

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Civil Revision Petition No.3064 of 2018

ORDER:

This civil revision petition, under Article 227 of the Constitution of India, by the unsuccessful respondents 3 & 4 – defendants 3 & 4 is directed against the orders, dated 28.12.2017, of the learned VII Additional District Judge, Prakasam at Ongole, passed in IA.No.854 of 2017 in OS.No.74 of 2010, filed by the plaintiff requesting for permission to deposit balance of sale consideration of Rs.95,00,000/- [Rupees Ninety Five Lakhs only] to the credit of the suit before the trial Court.

2. I have heard the submissions of Sri K. Sita Ram, learned counsel appearing for the revision petitioners – defendants 3 & 4, and of Sri Naga Praveen Vankayalapati, learned counsel appearing for the 1st respondent - plaintiff. Respondent nos.3 to 6 are stated to be not necessary parties.

3. The introductory facts, in brief, are as follows: -

Plaintiff brought the suit for specific performance of a contract of sale, dated 06.06.2007, directing the defendants 2 to 7 to execute a registered sale deed in favour of the plaintiff in respect of the plaint schedule site; (or) alternatively for a decree for a sum of Rs.1,01,25,000/- and for costs. The 3rd defendant filed a written statement resisting the suit. In the said suit, the plaintiff filed the afore-stated Interlocutory Application for permission to deposit the balance of sale consideration into Court, *inter alia*, stating that he is always ready and willing to perform his part of the contract and that the defendants 2 to 5 are not willing to perform their part of contract and that they

did not come forward to execute the sale deed despite issuance of several legal notices and that he is previously an income tax assessee and is capable of paying the balance of sale consideration at any time and that his family possessed properties worth more than rupees two crores and that he was advised to deposit the balance of sale consideration into Court. The fourth defendant filed a counter and the same was adopted by the defendants 3 & 5. The case of the said defendants is as follows: - 'The trial of the suit has commenced. Plaintiff was examined as PW1. He was cross-examined in-part on 25.10.2017. He was further cross examined on 06.11.2017 by the learned counsel for the defendants 3 to 5. In his said cross-examination, he categorically admitted that he does not have proof to show that he is having balance of sale consideration within the time stipulated in the contract of sale, exhibit A1. He further admitted that he did not make any request to the Court for permission to deposit the balance of sale consideration. To cover up the lacunae and to water down the cross-examination, the plaintiff came forward with the present Application on the same day he was further cross-examined. There are no *bona fides* on his part. He has to pay the balance of sale consideration within three months from the date of exhibit A1, that is, before 05.09.2007. He never expressed his readiness with cash; and, he was not ready to pay the balance of sale consideration within the time stipulated in the contract of sale. He did not comply with the conditions in the contract of sale. Seeking permission to deposit the balance of sale consideration at this stage is not a *bona fide* attempt and it is clear contravention of the terms of the contract of sale. It is clearly pleaded in the written statement that the 1st defendant in his reply notice informed the plaintiff that he was 93 years old and is suffering with paralysis and other health complications and requested the plaintiff

through his men and by telephone calls to come forward to take back the earnest money and cancel the contract of sale as he was unable to get the NOC from the authorities. The deceased 1st defendant also informed the plaintiff that due to old age, ill health and also love & affection towards his grand sons, he intends to convey the property to them. The 1st defendant also executed a Will/Codicil in favour of the sons of the defendants 3 & 4. The schedule property is already transferred to the grand children of the deceased 1st defendant. Plaintiff is aware of the same. He filed the suit mischievously.' By the impugned order, the trial Court allowed the Interlocutory Application and permitted the plaintiff to deposit the balance of sale consideration. Aggrieved thereof, the defendants 3 & 4 preferred this revision.

4. Learned counsel for the revision petitioners – defendants 3 & 4 contended as follows: - 'The suit was filed in the year 2010 seeking specific performance of a contract of sale, dated 06.06.2007. The defendants 3 & 4 are strongly resisting the suit, *inter alia*, contending that the plaintiff was never ready and willing to perform his part of the contract. The plaintiff did not deposit the balance of sale consideration at the time of institution of the suit to show his *bona fides*. If he wanted to deposit the balance of sale consideration, he ought to have done so at the time of institution of the suit in the circumstances stated in the counter. The instant Application is filed to cover up the lacunae and get over the admissions in the cross-examination and water down the cross-examination done on behalf of the defendants 3 to 5 by their counsel. Mere seeking of permission at the belated stage and depositing of the balance of sale consideration is not adequate as the plaintiff is required, under facts and in law, to show his readiness and willingness from the inception and

throughout. The plaintiff is unable to show his readiness and willingness at all relevant times. He is attempting to deposit the balance of sale consideration nearly 8 years after the filing of the suit and more than a decade after the contract of sale. Therefore, the request made at this belated stage is not *bona fide*. The deposit, if any, made is not going to advance his case any further and is not sufficient to show his readiness and willingness at all relevant times. In any event, the right of the defendants to contend that the plaintiff was never ready and willing to perform his part of the contract right from the inception and at all relevant times may be kept open as the defendants are entitled to so contend as per law.'

5. Learned counsel for the plaintiff supported the orders of the trial Court and contended that the plaintiff is previously an income tax assessee and that he and his family members own properties worth crores of rupees and that he was always ready and willing to perform his part of the contract and is having cash with him at all relevant times and, therefore, the revision is liable to be dismissed.

6. I have given earnest consideration to the facts and submissions.

7. In the suit for specific performance, the plaintiff filed the interlocutory application seeking permission to deposit the balance of sale consideration into Court. The defendant contends that the plaintiff has to pay the balance of sale consideration within three months from the date of exhibit A1, that is, before 05.09.2007 and that the plaintiff never expressed his readiness with cash; and, he was not ready to pay the balance of sale consideration within the stipulated time and that he did not comply with the conditions in the contract of sale.

8. In the backdrop of facts and contentions, it is necessary to first refer to Section 16 of the Act, which reads as under:

16. Personal bars to relief.—Specific performance of a contract cannot be enforced in favour of a person—

- (a) who would not be entitled to recover compensation for its breach; or
- (b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or
- (c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms of the performance of which has been prevented or waived by the defendant.

Explanation.—For the purposes of clause (c),—(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court; (ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.

No doubt, having regard to the facts and circumstances of a given case, the trial Court in its discretion may direct the plaintiff to deposit the balance of sale consideration. It is also true that in a suit for specific performance of a contract, the plaintiff has an obligation to aver and prove that he has either performed or has always been ready and willing to perform the essential terms of the contract, which are to be performed by him, other than the terms, the performance of which has been prevented or waived by the defendant. It is also to true that as per Clause 'c' of Section 16 of the Act, where a contract involves the payment of money it is not essential for the plaintiff to actually tender to the defendant or deposit in Court any money except when so directed by the Court; but, the plaintiff must aver performance of or readiness and willingness to perform the contract according to its true construction. Even in cases where the trial Court was to exercise the discretion in the matter of directing the plaintiff to deposit the balance of sale consideration, it has to give

an opportunity of hearing to both sides and then pass a reasoned order. The trial Court, having regard to the terms of the contract of sale, is also required to examine as to whether the sale consideration payable in respect of the property agreed to be sold is a fixed sum or whether the same has to be determined after measuring the property agreed to be sold and after arriving at the actual extent of the same. In the latter case, the consideration payable and the balance sale consideration payable are dependent upon the extent of the land that would be determined only after conducting survey of the land agreed to be sold under the contract of sale. Therefore, in certain cases, there may be a necessity of localising and measuring the land for ascertaining actual extent agreed upon to be sold and purchased under the contract of sale. Consequently, the answer to the question - whether a direction can be given to the plaintiffs to deposit the balance of sale consideration into Court? - depends upon the facts and circumstances of the case. Further, if the plaintiff is willing to deposit the balance of sale consideration into Court, the Court may permit the plaintiff to do so, if the Court is satisfied that such a course is permissible. As rightly contended, mere permission granted to deposit the balance of sale consideration into Court and the deposit of the same into Court pursuant to such permission of the Court will not be considered as a circumstance or a factor favourable or unfavourable to one of the parties to the *lis* in view of the settled legal position that the plaintiff has an obligation to aver and prove that he has either performed his part of the contract or has always been ready and willing to perform the essential terms of the contract, which are to be performed by him, other than the terms, the performance of which has been prevented or waived by the defendant. Hence, mere deposit of the balance of sale consideration into Court does not absolve the plaintiff either of the 'Onus

of Proof, which initially rests upon the plaintiff, or the legal burden i.e., the 'Burden of Proof'. On the above analysis, this Court finds that the revision petition can be disposed of with appropriate observations.

9. Accordingly and in the result, while confirming the order of the trial Court, the Civil Revision Petition is disposed of with the observation that the subject order permitting the plaintiff to deposit the balance of sale consideration into Court and the deposit, if any, made by the plaintiff pursuant to the said orders of the trial Court, shall not preclude the defendants from raising the permissible defence that the plaintiff was never ready and willing to perform his part of the contract right from the inception and at all relevant times. It is needless to state that the trial Court shall consider the said contention of the defendant, if raised, having regard to the facts, evidence brought on record and the legal position obtaining and applicable.

There shall be no order as to costs.

Miscellaneous petitions pending, if any, shall stand closed.

M.SEETHARAMA MURTI, J

06.08.2018

Vjl