

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

A.S.No.682 of 1999

JUDGMENT:

This appeal is filed by the unsuccessful defendant against the judgment and decree dated 31.12.1998 passed in O.S.No.66 of 1996 by the II Additional District Judge, Visakhapatnam.

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

The plaintiff filed the suit against the defendant for specific performance of an agreement of sale dated 01.07.1986. The defendant contested the suit on various grounds. The brief averments of the plaint and the written statement are as follows:

An agreement of sale was entered into between the plaintiff and the defendant. The defendant is his brother-in-law. The defendant had constructed two portioned building on the vacant site, which he got by way of a gift settlement deed dated 02.07.1982. Out of the two portions, the defendant had sold the southern portion to the plaintiff for a total consideration of Rs.85,000/- on 01.07.1986. The entire sale consideration of Rs.85,000/- was paid by the plaintiff and received by the defendant. The defendant on receipt of the consideration of Rs.85,000/- had executed an agreement to sell. The physical possession of the property was delivered to the plaintiff and he has been in possession and enjoyment

of the plaint schedule property without any interference. The defendant who worked in Central Excise Department stated that the property is under mortgage to Central Excise Department by deposit of title deeds, therefore, the registration of sale deed would be done in favour of either the plaintiff or his order on discharge of the mortgage with the Central Excise Department. The plaintiff always is ready and willing to meet the necessary expenditure towards the purchase of stamps to inscribe the sale deed and pay the registration fee etc.

On 15.06.1992 the defendant while making construction in his portion has also attempted to make construction on the terrace of the portion sold to the plaintiff. The plaintiff had objected the construction and also demanded for immediate execution of the sale deed in his favour in terms of the agreement of sale. The defendant refused to comply with the demand. Hence, the suit for specific performance. If the Court feels that the agreement dated 01.07.1986 cannot be performed by the defendant an alternative relief for a money decree in favour of the plaintiff for a sum of Rs.1,46,200/- being the refund of advance together with interest thereon at 12% per annum till the date of suit was sought with subsequent interest on the principal amount of Rs.85,000/- and costs of the suit.

The defendant filed an elaborate written statement stating that the suit is not maintainable on facts or law and

denied all allegations. He further submitted that while the defendant was in service, due to some departmental problems, the defendant purchased a house site to an extent of 444 square yards at Akkayyapalem, Visakhapatnam in the name of his father-in-law, who is no other than the father of the plaintiff in the year 1973. Subsequently, after the death of father-in-law of this department, the plaintiff, mother of the plaintiff and wife of the defendant transferred the said property in favour of the defendant by executing a registered gift settlement dated 27.09.1982, since then the said property belongs to the defendant. For the purpose of construction of the said building, the defendant besides his earnings, has also taken a loan of Rs.85,000/- from his department and also from his brother-in-law i.e., the plaintiff. The defendant never executed any document with regard to the said amount advanced by the plaintiff to this defendant. On one day, while the defendant was in hurry to go to his office, the plaintiff brought one document saying that he got the said document prepared on the agreed terms and asked the defendant to sign on it. Believing that the plaintiff has got the document prepared on the terms as agreed upon between the plaintiff and the defendant, the defendant simply signed on the said document without seeing the contents of the said document.

Since the plaintiff has not taken any document for the loan amount of Rs.85,000/- given to the defendant by the plaintiff, the defendant blindly believed that the plaintiff will

not deceive the defendant, so he signed on the said document with a blind belief that the plaintiff got the document prepared to the effect that the plaintiff has given a loan amount of Rs.85,000/- to the defendant and till that amount is discharged in lieu of interest, the plaintiff has to collect the rents on the southern side portion of the building construction by the defendant. The plaintiff is only entitled for the said sum of Rs.85,000/- which he has given as loan to the defendant at the time of construction. The question of selling away the half of the said southern side portion to the plaintiff for the said paucity sum of Rs.85,000/- is an utter falsehood and deliberate lies. The plaintiff has no right to prevent the defendant from proceeding with the construction of the first floor over the existing ground floor. The defendant need not execute the sale deed in favour of the plaintiff in respect of the southern side portion of the building of the defendant and the plaintiff is not entitled to ask for specific performance of the contract.

Based on the above pleadings, the following issues and additional issue were framed:

Issues:

- i) Whether the suit agreement of sale came into existence under the circumstances stated by the defendant in his written statement?
- ii) Whether the plaintiff is entitled for the specific performance of the suit agreement of sale?
- iii) To what relief?

Additional issue:

- iv) Whether the alleged agreement is enforceable for the reasons stated in the additional written statement?

For the plaintiff, four witnesses were examined and Exs.A.1 to A.17 were marked. For the defendants, two witnesses were examined and Ex.B.1 was marked. After considering the entire evidence both oral and documentary, the lower Court decreed the suit and the defendant was directed to execute the sale deed and get it registered in the name of the plaintiff or his order within one month, failing which the plaintiff is at liberty to get the sale deed executed through Court. It is this order that is now impugned in the present appeal.

This Court has heard Sri T.M.K. Chaitanya, learned counsel for the appellant/defendant and Sri T.S. Anand, learned counsel for the respondent/plaintiff.

The learned counsel rightly concentrated on issue Nos.1 & 2 together and argued on the question whether the plaintiff is entitled to specific performance.

Before going into the merits of the case, a few facts have to be noticed. The defendant is the brother-in-law of the plaintiff. The sister of the plaintiff married the defendant. Both the plaintiff and the defendant are educated and well-employed. The plaintiff is an employee of a public sector bank, while the defendant retired as a Superintendent of the Central Excise Department and commenced practice as an advocate. The signatures on Ex.A.4 are not in question also.

These facts are highlighted at this stage, since the learned counsel for the appellant argued that the suit agreement is not validly entered into and that the defendant has also filed additional written statement challenging the suit agreement. The learned counsel pointed out that in view of the close relationship between the parties, the defendant blindly signed the agreement without reading the contents and therefore he was not aware that it is an agreement of sale. Consequently, it is argued that the agreement of sale is not enforceable. Therefore, the first and foremost question to which the attention of this Court was drawn to invite is: Ex.A.4-agreement.

Ex.A.4 is an agreement dated 01.07.1986 by which according to the plaintiff, the defendant agreed to sell the suit schedule property to the plaintiff. The sale consideration shown therein is Rs.85,000/-. The document stated that the entire sale consideration was paid and that the plaintiff is put in possession of the property. It is also mentioned that the property covered by the agreement is under a mortgage to the Central Excise Department in which the defendant is working and that the registration would be carried out after the mortgage is clear. The agreement is attested by two witnesses and scribed by one P.L. Narsinga Rao. The argument of the learned counsel is that out of blind faith and believing the representation of the plaintiff, the defendant signed the same.

In reply thereto, the learned counsel for the respondent/plaintiff argued that apart from examining himself as PW.1, the plaintiff also examined PW.2, who is an attester. PW.1 supported his case. PW.2 clearly deposed that the agreement of sale was entered in his presence and consideration of Rs.85,000/- was paid in his presence and that thereafter defendant signed Ex.A.4. The witness also identified the signature of second attester, Jogarao and deposed that this second attester died in 1989. He also stated that the scribe is one P.L. Narsinga Rao. This was followed by the evidence of PW.4, who is a practicing advocate of Visakhapatnam. The scribe of this document was his deceased clerk as per the deposition. Therefore, PW.4 who has been practicing in Visakhapatnam for 22 years by then identified the signatures of his erstwhile clerk as the scribe of this document.

In addition to PWs.2 & 4, PW.3 is a witness who was examined to prove the case of the plaintiff being in possession of the property. This witness states that he met the plaintiff for taking a portion of suit schedule property on rent. His evidence is to the effect that he met DW.1 who is residing in the house and asked about renting out a portion belonging to PW.1. Thereafter, the witness states that he met PW.1 at Rayapur and agreed on the terms and conditions for the lease. PW.1 informed DW.1 to handover the key to the portion belonging to PW.1. Therefore, this tenant continued in

the house till he vacated the said portion. This witness was examined to prove that PW.1 and DW.1 were living in the respective portions of their house and to prove that the possession of the property, which is the subject matter of litigation was given to PW.1 by the defendant under Ex.A.4. The learned counsel pointed out that the cross-examination of these three important witnesses did not really take away from the intrinsic worth of their testimony and that their testimony in chief examination is not shown to be untrustworthy.

In addition, the learned counsel also pointed out about the letters which are marked as Exs.A.1 to A.3 which clearly show the fact that the plaintiff and the defendant were in correspondence about the construction of the property, the wood work in the house etc. In Ex.A.2, the defendant describes to the plaintiff the manner in which the wood is being purchased for the house. According to the learned counsel for the respondent, Ex.A.3 and its enclosure are an important document which clearly shows that the transaction was concluded between PW.1 and DW.1. It appears from a reading of this letter that the Central Excise Department where the defendant is working sought certain clarifications from the defendant regarding his housing loan. Therefore, the defendant addressed a letter to the plaintiff, which is marked as Ex.A.3. To this Ex.A.3, he enclosed a copy of the letter

which he had addressed to the Assistant in Central Excise Department for his information and states as follows:

“I never thought they would enquire so deeply.”

The enclosure shows that the defendant was clarifying to his Department about the source of income from which the plaintiff got the money. This enclosure also states that the plaintiff got Rs.80,000/- after the death of his father and that further facts can be ascertained from the Punjab and Sindh Bank where the defendant is working.

The learned counsel also pointed out that in the cross-examination of the defendant (DW.1) on 08.09.1998, he admitted about Ex.A.1 to A.4 without any restrictions. The learned counsel also pointed out that the defendant admitted in his cross examination on 08.09.1998 that the electricity service connection of the southern portion is in the name of the plaintiff from the date of the connection till the date of deposition. The witness also admitted that the plaintiff is residing in the southern portion and that the tenant used to credit the rent amounts for the southern portion to the plaintiff's account as per his instructions only. DW.1 was recalled and examined on 16.09.1998 and on that date he admitted that the enclosure to the Ex.A.3 was addressed to his Department when they asked the defendant about his source of income for constructing the house. He clearly admitted that he clarified to the Department that he got money from the plaintiff for construction of the house. The

learned counsel for the respondent argued that on the basis of all these, the case of the plaintiff is proved.

He points out that the agreement of sale is voluntarily signed with full knowledge of the contents and the same is borne out by Ex.A.3 and its enclosures. The fact that the defendant is in possession of the portion of the property is borne out by the cross-examination of DW.1 and by the evidence of PW.3. The learned counsel also points out that it is very difficult to believe that the defendant signed the agreement blindly. It is his contention that the fact that PW.1 was in possession and was openly enjoying of the property over the years by collecting the rents; paying electricity bills etc. If Ex.A.4 was not voluntarily executed, the defendant would have taken action to question the possession and enjoyment of the plaintiff.

On a review of all of the above, this Court is of the opinion that the case set up by the defendant is not correct. The plaintiff has proved through oral and documentary evidence that the agreement of sale in question was executed voluntarily and possession was also delivered to the plaintiff under the same. In addition, the plaintiff also filed a telegraphic notice, Ex.A.5 dated 17.06.1992 which was followed by a regular lawyer's notice dated 30.06.1992, Ex.A.6 demanding specific performance.

Since the entire consideration was paid under Ex.A.4 and possession was also delivered, the question of proving

defendant's "readiness" namely the financial capacity to pay does not arise in this case. The lawyer's notice that is issued by the plaintiff to the defendant also shows that he was expressing his willingness to get the sale deed registered in his name. Ex.A.6 notice was refused by the defendant. The endorsement on the returned postal cover marked as Ex.A.16 shows it is refused.

Therefore, in view of the above facts and circumstances of the case, this Court is of the opinion that the case set by the defendant is not correct. The plaintiff has proved that Ex.A.4 agreement was executed voluntarily and that he was put in possession of the property also. The documents referred to the judgment including electricity bills from the evidence of PW.3 and the admissions of the defendant clearly show that the defendant was put in possession of the property pursuant to Ex.A.4 agreement. The conduct of the defendant disentitles him from any relief from this Court. On the contrary the plaintiff has proved the agreement; the payment of sale consideration and also the demand made for registration. Therefore, all the essential pre-requisites in granting a decree for specific performance are made out in this case.

In the result, this Court holds that the lower Court was right in decreeing the suit as prayed for and holding the issues in favour of the plaintiff and against the defendant. This Court also concurs with the judgment and decree passed

by the lower Court and confirms the findings with regard to issue Nos.1 & 2 and the additional issue. As all the issues are dealt with together and decided, this Court has also adopted the same procedure. This Court therefore confirms the judgment and decree passed by the lower Court in all respects. The appellants 2 to 6 (legal representatives of the deceased defendant/1st appellant) are directed to execute a sale deed in favour of the plaintiff or his nominee within 30 days of this order, failing which the plaintiff/respondent is at liberty to get the sale deed executed through Court.

The appeal is accordingly 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.

Date: 23.03.2018
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D.V.S.S. SOMAYAJULU, J