

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

+ AS No.2274 of 1998

% 25-01-2018

Madhavabotla Venkata Dattatreya Sarma,
s/o. Venkateshwarlu,
r/o. Piduguralla, Guntur District.

... Appellant/
Plaintiff

Vs.

\$ Gunda Rama Rao,
s/o. Sarvaiah, r/o. Piduguralla,
and 2 others.

... Respondents/
Defendants

! Counsel for the appellant: Sri O. Ramesh

Counsel for the Respondents: Sri N. Subba Rao.

< Gist:

> Head Note:

? Cases referred:



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

A.S.No.2274 of 1998

JUDGMENT:

This appeal is filed by the unsuccessful plaintiff against the judgment and decree dated 27.08.1998 in O.S.No.306 of 1995 passed by the Senior Civil Judge, Gurajala.

2. The brief facts of the plaintiff's case are as follows:

a) Originally, the suit was filed before the Subordinate Judge's Court, Narasaraopet and numbered as O.S.No.80 of 1994 and subsequent to the constitution of Senior Civil Judge's Court at Gurajala, the suit has been made over and renumbered as O.S.No.306 of 1995.

b) The suit is filed for the specific performance of contract of sale deed dated 08.05.1991 and in alternative for refund of the advance paid and also to grant of Rs.1,00,000/- as damages in case the sale deed could not be executed by defendants 1 & 2 in addition to the relief of granting of interest on earnest money.

c) The suit schedule property is purchased by Gunda Saravaiah under the registered sale deed and the same devolved upon defendants 1 & 2 after the demise of Gunda Sarvaiah. Ever since, they have been in possession and enjoyment of the said property. The 3rd defendant was given in adoption to Batchu family. He acquired the property from his adoptive parents and has been treated as member of adoptive family and he has no right over the suit schedule

property. The defendants 1 & 2 contracted to sell the suit schedule property to the plaintiff at the rate of Rs.7,800/- per each cent of land and tentatively the area has been estimated to be Ac.0.13 ½ cents. The defendants 1 & 2 received Rs.25,000/- on 08.05.1991 and executed a contract of sale and agreed to get the land measured to arrive at the actual area and to receive the exact amount after measurements.

d) As a dispute was raised by the 3rd defendant, the 2nd defendant made an endorsement to the effect on the foot of the contract on 28.09.1991 that after the disputes raised by the 3rd defendant are settled, the defendants would execute a regular registered sale deed and the plaintiff need not pay any interest for the balance of consideration. The 3rd defendant also filed O.S.No.303 of 1991 on the file of Sub-Court, Narasaraopet, which was pending then.

e) The plaintiff also claimed that he is entitled to the interest on Rs.25,000/- at 24% per annum from the date of notice till the date of execution of sale deed. The defendants 1 & 2 received the said notice but did not give any reply. The 3rd defendant gave reply notice with false allegations. Under the said circumstances, the plaintiff filed the suit for specific performance of contract of sale deed dated 08.05.1991 and also for interest at 24% per annum on Rs.25,000/-, which was paid as an advance and in the alternative for damages at Rs.1,00,000/-.

3. The 2nd defendant filed a written statement stating that the suit schedule property is the absolute property of Gunda Saravaiah, who is none other than of his father. The said property had devolved upon defendants 1 & 2. The plaintiff, who is not ready and willing to perform his part of contract, invented the false story to delay the specific performance and to gain time. The defendants never gave any consent or authorization to the 1st defendant at any time to act on behalf of the 2nd defendant in the transaction between the plaintiff and defendants 1 & 2 with regard to the suit document. The payment of interest on the earnest money would not arise for consideration. The plaintiff is not willing to perform his part of contract and as such, he is not entitled to the relief and the agreement of sale is barred by limitation and it is unenforceable. The suit is bad for mis-joinder of parties as the 3rd defendant is unnecessarily impleaded in the suit. Hence, it is prayed that the suit may be dismissed with costs.

4. On the basis of the said pleadings, the parties went to trial. For the plaintiff, six witnesses were examined as PWs.1 to 6 and Exs.A.1 to A.13 were marked. For the defendants, one witness was examined as DW.1 and no documents were marked. The lower Court framed the following 6 issues for trial.

- i) Whether the plaintiff is entitled for the relief of specific performance of the contract of sale dated 08.05.1991?

- ii) Whether the plaintiff is entitled to claim interest on Rs.25,000/-.
- iii) Whether the plaintiff is entitled to claim damages in the event of defendants 1 & 2 cannot execute the sale deed due to internal disputes of defendants 1 to 3?
- iv) Whether the suit agreement for sale is barred by limitation?
- v) Whether the suit is bad for misjoinder of parties?
- vi) To what relief?

5. The lower Court, after assessment of the oral and documentary evidence, dismissed the suit for the relief of specific performance as also the claim for damages. The court only granted the alternative relief of the refund of the advance amount paid. It is this judgment that is assailed in the present appeal.

6. For the sake of convenience and as this is a first appeal, this Court will refer the parties as plaintiff and defendants only.

7. This Court has heard Sri O. Ramesh, learned counsel for the appellant/plaintiff and Sri N. Subba Rao, learned counsel for the respondents/defendants.

8. This Court proceeds to analyze the evidence and the judgment in the same serial order as in the lower Court, as this was the order adopted by the learned counsels, also in the course of their submissions.

9. Issue No.5 decided by the lower Court is about the mis-joinder of party. The third defendant, who is not a party to the agreement, was added as party to the suit. Since the suit is for specific performance, the plaintiff can only claim a

relief against the agreement holders only. Admittedly, the third defendant is not a party to the suit agreement. Although the third defendant has not really contested the suit, the second defendant has filed a written statement wherein he raised the plea that the third defendant is a bona fide, necessary and proper party. This objection is in accordance with the Order I Rule 13 CPC, which states that objection as to mis-joinder shall be taken at the earliest instances. In addition, this Court also noticed that as per the provisions of Order I Rule 3 CPC a right to relief in respect of or arising out of the same transaction in which the defendants are involved jointly or severally or if separate suits were brought, a common question would arise, then only a party can be joined to the suit. In this case, admittedly, the third defendant is not a party to the agreement. Neither Order I Rule 3 or Rule 3 (a) or (b) CPC mentioned above will apply. Therefore, this Court holds that the third defendant is not a proper party and the suit is bad for mis-joinder. Therefore, this Court holds that the name of the third defendant should be struck off as he was improperly joined as a party to the suit.

10. Issue Nos.1 to 4 were decided jointly. These issues are the crux of the matter. As this is a suit for specific performance, a duty was cast upon the plaintiff to prove that he was ready and willing to get the sale deed executed in his name. Readiness implies the availability of funds and

willingness applies to the behaviour of plaintiff to get the sale deed registered in his name. Therefore, readiness in the form of ready availability or a proper arrangement of the sale consideration and the willingness in the form of prompt action to get the sale deed registered should be manifest in a case from the date of the agreement till the date of the decree. This is a settled proposition of law that does not require further repetition.

11. In this case, Ex.A.1 is the agreement of sale dated 08.05.1991. The agreement stipulates payment of advance of Rs.25,000/- and the payment of balance within three months i.e., 07.08.1991. The balance payable according to the terms and conditions of the agreement is Rs.76,250/-.

12. Ex.A.1 contains two endorsements, which are Exs.A.2 & A.3 dated 19.08.1991 and 28.09.1991. These endorsements are only by the first defendant and not by the second defendant. No clear explanation is forthcoming for this. This factor and the absence of any proof to show that the second defendant authorized the first defendant to make these endorsements leads this Court to the conclusion that the endorsements cannot be treated as extensions of time of the time stipulated.

13. Even otherwise, it is worthwhile noting that Ex.A.4 is the notice that is first issued by the plaintiff demanding execution of the sale deed, subject to the following conditions:

- a) to get suit O.S.No.303 of 1991 filed by third defendant disposed off;
- b) to execute the sale deed after measurements; and
- c) payment of interest on the paid amount of Rs.25,000/- that is given as advance.

The learned counsel for the appellant/plaintiff strongly stressed upon the conduct of the plaintiff and argued that the plaintiff showed his readiness and willingness to get the sale deed registered. It is the submission of the learned counsel that the third defendant filed a suit for partition against the defendants 1 & 2 and therefore, as a prudent purchaser, his client cannot be called upon to take a property, which is the subject matter of litigation. Therefore, he argues that the plaintiff rightly demanded the defendants 1 & 2 to get the suit disposed off and also to get the sale deed registered.

14. On the contrary, it is the argument of the learned counsel for the respondents/defendants that there was no difficulty to get the sale deed registered because of the pendency of the suit O.S.No.303 of 1991. He argued that the plaintiff was satisfied about the measurements of the plot and that further measurements were not necessary. His last submission is that the plaintiff was not ready and willing to perform his part of the contract and he did not have the funds also. Therefore, to get over this, he has urged that measurements are to be taken and that the suit O.S.No.303 of 1991 is to be disposed of.

15. This Court also after a review of the entire evidence and hearing the submissions comes to the following conclusions.

a) The evidence of PW.1 is very clear on the issue of the measurements. On 19.11.1997, he deposed as follows:

“I have verified the boundaries and the extent of property that was sought to be purchased by me prior to execution of Ex.A.1. I inspected the suit property prior to Ex.A.1. After getting myself satisfied only, I got executed Ex.A.1.”

Therefore, it is clear that the measurements or the alleged lack of measurements that are relied upon by the plaintiff are not a serious ground at all.

b) As far as the suit O.S.No.303 of 1991 is concerned, certified copies of the plaint, written statement and the judgment dismissing the suit are filed as Exs.A.10 to A.12, which reveal that the suit was dismissed on 27.11.1996 itself. The certified copies of these documents were obtained in November 1996 and were filed by PW.1 during the course of his evidence on 03.07.1998 when he was recalled. Other than marking these documents, the plaintiff did not depose in any manner about the contents. He did not state in his evidence that the pendency of this suit was a fetter or bar for him to obtain the sale deed. He did not state how this suit would bar him from getting a sale deed. It is also apparent that even if the pendency of the suit was considered as a bar,

the dismissal of the suit in November 1996 removed the bar, if any.

c) the cross-examination of PW.1 reveals that right from the inception, an issue was raised about the availability of funds with PW.1 to complete the transaction. PW.1 in the course of his cross-examination on 19.06.1998 clearly states “to enable him to secure necessary finances, three months time was fixed for getting the document registered. I do not keep the balance sale of consideration in bank deposit.” He denies the suggestion that he was not in possession for sufficient funds. Apparently, to get over this cross-examination, the plaintiff was recalled and on 03.07.1998 along with other exhibits, he filed Ex.A.13 bank passbook. However, he does not depose about the contents of the pass book. In the cross-examination on Ex.A.13, PW.1 admits that there is no proof in Ex.A.13 that there are sufficient funds available during the years 1993-94 and 1996.

16. Even in the deposition of DW.1, it is asserted that PW.1 does not have sufficient funds. Irrespective of other submissions made, a perusal of Ex.A.13 reveals that in July, 1991, the plaintiff only had Rs.36,341/- to the credit of his account. In August and September, 1991, which was the date fixed for the performance of the agreement, the plaintiff had approximately about Rs.90,000/- the in his account. But the same got depleted by October 91 to Rs.21,154.70 and the balance went down to Rs.1,154/- by October 1991.

Thereafter, by the date of Ex.A.4 i.e., January 1994 on which date the plaintiff demanded specific performance, the balance available was in a few hundred rupees (Rs.314/- to Rs.144/-). In fact, by the end of January, 1994, (the date of Ex.A.4 notice), the balance was only Rs.144/-. Similarly, on the date of filing of the plaint viz., July, 1994, the balance was approximately Rs.2,000/- to Rs.3,000/-. The witnesses also deposed in September, 1996 and October 1997 and on 01.11.1997, the balance is Rs.242/-. Even in November, 1996, when the suit O.S.No.303 of 1991 was dismissed and the so-called obstacle was removed, the balance available with the plaintiff was only Rs.204/- as on 21.11.1996.

17. Therefore, this Court finds that readiness to seek a decree for specific performance is not proved in this case. The ready availability of the money or the availability of a source or arrangement for raising money is not proved in this case. The plaintiff must prove that he had the money or that an effective arrangement like a proper loan was made to pay the sale consideration. Such evidence is missing in this case. Therefore, the plaintiff is not entitled to plead that he was ready and willing to take the sale deed. The continuous examination of his conduct and more so, the document filed by him (Ex.A.13) reveals that he was never having necessary resources to get the sale deed registered in his name. Therefore, this Court agrees with the finding of the lower Court that the plaintiff is not entitled to the relief of specific

performance, as the plaintiff was not ready and willing. Therefore, issue No.1 is held against the plaintiff and in favour of the defendant.

18. Issue No.2 is whether the plaintiff is entitled to claim interest on Rs.25,000/-. The lower Court awarded interest at 12% per annum from the date of institution of the suit till the date of the realization. Interest prior to the suit is not a matter of right. Interest prior to the suit can be awarded only if there is an agreement between the parties or there is a statute governing the agreement which permits interest; or on the ground of equity or trade custom and usage. All of these are, however, matters of pleading and evidence. There should be pleading about the right to interest prior to the suit and there should be evidence about the interest rate. In this case, there is neither pleading nor proof for award of interest prior to the filing of the suit. As far as interest after the suit is concerned, Section 34 CPC empowers the court to award interest. In this case, the Court awarded interest at 12% in its discretion and the same is not really objected by the respondents in this appeal. Therefore, this Court also does not wish to interfere with the award of interest from the date of the suit till realization.

19. Issue No.3 is about the damages of Rs.1,00,000/- claimed as an alternative relief. This Court notices that there is neither pleading nor proof for the claim of damages. Damages can only be awarded in order to compensate the

plaintiff for any loss that he has sustained. There is no pleading or proof about the damages claimed. A single prayer for damages of Rs.1,00,000/- is made. The provisions of Section 21 (2) and (4) of the Specific Relief Act are very clear about the compensation and the methodology for awarding the same in such cases. The plaintiff must prove the breach of contract by the defendant. For assessing the compensation for such breach; the principles of Section 73 of the Indian Contract Act will apply. Lastly, sub-section 5 of Section 21 makes it clear that there should be adequate pleading for the loss. In this case, there is no pleading let alone evidence to show that the plaintiff sustained any 'loss'. Therefore, this Court is of the opinion that the plaintiff is not entitled to the alternative relief for compensation of Rs.1,00,000/- also.

20. As far as issue No.4 about the limitation is concerned, no serious arguments were advanced about the same.

21. In conclusion, this Court agrees with the findings of the lower Court. The order of the lower Court is a correct and reasoned order. The appeal is therefore dismissed. There shall be no order as to costs. Miscellaneous Petitions, if any, pending in this appeal shall stand closed.

D.V.S.S. SOMAYAJULU, J

Date: 25.01.2018

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Note: L.R. Copy marked.