

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

A.S.No.946 of 2002

JUDGMENT:

This appeal is filed by the unsuccessful second defendant against the judgment and decree dated 30.12.1988 passed in O.S.No.552 of 1983 by the Principal Subordinate Judge, Ranga Reddy at Saroornagar.

For the sake of convenience, the parties are referred to as plaintiff and defendants only.

The brief averments of the plaint are that the first defendant, who is the absolute owner of a House bearing No.8-52/2 constructed on a plot of land admeasuring 170 square yards in Survey Nos.654, 655 and 656 situated at Malkajgiri has agreed to sell the said house to the plaintiff for a consideration of Rs.15,000/- and executed an agreement of sale to that effect on 08.08.1982 by receiving in all sum of Rs.10,248/- on various dates. The balance amount of Rs.4,652/- was agreed to be paid at the time of registration of the sale deed. The plaintiff repeatedly requested the first defendant to execute a registered sale deed in his favour by receiving the balance sale consideration, but the first defendant went on postponing the same on one pretext or the other. Later, the plaintiff came to know that the first defendant completely shifted his residence to Mysore and is not coming forward to execute the sale deed in his favour. The plaintiff got issued a legal notice dated 23.04.1983 to the

first defendant calling upon him to execute the registered sale deed. The first defendant did not give any reply to the said notice, in spite of service of the same on him. On 01.05.1983 the second defendant approached the plaintiff and showed a registered sale deed dated 15.04.1983 executed by the first defendant in favour of the second defendant in respect of the suit house and demanded the plaintiff to vacate and handover the vacant possession of the suit house. The plaintiff told the second defendant that he is in possession of the house by virtue of the agreement of sale dated 09.08.1982 having paid considerable amount to the first defendant and that the first defendant had no right or authority to execute any registered sale deed in favour of the second defendant. Hence, the suit with a prayer that the registered sale deed dated 15.04.1983 be cancelled and the first defendant be directed to execute the registered sale deed in favour of the plaintiff in respect of the suit house by receiving balance consideration amount of Rs.4,652/- as per the agreement of sale.

The first defendant was set *ex parte* and he remained *ex parte* throughout the proceedings.

The second defendant filed his written statement stating that the allegation that the first defendant has agreed to sell the suit house to the plaintiff and the execution of an agreement on 09.08.1982 or that he received an amount of Rs.10,248/- on different dates is false. As per him, an oral agreement of sale was entered in the month of June, 1982

between the defendants 1 & 2. In pursuance of the said oral agreement, the registered sale deed was executed on 15.04.1983 in favour of the second defendant. After the execution of sale deed, the father of the second defendant demanded the plaintiff to vacate the suit house on 01.05.1983 but the plaintiff sought for three months time. After the expiry of three months, instead of vacating the suit house the plaintiff has filed the instant suit falsely. There was no agreement of sale in between the plaintiff and the first defendant prior to execution of registered sale deed in favour of second defendant. Hence, the said agreement is not binding upon the second defendant as he is a bona fide purchaser for value. The suit is misconceived and vexatious in nature. Therefore, the suit may be dismissed with costs.

Based on the above pleadings, the following issues were framed for trial:

- i) Whether the agreement of sale dt. 9-8-1982 in favour of plaintiff is true and binding?
- ii) Whether D1 executed the sale deed in favour of D2 on 15-4-83 in pursuance of oral agreement of sale in the month of June, 1982?
- iii) Whether D2 is a bona fide purchaser for value of the suit premises without knowledge of the agreement of sale in favour of D1?
- iv) Whether the plaintiff is in possession of the suit premises in pursuance of the agreement of sale in his favour?
- v) Whether the plaintiff is entitled to the cancellation of sale deed dated 15-4-83 executed by D1 in favour of D2?

- vi) Whether the plaintiff is entitled to the specific performance of agreement of sale dt.9-8-82 executed by D1 in his favour?
- vii) To what relief?

Based on the issues framed, the parties went to trial. For the plaintiffs, four witnesses were examined as PWs.1 to 4 and Exs.A.1 to A.7 were marked. For the defendants, two witnesses were examined as DWs.1 & 2 and Ex.B.1 was marked.

After considering the oral and documentary evidence, the lower Court came to the conclusion that the plaintiff is entitled to the relief of specific performance and also the cancellation of sale deed executed by the first defendant in favour of the second defendant. It is this judgment of the lower Court that is now assailed in the appeal.

This Court has heard Sri K. Raghuveer Reddy, learned counsel for the appellant/~~second~~ defendant and Sri Ashok Kumar Neeli, learned counsel for the respondent/plaintiff.

The crucial questions that arises for consideration in this case are a) whether the agreement of sale dated 09.08.1982 is genuine and as a consequence is the plaintiff entitled to a decree; and b) whether the sale deed dated 15.04.1983 executed by the first defendant in favour of the second defendant is pursuant to an agreement of sale which is anterior in point of time to Ex.A.1 agreement.

Both the learned counsel also concentrated on these aspects of the matter only. The case of the plaintiff is that an

agreement dated 09.08.1982 was entered into between him and the first defendant. As the first defendant did not execute the sale deed in favour of the plaintiff, he filed the suit for specific performance. Since he realized that the first defendant executed a sale deed in favour of second defendant for the very same property, a relief of cancellation of the said sale deed executed in favour of the second defendant was also sought. The case of the second defendant is that he purchased the property for valuable consideration, that he was not aware of Ex.A.1 agreement of sale and in any view of the matter, his agreement of sale, which preceded his sale deed is anterior in point of time to Ex.A.1.

The learned counsel for the appellant/second defendant argued vehemently against the decree and judgment that were passed. According to him, the suit is filed by the plaintiff in collusion with the first defendant to deprive his client-second defendant of the property. On the contrary, the learned counsel for the first respondent/plaintiff argued that the sale deed dated 15.04.1983, Ex.A.5/Ex.B.1 is a result of collusion between the defendants 1 & 2.

One important point that arises and which is not satisfactorily explained according to the learned counsel for the first respondent is the date of the alleged agreement of sale between the first defendant and the second defendant. The learned counsel points out that in para-2 of the written statement, there is a contradictory pleading one as it is

mentioned in para-2 that “the agreement of sale was entered into in the month of June, 1982” and in the very next line, it is mentioned that there is an “oral agreement” in pursuance of which the sale deed was executed. Therefore, the learned counsel points out that there is dichotomy and he argues that it is not clear whether there was a written agreement or an oral agreement. As per him, the words used in the pleading are very clear – “the agreement of sale was entered into”. Therefore, it is his case that the second defendant did not plead his case with certainty. The other submission is to the effect that for this agreement of sale there is no date nor time pleaded or proved. His argument is that if at all there is an agreement of sale, the date and other details of the same should have been mentioned with clarity. If it is an oral agreement; greater clarity is required as per him. He points out that neither in the pleadings nor in the evidence is there any clarity about this agreement of sale. The argument is therefore that the sale deed (Ex.B.1) was directly entered into on 15.04.1983 to defeat the earlier agreement of sale (Ex.A.1).

In reply thereto, the learned counsel for the appellant argued that Ex.A.1 document is not proved as per law, that unless and until the contents of Ex.A.1 are validly proved as per law, he argued that the plaintiff is not entitled to any relief. He points out that in the evidence of PW.2 for the first time the presence of certain witnesses at the time of execution is given viz., Eswar; Shankar and himself. He states that

Ex.A.1 is not attested by anybody and presence of people is not proved. He also argued that payments made on Ex.A.1 are not proved as required under law. Neither the extension of time nor the endorsement is proved according to the learned counsel. He also alleged that the fact that the first defendant remained *ex parte* clearly indicates that he has colluded with the plaintiff.

The learned counsel for the appellant also relied upon the cases reported in **Satish Kumar v. Karan Singh and another**¹, **P.V. Jospeth's Son Mathew v. N. Kuruvila's son**², **N.P. Thirugnanam v. Dr. R. Jagan Mohan Rao**³, **Ram Awadh v. Achhaibar Dubey**⁴ and **B. Rajamani v. Azhar Sultana and others**⁵.

The first four judgments of the Hon'ble Supreme Court of India and of a learned single Judge of this Court are on the issues of specific performance, how it is to be granted that it is a discretionary relief etc. The law is very settled that the plaintiff in a suit for specific performance will have to prove his readiness and willingness. Ex.A.1 is styled as a receipt, but the contents of the same make it clear that the first defendant received a sum of Rs.1,000/- as advance on 09.08.1982 and he mentions clearly therein that it is for the sale of the suit schedule property for a total consideration of Rs.15,000/-. The balance is agreed to be paid within two

¹ 2016 SAR (Civil) 269

² 1987 (Supp) SCC 340

³ (1995) 5 SCC 115

⁴ (2000) 2 SCC 428

⁵ 2005 (2) ALD 862

months from the date of the document and then the plaintiff is entitled to get the house registered. In addition to this Rs.1,000/-, there are other endorsements on the reverse of this document going up to 13.12.1982 totaling Rs.10,285/-. It is also settled proposition of law that that time is not the essence of the contract in case of sale of urban immovable properties. In this case, the plaintiff examined himself and filed Ex.A.1. The only parties connected to the document are the plaintiff and the first defendant, who remained *ex parte*. Therefore, PW.1 (plaintiff) is competent to depose about Ex.A.1.

A faint argument was raised as per ground No.5 that the plaintiff did not summon the first defendant to prove Ex.A.1. This Court is, however, of the opinion that a party to the suit viz., a plaintiff cannot summon a defendant to depose on his behalf. This is a practice that has been deprecated by the court and the law on this has been summarized by a Division Bench of the Kerala High Court in ***Jortin Antony and Others V. Padmanabha Dasa Marthanda Varma and Others***⁶, which held as follows:

We are thus of the view that a party to the suit does not have a right as such to summon the opposite party to give evidence. It is really left to the Court, possibly after the evidence of all the witnesses made available is completed, to consider whether the examination of one of the parties who has not come before Court, is necessary and in that context if found necessary, to compel that party to give evidence in exercise of its jurisdiction under Rule 14 of Order 16 of the Code. A plaintiff like the one in the present case, cannot as a matter of course include the defendant in his schedule

⁶ AIR 2000 Ker 369

of witnesses and as of right seek the issuance of summons to the defendant for being examined as a witness on his own behalf.

This Court therefore holds that in the circumstances of the case, the plaintiff has proved that Ex.A.1 is a validly executed document. The contention of the second defendant that the agreement (Ex.A.1) is forged and fabricated as pleaded in para-3 of the written statement has not been proved by them. Since they have raised the issue of fabrication/forgery the burden was on them to prove the same. They did not discharge the burden. Thus Ex.A.1, in the opinion of this Court has been validly proved.

The plaintiff's willingness is also clear from the actions he has taken viz., through Ex.A.2 lawyer's notice, paper publication-Ex.A.6 which are issued in quick succession, after the last payment endorsement on Ex.A.1 which is in December, 1982. It is also clear that the suit for specific performance was filed in August, 1983. Therefore, the plaintiff has established his willingness to get the sale executed. The fact that the plaintiff has also paid more than 2/3rd of the sale consideration makes it clear that his intention is to get the sale deed executed in his favour. He later deposited the balance sale consideration into the Court also. Thus both 'readiness' and 'willingness' are proved.

As far as the second defendant's case is concerned, this Court concurs with the argument of the first respondent/plaintiff that the date of the alleged agreement in favour of the

second defendant by the first defendant is not borne out by any record. There is no clarity as to when this agreement of sale was entered into. Even in the oral evidence, the date of this agreement between the first defendant and the second defendant is not spelt out. There is no clarity whether it is an oral agreement or a written agreement.

This Court also indicated to both the learned counsel the fact that the evidence of DWs.1 & 2 is not available. The original records are apparently destroyed. After the matter was heard, the case was reopened and both the learned counsel agree to check their records and reconstruct the same, but they ultimately appeared and stated that they could not do so and asked the Court to proceed with the available material. On 31.01.2018, this fact was brought to the notice of the learned counsel and on 02.02.1998 both the learned counsel confirmed that the depositions are not available and requested this Court to proceed with the available material. The letter dated 16.07.2009 of the Principal Senior Civil Judge, Ranga Reddy and the endorsement/index sheet of the Superintendent, Central Record Section of Principal District and Sessions Court, Ranga Reddy District were also brought to the notice of the counsels. In this sheet, it is clearly mentioned that the oral evidence of PWs.1 to 4 and DW.1 & 2 were destroyed on 20.02.2002. Hence, in the light of the above, this Court had to proceed further.

The learned counsel for the respondent in the appeal/plaintiff in the suit on the other hand argued that basing on ***Bondar Singh and others v. Nihal Singh and others***⁷ that in the absence of pleadings, no evidence can be let in. The learned counsel therefore argued that in the absence of clear pleading about the alleged agreement of sale in between the first defendant and the second defendant, this Court cannot look into in any evidence. This case was also cited to meet the 2nd defendant's argument that the plaintiff is in possession of the suit property as a 'tenant'. There is no pleading about this tenancy. Hence, no submission can be made about the same. The learned counsel also relied upon ***Murari Lal v. Muhammad Samiuddin Ahmad Khan***⁸, ***Bheek Chand v. Parbhuj***⁹ and ***Bhanuwar Lal Tatar v. Ahmed Khan***¹⁰ to argue that there is nothing in the Evidence Act to prevent a person from stating that they were present at the time of execution of document even though he did not sign on the same. The case law was cited to support the evidence of PWs.3 & 4 in this case. This Court is of the opinion that while the oral evidence to explain the presence of a person at the time of execution of a document is not prohibited under law still such an oral testimony will have to be looked into very carefully, lest it be misused. In this case, the evidence is not clear to explain the presence of PWs.3 & 4 at the time of

⁷ AIR 2003 SC 1905 (1)

⁸ AIR 1937 Allahabd 273

⁹ AIR 1963 Rajasthan 84

¹⁰ AIR 1977 Gauhati 27

execution of Ex.A.1. Even otherwise, this Court on a review of the entire evidence has come to a conclusion that Ex.A.1 is a genuine document. In view of the above, this Court is of the opinion that the defendants failed to prove that there was an earlier agreement in their favour that culminated in Ex.B.1 registered sale deed. Ex.A.1 is also held to be a valid document. The conduct of the plaintiff entitles him to get the discretionary remedy of specific performance. In view of all the above, this Court agrees with the findings of the lower Court and holds that the plaintiff is entitled to a decree for specific performance and as a consequence of this, issue No.5 viz., cancellation of the sale deed-Ex.B.1 is also held in favour of the plaintiff.

Issue No.3 is whether the second defendant is a bona fide purchaser for value. In the opinion of this Court the sale deed Ex.B.1 was executed subsequent to Ex.A.1 with a view to defeat Ex.A.1. Therefore, this Court holds that the second defendant is not a bona fide purchaser for value.

As far as issue No.4 is concerned, it is clear from the evidence that PW.1 is in possession of the property. PW.1 states that he was put in possession pursuant to Ex.A.1 agreement. The second defendant on the other hand argued that the possession of the plaintiff as a tenant. This 'tenancy' as noticed by the lower neither pleaded nor proved. Therefore, this Court concurs with the finding of the lower Court on this issue also.

The lower Court also noticed that the plaintiff has deposited the balance sale consideration into the Court and nothing further needs to be paid.

Therefore, for all the above reasons this Court holds that the plaintiff is entitled to the relief of specific performance of agreement of sale dated 09.08.1982 and also for the cancellation of the registered sale deed dated 15.04.1983. The first defendant is directed to execute the sale deed within 45 days from today, failing which the plaintiff/first respondent is entitled to approach the lower Court for execution of the sale deed. The plaintiff is at liberty to send a copy of this order to the concerned Sub-Registrar concerned to cancel Ex.B.1 sale deed (dated 15.04.1983, document No.1274 of 1983).

In the result, the appeal is dismissed. In the circumstances of the case, there shall be no order as to costs. As a sequel, miscellaneous petitions, if any, pending in this appeal shall stand closed.

D.V.S.S. SOMAYAJULU, J

Date: 29.03.2018
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