

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.589 of 2013

JUDGMENT:

This appeal is filed, under section 100 CPC, by the plaintiff assailing the judgment and decree dated 19.03.2013 passed in A.S.No.53 of 2012 on the file of District Court, Rajahmundry, wherein whereby the decree and judgment dated 28.03.2012 passed in O.S.No.1400 of 2006 on the file of I Additional Junior Civil Judge Court, Rajahmundry, dismissing the suit filed by the plaintiff for specific performance, was confirmed.

2. Heard the learned counsel for the appellant and perused the record.

3. For the sake of convenience, the parties will be hereinafter referred to as they were arrayed before the trial Court to avoid confusion.

4. The facts leading to filing of the second appeal in nutshell are as follows: On 02.10.2006, the defendant approached the plaintiff agreeing to sell the suit schedule property at the rate of Rs.250/- per square yard. As per the terms and conditions of the oral agreement, the plaintiff paid an amount of Rs.5,000/- to the defendant as advance amount, and agreed to obtain the sale deed on 03.10.2006. The defendant handed over the original sale deed and the will to the plaintiff. On 03.10.2006, the plaintiff purchased the stamps from the Registrar office in order to obtain the sale deed from the defendant. For one reason or the other, the defendant did not cooperate with the plaintiff. On 16.10.2006, the plaintiff got issued a legal notice directing the defendant to execute

the sale deed in his favour. The defendant received the legal notice on 17.10.2006 and remained silent. Hence, the plaintiff filed the suit for specific performance or alternatively for refund of earnest money with interest at 24% per annum.

4. The defendant filed written statement denying all the averments made in the plaint including the alleged oral agreement of sale dated 02.10.2006 *inter alia* contending that the defendant proposed to sell the suit schedule property if anybody offers good price. Kandukuri Veerraju informed the son-in-law of the defendant that he is a document writer and requested him to show the title deeds. The son-in-law of the defendant showed the title deeds to Veerraju and the plaintiff. After verification of the documents, the plaintiff and Veerraju asked the son-in-law of the defendant that they will show the documents to Advocate for legal opinion. Believing their words, the son-in-law of the defendant handed over the title deeds of the suit schedule property to the plaintiff and Veerraju. Taking advantage of the custody of the documents, the plaintiff got issued the legal notice with false and frivolous allegations. The defendant filed a criminal case against the plaintiff and the said Veerra Raju on the file of II Additional Judicial Magistrate of First Class Court, Tanuku. The market value of the suit schedule property per square yard is Rs.1500/- and not Rs.250/-. The plaintiff approached the Court with unclean hands, hence, the suit is liable to be dismissed.

5. Basing on the above pleadings, the trial Court framed the following issues:

1. Whether the plaintiff is entitled a decree for specific performance of agreement of sale dated 02.10.2006 as prayed for?
2. Whether the plaintiff is entitled for alternative decree for refund of Rs.5000/- advance amount along with interest @ 24% per annum?
3. Whether the plaintiff is entitled for permanent injunction from alienating the schedule property to third parties?
4. To what relief?

6. Before the trial Court, on behalf of the plaintiff, P.Ws.1 and 2 were examined and Exs.A1 to A5 were marked. On behalf of the defendant, D.Ws.1 to 4 were examined and no documents were marked.

7. Basing on the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the plaintiff failed to prove the oral agreement of sale dated 02.10.2006 and consequently, dismissed the suit. Feeling aggrieved by the judgment and decree of the trial Court, the plaintiff preferred A.S.No.53 of 2012 on the file of the Principal District Court, Rajahmundry. The first appellate Court after reappraising the oral, documentary evidence and other material available on record, arrived at a conclusion that the plaintiff failed to prove the oral agreement of sale dated 02.10.2006 and consequently dismissed the appeal while confirming the findings recorded by the trial Court. Hence, the unsuccessful plaintiff preferred the present second appeal.

8. The substantial question of law formulated is as follows:

Whether the findings recorded by the Courts below are perverse even though the plaintiff was in possession of Exs.A1 and A2 documents?

9. Before adverting to the findings of the Courts below, this Court is placing reliance on the judgment in **Municipal Committee, Hoshiarpur v. Punjab SEB**¹, wherein, while dealing with the scope of Section 100 of CPC, the Hon'ble Apex Court held at paragraph No.16 as follows:

16. A second appeal cannot be decided merely on equitable grounds as it lies only on a substantial question of law, which is something distinct from a substantial question of fact. The court cannot entertain a second appeal unless a substantial question of law is involved, as the second appeal does not lie on the ground of erroneous findings of fact based on an appreciation of the relevant evidence. The existence of a substantial question of law is a condition precedent for entertaining the second appeal; on failure to do so, the judgment cannot be maintained. The existence of a substantial question of law is a sine qua non for the exercise of jurisdiction under the provisions of Section 100 CPC.

10. Let me consider the facts of the case on hand in the light of the above legal principle.

11. The father of the defendant purchased the suit schedule property under a registered sale deed dated 11.03.1991, Ex.A1. It is not in dispute that the suit schedule property originally belongs to the father of the defendant. The father of the defendant executed

a will Ex.A2 dated 30.11.2002 in favour of the defendant. The defendant has been in possession and enjoyment of the suit schedule property as absolute owner by virtue of Ex.A2 will. P.W.1 is the plaintiff, D.W.1 is the defendant. P.W.1 and D.W.1 being the parties to the proceedings, the possibility of distortion of the facts in order to suit their case cannot be ruled out completely. D.W.2 is none other than the son-in-law of the defendant. P.W.2, D.W.3 and D.W.4 are the colleagues of D.W.2. It is the case of the

¹ (2010) 13 SCC 216

plaintiff that the defendant agreed to sell the suit schedule property and handed over Exs.A1 and A2 to him. As seen from the testimony of D.Ws.1, 3 and 4, D.W.2, who is son-in-law of the defendant, handed over Exs.A1 and A2 to P.W.2, who in turn handed over the same to the plaintiff. As seen from the testimony of D.Ws.1 to 3, P.W.2 handed over Exs.A1 and A2 to the plaintiff in order to verify whether the defendant is the owner of the suit schedule property or not. Even as per the version put forth by the plaintiff, the parties have entered into an oral agreement of sale on 02.10.2006. It is the case of the plaintiff that he purchased the stamp papers on 03.10.2006 in order to prepare the sale deed. The trial Court after perusing Ex.A3 came to a conclusion that the plaintiff purchased stamps in the month of September 2006, i.e., much prior to the date of the alleged oral agreement of sale. The plaintiff failed to offer explanation why he purchased the stamp papers in the month of September 2006. D.W.3, who is a relative of the plaintiff, categorically deposed that the son-in-law of the defendant handed over the sale deed and will to the plaintiff for verification of title and not with an intention to sell the property. If the testimony of D.Ws.2, 3 and 4 is taken into consideration, there is no oral agreement on 02.10.2006 between the plaintiff and the defendant. P.W.2 is the close relative of P.W.1. The material available on record clearly reveals that the plaintiff is carrying on real estate business. The possibility of handing over the title deeds by the son-in-law of defendant to P.W.2 cannot be ruled out completely.

12. The predominant contention of the learned counsel for the appellant is that the defendant failed to issue a reply to legal notice Ex.A4 dated 16.10.2006. Mere non-issuance of reply notice itself is not a valid ground to draw adverse inference against the defendant. The Court has to consider the recitals of Ex.A4 with reference to other material available on record. Except the self-served testimony of P.W.1, there is no other convincing evidence to establish that the defendant agreed to sell the suit schedule property in favour of the plaintiff on 02.10.2006.

13. Section 20 of the Specific Relief Act confers a discretionary power on the Court either to grant or reject the relief of specific performance. The relief of specific performance is purely a discretionary relief. It is needless to say that the Court has to exercise the discretionary power basing on sound principles of law. The crucial question that falls for consideration is whether the Courts below have exercised the discretionary power judiciously or not. As observed earlier, the trial Court after taking into consideration the oral and documentary evidence available on record arrived at a conclusion that the plaintiff failed to prove the oral agreement of sale dated 02.10.2006. The findings recorded by the trial Court are based on evidence much less legally admissible evidence. The first appellate Court, without being influenced by the findings recorded by the trial Court, arrived at a conclusion that the plaintiff failed to prove the oral agreement of sale dated 02.10.2006. Both Courts concurrently held that mere possession of Ex.A1 and A2 by the plaintiff that itself is not a valid ground to grant the relief of specific performance, without proving the

agreement of sale in favour of plaintiff. The Courts below have assigned reasons much less cogent and valid reasons to its findings. If the findings recorded by the Courts below are based on no evidence or based on evidence which is not legally admissible, then those findings can be termed as perverse. As observed earlier, the findings recorded by the Courts below are based on evidence much less legally admissible evidence. Therefore, I am unable to accede to the contention of the learned counsel for the appellant that the findings recorded by the Courts below are perverse. The first appellate Court is the fact finding final Court. The question framed will not fall within the ambit of Section 100 CPC. There is no question of law much less substantial question of law to interfere with the concurrent finding of fact recorded by the Courts below. Hence, the appeal is liable to be dismissed.

14. In the result, the second appeal is dismissed at the stage of admission. There shall be no order as to costs. As a sequel, miscellaneous petitions pending, if any, shall stand closed.

T.SUNIL CHOWDARY, J

29.10.2018

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