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

AS No.1016 of 1999

JUDGMENT:

This appeal is filed questioning the judgment and decree dated 27.02.1999 in Original Suit No.184 of 1989 passed by the Principal Senior Civil Judge, Eluru.

Initially, the suit was filed by the first plaintiff for specific performance of an agreement of sale dated 11.04.1985 and also seeking the relief of an injunction restraining the defendant from interfering with the possession and enjoyment of the suit schedule property and for other reliefs. Later, after the death of first plaintiff, his legal representatives were brought on record as plaintiffs 2 to 4, as per the orders of the lower Court dated 14.06.1995 in IA No.1017 of 1995.

The case of the plaintiffs before the lower Court is that an agreement of sale was executed on 11.04.1985 between the first plaintiff and the defendant. Under this agreement, the first plaintiff agreed to convey Ac.8.00 cents of land. An advance of Rs.45,000/- was paid for specific performance within 60 days, but a specific date was mentioned in the contract for specific performance; that the defendant also received the sale consideration after completion of the time fixed in the contract; that time is not the essence of the contract and out of eight acres of land, three acres was sold under three different sale deeds executed on 19.07.1988; and ultimately the suit was filed for specific performance of the balance land measuring Ac.5.00 cents.

The defendant filed a written statement stating that the period of 60 days was fixed in the contract and that on expiry of 60 days, the contract will lapse automatically. It is also averred that the possession was not delivered to the first plaintiff. With regard to three sale deeds executed on 09.07.1988, the defendant stated that he had an option of forfeiting the advance, but on the intervention of elders, instead of forfeiting the advance, he has decided to sell three acres of land under three sale deeds, but the said transaction is independent of the present suit transaction. The original agreement was also returned by the first plaintiff to the defendant as the accounts were settled; that the suit is bad for non-joinder of necessary parties and it is barred by time.

After the pleadings were filed, the following six issues were framed by the lower Court, apart from the additional issue that was framed:

1. Whether the plaintiff is entitled for the specific performance of the contract of sale dated 11.04.1985 from the defendant?
2. Whether the time is the essence of the contract and since the plaintiffs did not

enforce the contract within 60 days, the advance of Rs.45,000/- is liable to be forfeited?

3. Whether the possession is only given in respect of Ac.3.00 and the defendant is in possession of remaining Ac.5.00?
4. Whether the suit is barred by time?
5. Whether the suit is bad for non-joinder of necessary parties?
6. To what relief?

Additional Issue:

Whether the contract dated 11.04.1985 was substituted and cancelled by the agreement reached on 19.07.1988, as per the contention of the defendant in para-9 of his written statement?

For the plaintiffs, PWs.1 to 9 were examined and Exs.A.1 to A.32 were marked. For the defendant, DWs.1 to 6 were examined and Exs.B.1 to B.25 were marked. On the basis of the oral and documentary evidence, the lower Court came to a conclusion that the plaintiffs are not entitled to the relief that is claimed. The suit was dismissed. Questioning the same, the present appeal is filed.

This Court has heard Sri G. Vivekanand, learned counsel for the appellants/plaintiffs and Sri Raja Reddy Koneti, learned counsel for the respondents/defendants.

As this is a first appeal, for the sake of convenience, the parties are referred to as the plaintiffs and the defendant only.

The learned counsel for the appellants/plaintiffs argued that the lower Court committed an error in deciding the case against the plaintiffs. He pointed out that the lower Court wrongly came to a conclusion that the suit is barred by time, that basing on the said decision on limitation the lower Court proceeded to analyze the rest of the evidence and therefore came to a wrong conclusion on the entire case. The learned counsel argued out that the suit is not barred by time at all.

On the other hand, the learned counsel for the respondent/defendant argued that the lower Court did not commit any error in holding that the suit is barred by time. He also argued that the first part of Article 54 of the Indian Limitation Act is applicable to the facts of the present case and the suit is filed three years thereafter and therefore the suit is not within the time and it is in fact barred by time.

The learned counsel for the appellants/plaintiffs argued that the time is not the essence of the contract. The learned counsel pointed out that the agreement specified the period of 60 days for the purpose of Ex.A.1-agreement, but even after the expiry of 60 days, a part payment was made under Ex.B.2. The learned counsel pointed out that acceptance of a part of sale consideration on 12.06.1985 (which is after the 60 days is fixed) makes it clear that the defendant did not treat time as the essence of the contract. In addition, the learned counsel argued that the fact that out of Ac.8.00 cents, three acres were sold and three different sale deeds (Exs.A.16 to A.18) were executed in July 1988, clearly shown that both the parties treated the contract as subsisting and valid even in July 1988. In addition, the learned counsel for the appellants argued that generally time is not the essence of the contract in the sale of the immovable property as per the settled law. For all these reasons, the learned counsel argued that the finding of the lower Court is incorrect in so far as it relates to limitation and that the contract was treated as valid even in July 1988. Therefore, he contends that the suit filed in 1989 is within time.

In reply to this, the learned counsel appearing for the respondent/defendant argues that the terms of the contract cannot be ignored or overlooked. He argued that a specific period of 60 days was put in the agreement for completing the transaction. He also argued that the agreement clearly says that if the amount is not paid as stipulated, the agreement would be treated as cancelled.

It is his contention that the three sale deeds of July 1988 are independent documents based on an independent transaction and that they are not connected with Ex.A.1. The learned counsel pointed out the fact that Ex.A.1 was returned to the defendant by the plaintiffs clearly signifies that both the parties have treated the agreement as cancelled/novated. Therefore, it is his contention that the findings of the lower Court are totally correct. He also that readiness and willingness, which are mandatory, have not been proved and that the suit is barred by time. He also submits that possession was never delivered.

After hearing both the learned counsel, this Court noticed that certain admitted facts are present in the suit. An agreement of sale was executed on 11.04.1985 for sale of Ac.8.00 cents of land. Initial payment of Rs.45,000/- was made at the time of execution of the agreement. Two subsequent payments of Rs.50,000/- and Rs.58,000/- are also made. Similarly, the execution of three sale deeds each for one acre of land on 19.07.1988 is also not in dispute.

The facts which are in dispute are whether the possession of the land is delivered to the first plaintiff; whether he executed three sale deeds of 1988 in pursuance to the original agreement of 11.04.1985 and most importantly whether the readiness and willingness has been proved or not.

As the suit is one for specific performance of an agreement of sale, the plaintiffs will have to prove continuous readiness and willingness. Ex.A.1-agreement was executed on 11.04.1985 and Ex.A.14-notice demanding specific performance was issued in June 1989. The suit was filed soon after. In view of the settled legal principles viz., ***N.P. Thirugnanam (D) by L.Rs. v. R. Jagan Mohan Rao and Ors.***[1], ***Narinder Kumar Malik v. Surinder Kumar Malik***[2], and ***Man Kaur (Dead) by Lrs. v. Hartar Singh Sangha***[3] the plaintiff will have to prove his continuous readiness and willingness from the date of the agreement till the date of the suit/decree?. Readiness has been interpreted to mean that he has the financial capacity to pay the sale consideration. Even if the actual sale consideration is not available, the capacity to pay the same should be established. Willingness has been interpreted to mean the conduct of the party seeking a specific performance by showing a particularly active attitude to get a proper sale deed. These two basic principles have to be examined in this case.

[1] (1995) 5 SCC 115
[2] (2009) 8 SCC 743
[3] (2010) 10 SCC 512

Ex.A.1 is the original agreement produced by the defendant. As per this agreement dated 11.04.1985, the total sale consideration is Rs.2,86,000/-. The advance of Rs.45,000/- is acknowledged. The subsequent payments under Exs.B.1 and B.2 are dated 14.05.1985 and 12.06.1985. Therefore, the total payments made are Rs.1,53,000/-. In addition, another payment is supposed to have been made on 19.07.1998 of Rs.61,150/-. This is in dispute. The lawyers notice demanding specific performance was issued on 14.06.1989. These are the factors which can be gathered from the documents. When the oral evidence is examined, PW.1 in his chief examination clearly admits that his father could not pay the entire balance sale consideration within 60 days. He admits that some part payment was made thereafter. The third payment is supposedly made on the date of execution of the sale deeds in July 1988. Therefore, this witness deposed that he has to pay the balance of approximately Rs.72,000/- and stated that if time is given, they would pay the remaining balance. In his cross-examination, on 22.01.1988 he also deposed as follows:

> "As per the terms of the sale agreement, the entire sale consideration is to be paid within 60 days from the date of agreement, and the sale deed is to

> be obtained from the defendant within 60 days. There is no proof to show that we are having cash to pay the balance of sale consideration with us from the date stipulated in the agreement. It is not true to suggest that as per the terms of the agreement, the defendant has got right to forfeit the advance purchase money, in case the balance of sale consideration is not paid within 60 days."

In addition, in continuation of the cross-examination, he deposed as follows:

> "we availed a loan from Co-operative Bank, Vatluru, after depositing our title deeds with the Society. We deposited two title deeds with one Rajarao and created an equitable mortgage in his favour. It is true that the said Rajarao filed a suit against my father to recover the mortgage money. It is not true to suggest that as my father was unable to pay the entire sale consideration, he requested the defendant to cancel the agreement and execute three sale deeds over an extent of three acres only, and that in pursuance of said fresh contract, accounts were settled between the defendant and my father. ....
> It is not true to suggest that we are never ready and willing to perform our part of contract due to our financial problems."

Therefore, a reading of the evidence of PW.1 shows that he did admit that within 60 days they did not pay the balance sale consideration. Even on the date of deposition viz., 27.11.1997 he was not ready with the balance sale consideration. He clearly deposed that if one month time was given, he would pay the remaining sale consideration. Again it is admitted that a loan was taken from a bank by depositing the title deeds. In addition, another loan was taken from one Rajarao. The said Rajarao also filed a suit for recovery of money. The last suggestion in the cross-examination to the effect that there were never ready to pay the part of sale consideration due to the financial problem was however denied. After considering the entire evidence of PW.1, who is the prime witness for the plaintiffs, it is clear that the continuous readiness and willingness that is needed to be exhibited by a plaintiff in a suit for specific performance is not proved. Even the lawyer's notice is issued only on 14.06.1989 which is four years after the agreement of sale Ex.B.1 dated 11.04.1985. The lower Court also noticed this part of the evidence that the original plaintiff is not a person of ample means. Even after the payment dated 12.06.1985, there was a gap. The lawyer's notice as noticed was only issued in 1989. Therefore, this Court concurs with the finding of the lower Court that the continuous readiness and willingness, which have to be exhibited by a plaintiff seeking for specific performance is not borne out by the record.

The additional issue that is framed is whether the contract dated 11.04.1985 was substituted by another agreement and that there was a settlement of accounts between the parties. This issue was negatived. It is noticed that the plaintiffs filed a Photostat copy of the agreement of sale and the same is marked as Ex.A.13. The original agreement of sale Ex.B.1 is filed by the defendant during the course of the trial. The case of the first plaintiff in his pleading is that the original of Ex.B.1 was handed over to the Village Karnam in July 1988 for the sake of noting all the boundaries. As noticed by the lower Court, PW.1 was not present at the time of execution of three sale deeds in July 1988. If the original of this document was given to the Village Karnam, the first plaintiff should have taken steps to issue a notice or otherwise demand the Village Karnam to return the document. There is absolutely no evidence to show that this document was given to the Village Karnam. In the absence of any notice or demand from the first plaintiff, this Court cannot believe the theory advanced by the plaintiff that the document was given to the Village Karnam.

In addition, the presumption under Section 114 (i) of the Indian Evidence Act is also of importance. The presumption is to the effect that when a document creating an obligation is in the hands of the obligator, the obligation has been discharged. This is no doubt a rebuttable presumption. The evidence on record does not show that the plaintiffs were able to rebut this presumption. The very fact that Ex.B.1 was in the custody of the defendant and that he has produced it and marked it in his evidence clearly shows that there is strength in the submission of the defendant that there was a settlement of account and the document was returned. In addition, Ex.A.11 is a document showing the settlement of account between the original plaintiff and the defendant. There are admittedly dealings between all of them. The details of the account as settled in Ex.A.11 are explained by DW.1 also lends credence to the theory that the account was in fact settled. No explanation whatsoever is forthcoming from the plaintiffs' main witness about the contents of Ex.A.11. He merely marked the document. DW.1 clearly deposed that the transactions were settled in July 1988 and deposed in his chief examination about the manner in which the payments were made and are adjusted. He stated that only because of the settlement, the sale deeds were executed in July 1988. This Court notices that even in the cross-examination, the witness admits that Ex.A.11 is his hand writing. He admits that Ex.A.11 was written on 10.07.1988. A reading of the entire cross-examination shows that the contents of Ex.A.11 and the explanation given by DW.1 are not really in any way shattered or altered. Therefore, in view of the presumption under Section 114 (i) of the Indian Evidence Act and the fact that the contents of Ex.A.11 are satisfactorily explained by DW.1 leads this Court to a conclusion that the additional issue framed is to be decided in favour of the defendant and against the plaintiffs. The lower Court disbelieved Ex.A.11, because it does not bear the signature or the thumb mark of the original plaintiff. However, the lower Court failed to notice the fact that the plaintiffs have produced Ex.A.11 and the witness has deposed that Ex.A.11 is the chit written by the defendant showing the amount due to him under the khata. The witness did not state that Ex.A.11 was never given to them or that it was created by DW.1. Therefore, this Court holds that additional issue has to be decided in favour of the defendant and against the plaintiff.

The next issue to be decided is issue No.2 - whether the time is the essence of the contract and since the plaintiffs did not enforce the contract within 60 days whether the advance of Rs.45,000/- is liable to be forfeited. The submission of the learned counsel for the respondent/defendant is that for the sale of the immovable properties, time is not the essence of the contract. The fact that payment was received a few days after the time fixed for payment also lends support to this as per plaintiffs. No notice is admittedly given after receipt of payment under Ex.A.3-endorsement making time as the essence of the contract once again. However, the clauses of this agreement (Ex.B.1) do make it clear that the '60 day period' has a meaning. The same is discussed while dealing with issue No.4. This Court holds that time is the essence by reading all the clauses in the agreement. But, this Court agrees that unless and until the loss is established, the amount that has been taken as advance cannot be forfeited. Forfeiture is not automatic. The settled law on the subject is ***Maula Bux v. Union of India***[4]. Therefore, this issue is partly held in favour of the plaintiffs.

With regard to issue No.3 - whether the possession is only given in respect of Ac.3.00 cents and the defendant is in possession of remaining Ac.5.00 cents, a lot of arguments and evidence were advanced on these issues. On this issue of possession, a prayer for injunction was also made. It is clear that Ex.B.1-agreement of sale does not talk of handing over of the possession. Both the parties contended that the

[4] AIR 1970 SC 1955

sugarcane in the land was cut and supplied to the factory. Exs.A.4 to A.8 are receipts for supply of sugarcane. This merely shows that some sugarcane was transported in the year but this did not establish that the first plaintiff was put in actual possession of the land. In addition, Exs.B.22 to B.25 show that the defendant has also been transporting sugarcane to the cooperative factory and the pattadar passbooks which are filed by the defendant (Exs.B.4 & 5) show that he is in possession and enjoyment of the land.

In addition, as noticed by the lower Court, the evidence of PW.5 is also categorical. This witness in the course of his chief examination states that only an extent of Ac.3.00 cents is in the occupation of his brother/first plaintiff. The remaining extent is in dispute. This is an admission made in the course of his chief examination itself. This admission was rightly noticed by the lower Court. Apart from the three sale deeds which were marked as Exs.A.16 to A.18, there is no clear proof filed to show that the first plaintiff is in possession of the entire Ac.8.00 cents of land. A perusal of recitals of this document shows that there is a recital about the delivery of possession on the date of the deed itself. Therefore, the lower Court rightly came to the conclusion that the entire Ac.8.00 cents of land was not given in possession to the first plaintiff. Only for Ac.3.00 cents of land, there is documentary evidence to show that the land was actually delivered. In the course of cross-examination, PW.1 admits that an agreement does not prove delivery of possession and that the defendant himself is shown as a supplier of sugarcane. The witness also admits that the plaint schedule property is shown as one of the boundaries and that it is the property of the defendant. This admission is about the boundary in Ex.A.18. The plaint schedule property is for Ac.5.00 cents only and Ex.A.18 shows the same as the boundary for the property conveyed under Ex.A.18. Therefore, a total reading of the respondent's evidence makes, it clear that only Ac.3.00 cents of land was delivered to the plaintiff and not the entire Ac.8.00 cents. Therefore, the plaintiff was in possession of Ac.3.00 cents of land only and is not entitled to an injunction for the rest of the land measuring Ac.5.00 cents.

With regard to Issue No.4 - whether the suit is barred by time. It is true that as per the original agreement dated 10.04.1985, 60 days was the time fixed for completion of the contract. Therefore, 10.06.1985 is the outer limit. The suit has to be filed as per this by 09.06.1988. If Ex.A.3 payment (12.06.1985) is taken as an extension, the suit has to be filed on or before

11.06.1988. The suit in this case was filed in June 1989. The 60 day period fixed for completion cannot be ignored totally. As per the terms, if the payment is not made within 60 days; the agreement shall stand cancelled. If the entire payment is made, but the defendant does not come for registration; the agreement shall be treated as a sale deed. Hence, these terms in Ex.B.1 fix the time for performance. Therefore, viewed from any angle, even if the time is not treated as the essence of the contract and extension was granted as pleaded by the plaintiffs, this Court is of the opinion that the suit is barred by time. Even otherwise, his readiness and willingness are also not proved. Therefore, the plaintiffs are not entitled to a decree. This Court holds that the transaction of 14.07.1988 by which three sale deeds are executed is not in continuation of Ex.B.1. Hence, these sale deeds cannot be said to have saved the limitation or extended the period for specific performance.

The last issue that survives for consideration is about non-joinder of necessary parties. In para-17 of the written statement, it is clearly pleaded by the defendant that there is a non-joinder of a necessary parties. PW.1 admits that the wife of the defendant is an owner of Ac.56 cents of land. This admission by PW.1 himself supports the case of the defendant. The lower Court held that the defendant who executed an agreement of sale for the entire extent as if he is the owner cannot take advantage and plead that there is a non-joinder. This Court is of the opinion that the relief of execution of sale deed cannot be granted for the entire property, which does not belong to the defendant. The decree granted by the Court should be capable of being enforced. This Court cannot grant a decree for the sale of the property of a person who is not before the Court. Therefore, this Court holds that the decree cannot be passed in favour of plaintiffs and the wife of the defendant is a necessary party.

On an overall review of the entire case, this Court holds that the first plaintiff did not prove his readiness and willingness to get a sale deed in his favour and therefore he is not entitled to the specific performance. In this regard, the finding of the lower Court is confirmed. With regard to issue No.2, this Court holds that the time is the essence of the contract, but the forfeiture of deposit is not automatic. With regard to Issue No.3, this Court holds that possession was only given for Ac.3.00 cents and not for Ac.5.00 cents. With regard to issue Nos.4 and 5, this Court holds that the suit is already barred by time and that it is also bad for non-joinder of necessary parties. With regard to the additional issue, this Court holds that there is a settlement in July 1988 and the agreement dated 11.04.1985 is cancelled and returned.

For all these reasons, the judgment and decree dated 27.02.1999 in O.S.No.184 of 1989 passed by the Principal Senior Civil Judge, Eluru are confirmed. The appeal is accordingly dismissed. In the circumstances of the case, 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: 10.12.2018
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