while defendant in O.S.No.221 of 2003 is plaintiff in O.S.No.697 of 2010. For the sake of convenience, the parties to these appeals will hereinafter be referred to as they were arrayed in O.S.No.221 of 2003. The point involved in both the appeals is one and the same; therefore, this Court is inclined to pass a common judgment in both the appeals in order to avoid repetition.

4. The facts leading to filing of the present appeals, in nutshell, are as follows: The pleadings in both the suits are one and the same; therefore, this Court is referring the pleadings in O.S.No.221 of 2003. One Kaki Veerabhadra Rao is the father of plaintiff Nos.1 to 4, father-in-law of plaintiff No.5 and grandfather of plaintiff Nos.6 to 8. Veerabhadra Rao is the owner of an extent of Acs.1.81 cents in Survey No.1044/3 corresponding to old Survey No.68 of Hukumpeta Village, Rajahmundry Rural Mandal, East Godavari District. Out of total extent of Acs.1.81 cents, defendant purchased an extent of Ac.1.21 cents from Veerabhadra Rao under a registered sale deed dated 30.01.1986. On 30.09.1985 Veerabhadra Rao orally agreed to sell remaining extent of Ac.0.60 cents i.e., the suit schedule property in favour of the defendant at the rate of Rs.45,000/- per acre. In pursuance of the oral agreement, the defendant paid an amount of Rs.5,000/- to Veerabhadra Rao agreeing to repay the balance amount at the time of registration of sale deed. Veerabhadra Rao died on 23.01.1986. For one reason or the other, the plaintiffs did not execute a sale deed in favour of the defendant. It is the case of the plaintiffs that the defendant has never expressed his willingness and readiness at any point of time to obtain sale deed either from Veerabhadra Rao during his lifetime or after his death from the plaintiffs; therefore, the defendant is not entitled for the relief of specific performance. Hence, the plaintiffs are constrained to file a suit for recovery of the suit schedule property from the defendant.

5. The defendant filed written statement denying the averments made in the plaint *inter alia* contending that one Kolli Veera

Raghavamma, sister of Veerabhadra Rao, filed O.S.No.2 of 1986 against him and plaintiffs claiming right over the suit schedule property. The suit filed by Veera Raghavamma was dismissed. Aggrieved by the same, she filed A.S.No.549 of 2009 and the same was dismissed. Due to pendency of the said litigation and as there was understanding between himself and plaintiffs, defendant did not choose to file a suit. Hence, the suit is liable to be dismissed.

6. The defendant filed O.S.No.697 of 2010 against the plaintiffs for specific performance of the oral agreement of sale. The plaintiffs filed written statement stating that the defendant is not entitled for the relief of specific performance as the same is barred by limitation. Hence, the suit is liable to be dismissed.

7. Basing on the above pleadings, the trial Court framed the following issues in O.S.No.221 of 2003:

1. Whether the plaintiffs are entitled for possession of plaint schedule property after ejecting the defendant?
2. Whether the plaintiffs are entitled for past profits of Rs.30,000/- for three years?
3. Whether the plaintiffs are entitled for future profits?
4. Whether the defendant is a cultivating tenant for the plaint schedule property?
5. Whether the defendant failed to perform his part of contract in respect of plaint schedule property between late Veerabhadra Rao and this defendant?
6. To what relief?

The following additional issue was framed on 20.10.2010:

“Whether the suit is barred by time?”

The trial Court framed the following issues in O.S.No.697 of 2010:

- 1) Whether the plaintiff is entitled to direct the defendants to execute the registered sale deed in favour of the plaintiff as per oral agreement of sale dated 30.09.1985 and as per decree in O.S.221/2003 as prayed for?
- 2) Whether the claim of the plaintiff is barred by time?
- 3) To what relief?

8. The suit schedule property involved in both the suits is one and the same. Therefore, the trial Court clubbed both the suits and recorded the evidence in O.S.No.221 of 2003.

9. To substantiate the case, before the trial Court, the first plaintiff in O.S.No.221 of 2003 examined himself as PW.1 and got marked Exs.A.1 to A.4. The defendant examined himself as DW.1 and got marked Exs.B.1 to B.5. DWs.2 and 3 were examined to substantiate the stand taken by the defendant.

10. Basing on the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the plaintiffs in O.S.No.221 of 2003 are entitled for recovery of the suit schedule property as well as future profits and consequently, decreed the suit. The trial Court also arrived at a conclusion that the plaintiff in O.S.No.697 of 2010 is not entitled for the relief of specific performance as the same is barred by limitation and consequently, dismissed the suit.

11. Feeling aggrieved by the judgment and decree of the trial Court dated 15.06.2011 passed in O.S.No.221 of 2003, the defendant preferred A.S.No.87 of 2011 on the file of the Court of I Additional District Judge, Rajahmundry. Feeling aggrieved by the judgment and decree of the trial Court dated 15.06.2011 passed in O.S.No.697 of 2010, the plaintiff therein preferred A.S.No.91 of 2011 on the file of the Court of I Additional District Judge, Rajahmundry. The first appellate Court, after reappraising the oral, documentary evidence and other material available on record, arrived at a conclusion that the plaintiffs in O.S.No.221 of 2003 are entitled for recovery of possession of the suit schedule property

and the plaintiff in O.S.No.697 of 2010 is not entitled for the relief of specific performance as the same is barred by limitation and consequently dismissed both the appeals. Hence, the unsuccessful plaintiff in O.S.No.697 of 2010, who is defendant in O.S.No.221 of 2003, preferred these two appeals.

12. Heard Sri K.G.Krishna Murthy, learned senior counsel, representing Sri K.Venkatesh, learned counsel for the appellant, and Sri Ch.Pushyam Kiran, learned counsel for the respondents.

13. The questions of law urged by the learned counsel for the appellant are as follows:

- 1) Whether the Courts below misconstrued the scope of Article 54 of Limitation Act?
- 2) Whether the Courts below committed any error while not considering Exs.A.3 and A.4? and
- 3) Whether the findings recorded by the Courts below are perverse so far as A.S.No.1355 of 2012 is concerned?

Point Nos.1 and 2:

14. To substantiate the arguments, learned counsel for the appellant has drawn the attention of this Court to the following decisions:

(i) **K.S.Vidyanadam vs. Vairavan**¹, wherein the Hon'ble apex Court held at paragraph No.14 as follows:

"14. Shri Sivasubramaniam then relied upon the decision in *Jiwan Lal (Dr) v. Brij Mohan Mehra* ((1972) 2 SCC 757) to show that the delay of two years is not a ground to deny specific performance. But a perusal of the judgment shows that there were good reasons for the plaintiff to wait in that case because of the pendency of an appeal against the order of requisition of the suit property. We may reiterate that the true principle is the one stated by the Constitution Bench in *Chand Rani v. Kamal Rani* ((1993 1 SCC 519). Even where time is not of the essence of the contract, the plaintiffs must perform his part of the contract within a reasonable time and

¹ (1997) 3 SCC 1

reasonable time should be determined by looking at all the surrounding circumstances including the express terms of the contract and the nature of the property.”

(ii) **Ishwar Dass Jain (Dead) Through Lrs., vs. Sohan Lal**

(Dead) By Lrs.,², wherein the Hon’ble apex Court held at paragraph No.14 as follows:

“14. In either of the above situations, a substantial question of law can arise. The substantial question of law that arises for consideration in this appeal is: “whether the courts below had failed to consider vital pieces of evidence and whether the Courts relied upon inadmissible evidence while arriving at the conclusion that the mortgage was sham and that there was no relationship between the plaintiff and the defendant as mortgagor and mortgagee but the real relationship was as landlord and tenant” Point 1 is decided accordingly.”

(iii) **Saradamani Kandappan vs. S.Rajalakshmi**³, wherein the

Hon’ble apex Court held at paragraph No.23 as follows:

“23. The above section deals with the effect of failure to perform at a fixed time, in contracts in which time is essential. The question whether time is the essence of the contract, with reference to the performance of a contract, what generally may arise for consideration either with reference to the contract as a whole or with reference to a particular term or condition of the contract which is breached. In a contract relating to sale of immovable property if time is specified for payment of the same price but not in regard to the execution of the sale deed, time will become the essence only with reference to payment of sale price but not in regard to execution of the sale deed. Normally in regard to contracts relating to sale of immovable properties, time is not considered to be the essence of the contract unless such an intention can be gathered either from the express terms of the contract or impliedly from the intention of the parties as expressed by the terms of the contract.”

15. Let me consider the facts of the case on hand in the light of the above legal principles.

16. One Kaki Veerabhadra Rao is the owner of the suit schedule property. Plaintiff Nos.1 to 4 are children, plaintiff No.5 is daughter-in-law and plaintiff Nos.6 to 8 are grandchildren of Veerabhadra Rao. Veerabhadra Rao died on 23.01.1986. On

² (2000) 1 SCC 434

³ (2011) 12 SCC 18

30.09.1985, while he was alive, Veerabhadra Rao orally agreed to sell the suit schedule property in favour of the defendant at the rate of Rs.45,000/- per acre. In pursuance of the oral agreement, the defendant paid an amount of Rs.5,000/- to Veerabhadra Rao. After the death of Veerabhadra Rao, his sister by name Veera Raghavamma filed O.S.No.2 of 1986 in respect of the suit schedule property against the plaintiffs and defendant. The trial Court, after full-fledged trial, dismissed the suit on 10.09.1996. Feeling aggrieved by the judgment and decree passed in O.S.No.2 of 1986, Veera Raghavamma filed A.S.No.549 of 2009 on the file of this Court. This Court, after considering the material available on record, dismissed the appeal on 02.09.2009. While the plaintiffs filed O.S.No.221 of 2003 against the defendant for recovery of suit schedule property on 14.07.2003, defendant filed O.S.No.697 of 2010 for specific performance of oral agreement, on 16.02.2008 and the same was numbered on 19.03.2009.

17. The crucial question that falls for consideration is:

Whether the suit filed by the plaintiff for specific performance is barred by limitation or not?

18. It is the contention of the learned counsel for the appellant-defendant that the limitation starts from 02.09.2009 to file a suit for specific performance i.e., from the date of dismissal of A.S.No.549 of 2009. On the other hand, the contention of plaintiffs is that the defendant has to file the suit within a period of three years from the date of his appearance in O.S.No.221 of 2003, which was filed by the plaintiffs denying the agreement of sale. It is an admitted fact that Veera Raghavamma is not a party to the oral agreement of sale. In a suit for specific performance, the

parties to the agreement alone are necessary and proper parties. Merely because Veera Raghavamma filed O.S.No.2 of 1986 against the defendant in O.S.No.221 of 2003 that itself is not a valid ground to the defendant to file O.S.No.697 of 2010 for specific performance against the plaintiffs herein, after dismissal of A.S.No.549 of 2009 preferred by Veera Raghavamma. There is no bar much less legal bar preventing the defendant from filing a suit against the plaintiffs seeking the relief of specific performance. It is the contention of the defendant that there is an understanding between him and the plaintiffs not to file the suit till completion of the legal proceedings initiated by Veera Raghavamma. As rightly pointed out by the learned counsel for the plaintiffs, the legal proceedings initiated by Veera Raghavamma came to an end on 02.09.2009 only. For one reason or the other, the defendant did not choose to file O.S.No.697 of 2010, up to 16.2.2008. According to the defendant, cause of action for filing of the suit will arise on 02.09.2009 i.e., after dismissal of A.S.No.549 of 2009. If that is so, how the plaintiff has filed the suit on 16.2.2008. If the contention of the defendant is taken into consideration, he has filed the suit before accruing the cause of action in his favour. Viewed from this angle also, O.S.No.697 of 2010 filed by the defendant is premature one.

19. The next question that falls for consideration is whether there is any understanding between the plaintiffs and defendant as to filing of the suit for specific performance after conclusion of the legal proceedings initiated by Veera Raghavamma.

20. Suffice it to say, pleadings form bedrock in a civil suit. Any amount of oral evidence without pleading is of no avail. For one reason or the other, the defendant has not taken a specific plea that due to understanding between him and the plaintiffs; he could not file the suit till disposal of A.S.No.549 of 2009. The defendant did not take such a pleading in O.S.No.697 of 2010. Both the Courts below concurrently held that the defendant failed to prove the understanding, if any, between him and the plaintiffs. The findings recorded by the Courts below on this aspect are supported by oral and documentary evidence available on record. The defendant failed to prove the alleged understanding between him and the plaintiffs in order to postpone the filing of the suit. Hence, the contention of learned counsel for the appellant-defendant that the appellant waited till disposal of A.S.No.549 of 2009 is not sustainable either on facts or in law.

21. The other contention of learned counsel for the appellant-defendant is that the Courts below have not considered the recitals of Exs.A.3 and A.4. Exs.A.3 and A.4 are the certified copies of decree and judgment in A.S.No.549 of 2009. The Courts below have not dismissed O.S.No.697 of 2010 filed by the defendant on the sole ground that he has not filed the suit within three years from the date of dismissal of A.S.No.549 of 2009. In that view of the matter, these two documents are no way helpful to the defendant so far as the period of limitation is concerned.

22. To substantiate the argument, learned counsel for the respondents-plaintiffs has drawn the attention of this Court to Article 54 of the Limitation Act, which reads as follows:

Article	Description of suit	Period of Limitation	Time from which period begins to run
54	For specific performance of a contract	Three years	The date fixed for the performance, or, If no such date is fixed, when the plaintiff has notice that performance is refused.

Article 54 of Limitation Act consists of two limbs. As per the first limb, the plaintiff has to file a suit within a period of three years, after expiry date fixed for performance. If no specific date of performance is mentioned in the agreement, the plaintiff has to file a suit within three years from the date of refusal of performance of contract. First limb of Article 54 of Limitation Act is not applicable to the facts of the case on hand.

23. The plaintiffs filed O.S.No.221 of 2003 against the defendant seeking for recovery of the suit schedule property denying the oral agreement of sale dated 30.9.1995. The defendant made his appearance in O.S.No.221 of 2003 in the year 2003. The material available on record clinchingly establishes that the defendant came to know about the denial of the oral agreement of sale by the plaintiffs in the year 2003 itself. It is needless to say that a suit for specific performance has to be filed within three years from the date of denial of the agreement of sale. To reckon the period of limitation, the Court has to take into consideration the date on which the defendant came to know about the denial of the agreement of sale by the plaintiff. Invariably, the defendant ought to have filed O.S.No.697 of 2010 within the period of three years from the date of denial of the oral agreement of sale by the plaintiffs i.e., on or before 31.12.2006. It is an admitted fact that the defendant filed the suit for specific performance in the year

2008. Admittedly, the defendant filed O.S.No.697 of 2010 after expiry of five years from the date of denial of the agreement of sale by the plaintiffs.

24. As per the principle enunciated in **K.S.Vidyanadam's** case (1st cited supra), if there are any good reasons, the plaintiff can wait to file a suit till pendency of litigation. As observed earlier, Veera Raghavamma is not a party to the oral agreement of sale. In such circumstances, there is no legal bar to the defendant from filing the suit for specific performance within three years from the date of denial of agreement by plaintiffs. Hence, this decision is no way helpful to the appellant-defendant to substantiate his case.

25. As per the principle enunciated in **Ishwar Dass Jain's** case (2nd cited supra), if the Courts below failed to consider the vital piece of evidence, the same would constitute the substantial question of law. As observed earlier, Exs.A.3 and A.4 are nothing to do with the period of limitation.

26. As per the principle enunciated in **Saradamani Kandappan's** case (3rd cited supra), time is not the essence to file the suit for specific performance. Whether time is the essence or not? is not a point involved in this case. The point involved in this case is whether the suit filed by the plaintiff is barred by limitation or not. Therefore, this decision is also no way helpful to the appellant-plaintiff to substantiate the case.

27. The trial Court as well as the first appellate Court have properly considered the scope of Article 54 of Limitation Act, in the light of the oral and documentary evidence available on record.

The findings recorded by the Courts below are based on evidence much less legally admissible evidence. As observed earlier, the cause of action for filing of the suit for specific performance accrued in favour of the defendant in the year 2003 itself. The defendant has to file a suit within three years from the date of accruing of a cause of action, in view of Article 54 of Limitation Act. The application of mathematical formula clearly indicates that the defendant filed the suit five years after the cause of action accrues in his favour. The Courts below have assigned reasons much less cogent and valid reasons to its findings. In view of Article 54 of Limitation Act, this Court is of the considered view that O.S.No.697 of 2010 filed by the defendant is barred by limitation. I am fully agreeing with the findings recorded by the Courts below so far as the point of limitation is concerned. Accordingly, these two points are answered in favour of the plaintiffs and against the defendant.

Point No.3:

28. The next question that falls for consideration is whether the findings recorded by the Courts below are perverse.

29. The defendant himself has admitted that late Veerabhadra Rao is the owner of the suit schedule property. The plaintiffs, being the legal representatives of late Veerabhadra Rao, are entitled to file the suit for recovery of the possession. The plaintiffs filed O.S.No.221 of 2003 against the defendant for recovery of the suit schedule property. The trial Court, basing on the oral and documentary evidence available on record, more particularly, the admission made by the defendant, arrived at a conclusion that the plaintiffs are entitled for recovery of the suit schedule property with

future profits. Feeling aggrieved by the judgment and decree in O.S.No.221 of 2003, the defendant preferred A.S.No.87 of 2011 on the file of the I Additional District Court, Rajahmundry. The first appellate Court, after re-appraising the oral and documentary evidence available on record, arrived at a conclusion that the plaintiffs are entitled for recovery of the suit schedule property with future profits. It is needless to say that if the findings recorded by the Courts below are based on no evidence or based on evidence, which is not legally admissible; this Court can set aside the same while exercising the jurisdiction under Section 100 of C.P.C. The findings recorded by the Courts below are based on evidence much less legally admissible evidence. Therefore, I am unable to accede to the contention of the learned counsel for the appellant-defendant that the findings recorded by the Courts below are perverse. Accordingly, point No.3 is answered.

30. In **Municipal Committee, Hoshiarpur v. Punjab SEB⁴**, while dealing with the scope of Section 100 of C.P.C., the Hon'ble apex Court held at paragraph No.16 as follows:

16. ... A second appeal cannot be decided merely on equitable grounds as it lies only on a substantial question of law, which is something distinct from a substantial question of fact. The court cannot entertain a second appeal unless a substantial question of law is involved, as the second appeal does not lie on the ground of erroneous findings of fact based on an appreciation of the relevant evidence. The existence of a substantial question of law is a condition precedent for entertaining the second appeal; on failure to do so, the judgment cannot be maintained. The existence of a substantial question of law is a sine qua non for the exercise of jurisdiction under the provisions of Section 100 CPC.

⁴ (2010) 13 SCC 216

31. Having regard to the facts and circumstances of the case and also the principle enunciated in the case 4th cited supra, this Court is of the considered view that there is no question of law much less substantial question of law involved in these appeals. Hence, both the appeals are liable to be dismissed.

32. In the result, both the Second Appeals are dismissed at the admission stage. There shall be no order as to costs. Consequently, Miscellaneous Petitions, if any, pending in both the Second Appeals shall stand closed.

Date: 08.11.2018
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T.SUNIL CHOWDARY, J

