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

A.S.No.501 of 1997

JUDGMENT:

This appeal is filed against the judgment and decree dated 15.10.1996 in O.S.No.27 of 1991 passed by the II Additional District Judge, Guntur.

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

3. The brief facts of the case of the plaintiffs are as follows:

a) Originally, the plaint schedule property belonged to one Gollamudi Madan Mohanarao, husband of the 1st defendant and father of the defendants 2 & 3 and the son of 4th defendant. He obtained a loan of Rs.60,000/- from Indian Oversees Bank, Guntur branch and constructed a building by mortgaging the said property. But unfortunately the said Madan Mohanarao died in the year 1970. Defendants 1 to 4 failed to discharge the said loan to the Indian Oversees bank. The bank then filed a suit O.S.No.150 of 1970 for recovery of the said amount in the Sub-Court, Guntur and got a decree for an amount of Rs.1,40,000/- and odd with interest.

b) Later, the plaint schedule property was brought to sale in pursuance of the said decree. As the execution proceedings were pending and defendants 1 to 3 were unable to discharge the said debt, they negotiated for a private sale with a view to see that the property may not be lost for a lower price in court auction. In that pursuit, the first defendant on her behalf and on behalf of minor children agreed to sell the plaint schedule property for a consideration of Rs.4,40,000/- and executed a contract of sale on 29.09.1981 in favour of plaintiff and defendants 5 & 6. It was agreed that as defendants 2 & 3 are minors, the first defendant has to obtain permission from the District Court. The schedule property came up for sale in the court auction on 28.09.1981. It was agreed that the first plaintiff and defendants 5 & 6 should pay the balance of purchase money by 28.01.1992. Out of that balance of purchase money, 5/8th share of the minor should be deposited in a Bank. It was further agreed with defendants 1 to 3 that they will effect compromise with the 4th defendant as he filed a partition suit in O.S.No.38 of 1972 on the file of the Sub-Court, Tenali..

c) As per the terms of the contract, the first defendant filed O.P.No.316 of 1981 on the file of II Additional District court, Guntur seeking permission to sell the minors share. After an elaborate enquiry, the Court granted permission to the first defendant by its order dated 30.06.1982. The plaintiff and other two vendees have been requesting the vendors, defendants 1 to 3 to furnish encumbrance certificate, original title deed, income tax clearance certificate etc., to show that the decree in O.S.No.150 of 1970 is fully satisfied and deliver vacant possession of the property; for payment of balance of sale consideration and also to effect compromise with the 4th defendant, but they did not furnish the same.

d) On the other hand, the defendants sent a registered notice dated 02.02.1983 stating that a total amount of Rs.1,45,517/- was paid to them and in case the balance is not paid before 28.02.1983 the contract will be treated as cancelled. After receiving the said registered notice, the plaintiff and defendants 5 & 6 sent a reply dated 15.02.1983 expressing their willingness to pay the balance within the stipulated date and calling upon defendants 1 to 3 to furnish the above said documents.

e) The 2nd plaintiff is always ready and willing to perform his part of the contract and is prepared to deposit the entire balance of sale consideration into the court whenever directed. But the defendants are avoiding to execute a sale. Hence the suit.

4. The defendants 1 to 3 filed a joint written statement resisting the suit while admitting the execution of the agreement and about the payments made by the plaintiff and defendants. The plaintiff as per them was never ready and willing to perform his part of contract. These defendants came to know that the first plaintiff is only the broker in the

real estate and is in the habit of bargaining and selling away properties even without obtaining sale deeds for profits. The plaintiff is not a real purchaser.

5. The defendants 1 to 3 also filed an amended written statement as per orders in I.A.No.109 of 1994 dated 30.06.1994 stating that the plaintiff and defendants 5 & 6 committed breach of agreement of sale in discharge of decree debts as agreed upon and failing to pay the amount due or credit the amount to the District Court, Guntur in O.P.No.316 of 1981, that the property worth Rs.3,00,000/- was only sold for Rs.1,78,000/- and the defendants 1 to 4 were put to a loss of Rs.1,22,000/- and these defendants are entitled to set off the said amount, if any due to the plaintiff and defendants 5 & 6 which they paid the earnest money.

6. The 4th defendant filed a written statement resisting the suit contending that she got 1/8th share in the entire properties left by her son. She filed a partition suit and the same is pending against the defendants 1 to 3 in the High Court. The properties were not divided by metes and bounds. Hence, the defendants 1 to 3 have no right to enter into an agreement with the plaintiff and defendants 5 & 6. The 6th defendant also filed his written statement admitting the purchase of the suit schedule property in pursuance of the contract of sale.

7. Originally, the suit was filed by the first plaintiff in O.S.No.577 of 1983 on the file of the Principal Sub-Court, Guntur against the defendants 1 to 6. As the defendants 2 and 3 were minors represented by guardian, the 1st defendant was appointed as guardian as per orders dated 27.10.1983 in I.A.No.1943 of 1983. Subsequently, the said suit was transferred to the II Additional District Court and renumbered as O.S.No.27 of 1991. The 2nd plaintiff was added as per the orders dated 05.08.1988 in I.A.No.2385 of 1983. Subsequently, the minor defendants 2 & 3 were declared as majors, as per the orders dated 06.11.1992 in I.A.No.512 of 1992.

8. On the basis of the above pleadings, the following issues and additional issues were settled for trial:

i) Whether the suit agreement of sale is not enforceable?

ii) Whether the plaintiff, 5th defendant and 6th defendant have always been ready and willing to perform their part of contract and to obtain sale deed?

iii) Whether the contract of sale stood cancelled?

iv) Whether the 5th defendant transferred his right to the plaintiff?

v) Whether the plaintiff is entitled for specific performance of agreement of sale?

vi) To what relief?

<u>Additional issues</u>:

vii) Whether the plaintiffs can seek for enforcing the contract as against the 2nd defendant?

viii) Whether there was any breach of the agreed terms committed by the plaintiffs and defendants 5 & 6 in discharge of decree debts by failing to pay the amount or deposit it to the credit of the District Court, Guntur in O.P.No.316 of 1981?

9. For the plaintiffs, PWs.1 & 2 were examined and Exs.A.1 to A.18 were marked. For the defendants, DWs.1 to 3 were examined and Exs.B.1 to B.22 were marked.

10. After considering the entire oral and documentary evidence, the lower Court dismissed the suit for specific performance. However, the first plaintiff was held entitled to refund the amount of advance of sale consideration in a sum of Rs.1,45,527/- after deducting the 1/3rd share of 6th defendant. Aggrieved by the said judgment and decree, the plaintiffs filed the present appeal.

11. Heard Sri T.S. Anand, learned counsel for the appellants/plaintiffs and Sri P. Gopal Das and Sri P. Vinayaka Swamy, learned counsels for the respondents/defendants.

12. From a reading of the plaint, written statements and the submissions, the following factors emerge as uncontested facts.

i) The suit schedule property was mortgaged to the Indian Oversees Bank, Guntur branch and there was a litigation pending on the same. When the bank was set to sell the said property, the defendants negotiated with number of people and ultimately a deal was struck with the present agreement holders.

ii) the sale agreement was entered into to ward off the execution proceedings that were pending.

iii) the defendants/owners of the property included minors and permission was necessary from the concerned Court to alienate the shares of the minors.

iv) the 4th defendant in the suit is a shareholder/owner of the property who was not added as a party to the agreement. Her specific plea in her written statement is that the joint family property cannot be sold.

13. Against this background, the agreement of sale is to be examined. The agreement of sale is dated 29.09.1981 (Ex.A.1). This is entered into by the defendants 1 to 3 of whom 2 & 3 were minors at that point of time. The agreement was executed in favour of K. Sambasiva Rao, S. Gopala Krishna Reddy and S. Vasudeva Reddy. In the agreement, it is clearly mentioned that the two minors/defendants 2 & 3 and their mother/4th defendant are the joint owners of the property, which is ancestral in nature. The existence of the dispute and the need for adjourning the impending sale are mentioned in the agreement itself. The agreed sale consideration is Rs.4,60,000/-.

14. It is also mentioned in the agreement that once permission is given by the District Court for sale of the minors property, the sale consideration should be invested in fixed deposit in the name of the minors. The said fixed deposit is to be kept pending till the minors attained majority. It is also mentioned in the agreement of sale that there is a suit O.S.No.38 of 1972 pending in the Tenali Sub-Court filed by 4th defendant and that efforts are being made to compromise the same and to ensure that their share is adequately specified.

15. These factors are being highlighted at the outset since both the learned counsels argued on the issue of readiness and willingness vis-à-vis the sale agreement. As this is a suit for specific performance, both the learned counsels rightly concentrated on the issue of readiness and willingness and also the conduct of parties in relation to the mutual obligations assumed by both the parties to the agreement. It bears no repetition and is settled law that in a suit of specific performance, the plaintiff should clearly aver and prove his readiness and willingness from the date of the agreement till the hearing of the suit to enable him to get a decree. Readiness has been interpreted as being in possession or having made arrangements for the sale consideration payable. Willingness is the conduct of paying the said consideration or tendering the same and fulfilling the obligations in order to get the sale deed. These are the factors

which have to be established without fail if the plaintiff wishes to get a decree. The absence of these factors would enable the defendants to avoid the agreement. This proposition of law does not need further elaboration.

16. The learned counsel for the respondents/ defendants also brought to the notice of this Court a judgment of Hon'ble Division Bench of this Court in the case of ***Daparthi Seetharamayya v. Kurukuri Chinna Satyam @ Chinna Sathi Raju***[1] wherein the Division Bench after considering the earlier cases on this subject held that the readiness and willingness was not only be averred clearly but it must be supported by evidence.

17. Keeping this legal position in mind and after hearing the learned counsel, the following factors emerge in this case. Ex.A.1 is an agreement of sale involving the minors share for which the permission of the court was to be obtained. This was essential term of the agreement. Ex.A.1 agreement of sale was entered into on 29.09.1981 and cut-off date of 28.01.1982 is set up in the agreement as the date by which permission of the Court should be obtained and the minors share should be kept in deposit. As can be seen from Ex.B.1, an application was in fact filed in the Court of District Judge, Guntur seeking permission to sell the property belonging to the minors. This original petition was numbered

[1] 2014 (2) ALT 779 (D.B.)

as O.P.No.316 of 1981. The main contesting first defendant, Smt. G. Siva Kumari and her minor children are the petitioners. The 4th defendant and others are added as the respondents in the said OP. The said OP which is filed in 1981 was heard and ultimately ordered on 30.08.1982. The present first defendant and the first plaintiff gave evidence in the said OP as the petitioners' witnesses. The 4th defendant in the present suit deposed as RW.1.

18. A perusal of this judgment shows that a contest was raised by 4th defendant against the alienation of the property. The present agreement of sale which is the subject matter of dispute in this case was also marked as document Ex.A.7 in the OP. After considering the entire evidence the Court came to a conclusion that the sale of the property is in the interest of the minors and therefore, the Court held that the sale can go ahead. The District Judge directed the following a) that the transaction shall be completed within six months from the date of the said order, b) that the amount of Rs.3,45,000/- representing the share of the minors who are petitioners 2 & 3 therein should be deposited in the Court before the registration of the sale deed. The amounts relating to the minors/petitioners are directed to be kept in a fixed deposit in a scheduled bank till the minors attain the majority.

19. Therefore, it is the submission of the learned counsel for the respondents/defendants that this is a most critical and essential term for awarding specific performance and that being conscious of that the Hon'ble Court fixed six months as a time limit in which the agreement conditions have to be fulfilled. On the other hand, the learned counsel for the appellants/plaintiffs argued that this term of six months is not made the essence of the contract and the Hon'ble Court did not fix a default clause for termination of the agreement in case the same is not performed. Hence, he submits that this '6 months' is not the essence.

20. This Court on an examination of the facts and circumstances leading to the order is of the opinion that the order of the District Court makes time the essence of the contract. A reading of this entire order makes it clear that the Hon'ble Court discussed about the impending sale and the need to sell the property to save it from a distress sale. The Court noticed that the execution proceedings do not fetch a good price. The evidence in the case reveals that the receiver was appointed for all the properties of late Madan Mohanarao. The receiver could realize a sum of Rs.20,000/- from the estate of Madan Mohanarao in the years 1975 to 1982 and even this little income that was realized was also attached by the Municipality for arrears of municipal taxes etc.

21. The District Court after an analysis of the entire evidence that was recorded in the OP including the evidence of the present first plaintiff came to a conclusion that the sale of the property was in the interest of the minors and that the only way to save the estate was to permit the sale of this property. The judgment of the Principal District Judge in OP No.316 of 1981 also makes it clear that the validity of Ex.A.1 agreement was upheld by the Court, even though the 4th defendant in the present suit as the respondent in the said OP argued that the agreement was a collusive agreement. Thus, by a reasoned order against which no appeal was filed, the validity of the agreement (present Ex.A.1) was upheld. Considering the purpose behind the impugned judgment viz., to stop the execution proceedings initiated by Indian Oversees Bank, the Principal District Judge fixed six months as the time for conclusion of the sale transaction.

22. The judgment in OP No.316 of 1981 was pronounced on 30.08.1982. The learned counsel rightly points out that six months time granted would expire by the end of February, 1983. The learned counsel for the respondents argues that in the period between 30.08.1982 till February, 1983, the agreement holders did not do anything to satisfy their part of the bargain. On the contrary, he points out that his clients/the defendants in the suit have issued notice dated 02.02.1983 (Ex.A.4 equal to Ex.B.3) wherein

they clearly specified that as per the orders of the Court, payment of the balance sale consideration, registration of the sale deed etc. are to be completed on or before 28.02.1983, failing which the contract shall be treated as cancelled.

23. It is the submission of the learned counsel for the respondents that by this notice and by the order of the Court Ex.B.1 time was made the essence of the contract and that therefore, the failure of the agreement holders to fulfil their part of the contract lead to the cancellation of the contract on 14.03.1983 by Ex.A.6 notice. The learned counsel points out that in the period between 30.08.1982 (Ex.B.1-order) till the first notice by the owners (Ex.A.4 date 02.02.1983), the agreement holders did not do anything at all to fulfill their part of the obligation.

24. In reply thereto, the learned counsel for the appellants/plaintiffs argued that they had shown their bona fides by paying the advance amounts which allowed the defendants 1 to 3 to get the EP sale postponed. It is also his contention that the first plaintiff, K. Sambasiva Rao deposed in the said OP as a witness and showed his willingness to take a sale deed. His further contention is that in reply to Ex.A.4, the plaintiffs have issued Ex.A.5 reply notice, wherein they demanded the land owners to furnish encumbrance certificate, title deeds, income tax clearance certificate etc., to push through the contract. He also pointed out that the

tenants have not vacated the premises. Therefore, it is his contention that unless clear title is made out to the property and vacant possession is likely to be given, his clients need not perform their part of the agreement.

25. After hearing both the counsels, on this issue, this Court holds that the contention of the defendants 1 to 3 is correct, OP No.316 of 1981 was specifically filed for the purpose of obtaining permission for sale of the minors property. This was a major legal impediment that had to be crossed for the fulfilment of the agreement. The District Court in its wisdom after considering the evidence of the present first plaintiff and first defendant came to the conclusion by its order dated 30.08.1982 that the entire transaction should be completed within the period of six months. Therefore, the present plaintiffs were put on notice that the upper limit for completing the transaction was February 1983. In fact, the learned counsel pointed out that the present plaintiff Sambasiva Rao also wanted to implead himself as party in O.P.No.316 of 1981 and filed an application which is bearing IA No.3091 of 1983. A certified copy of the order passed is marked as Ex.B.14 in this case. Ex.B.13 is the certified copy of the affidavit filed by the present first plaintiff. A reading of the affidavit reveals that Sri Sambasiva Rao, first plaintiff wanted to join the proceedings in OP No.316 of 1981 because the present defendants 1 to 3 filed an application before the

Court to sell the property to third parties. This application bears I.A.No.2890 of 1983. Ex.B.8 is a copy of the said affidavit wherein the first defendant sought permission from the Court to sell the property to others on the ground that the three current agreement holders are in an *inter se* between themselves and are unable to fulfil their obligations. In this application, the present plaintiff wanted to join. The same was rejected by the court by its orders, which are marked as Ex.B.14, dated 06.09.1983.

26. The learned counsel points out that it is the specific case of the defendants that there was an *inter se* dispute amongst the proposed purchasers and that is the reason why in February 1983 there was exchange of notice fixing the time for parties and informing the agreement holders that after 28th February 1983 the agreement would be treated as cancelled. The agreement was in fact cancelled by Ex.A.6 notice dated 14.03.1983. Thereafter, the defendants also published a notice on 20.05.1983 inviting bids from the public for this property. This is marked as Ex.B.11.

27. It is therefore the contest of the learned counsel for the respondents that the appellants were aware of the entire sequence of events. They were a participating party in the OP filed to secure the permission for sale of the minor shares. Before the judgment and decree, they did not tender the entire sale consideration and even after the judgment and

decree and within the six months period, they did not actually tender or even offer the sale consideration. Therefore, the learned counsel for the respondents argued that his clients were right in terminating the contract.

28. The learned counsel for the appellants reiterated his earlier submissions and argued that the documents of title were not delivered, encumbrance certificate was not delivered and so also the income tax clearance certificate etc. It is noticed that the purchasers in this case went into the transaction being conscious of disputes pending including the decree pending. They were aware of the title deeds being mortgaged in the Indian Oversees Bank which was planning to sell the property in the EP. They were aware of the presence of tenants and they were aware of the fact that minors interests were involved and that at no point of time did they demand these documents. Therefore, it is his submission that these demands for documents etc. was an after thought. It is pointed out that that there is no mention about these documents in the agreement of sale.

29. Alternatively, the counsel submits the plaintiffs should have demanded these documents if at all they were necessary for the execution of the sale deed immediately after order of the lower Court at least. It is his submission that these documents could have been demanded after the agreement was executed also, since the OP that was filed in

the lower Court only for the permission of the sale of minors share. The learned counsel also relied upon the judgment reported in ***Mrs. Jaya P. Hemarajani v. Mrs. Rose Elvina D Souza***[2] wherein a learned single Judge of this Court in similar circumstances held that a demand for similar documents was not tenable in the absence of a clause in the agreement and so the agreement holders cannot say that they would only act after the documents are produced. This Court is also in agreement with the contentions of the learned counsel for the respondents on this issue.

30. The overall conduct of the plaintiffs/agreement holders clearly shows that they did not do anything in pursuance to the agreement other than the payment of the early instalment to postpone the sale of the property in the Court. Even after the judgment in OP No.316 of 1981; for a full period of five months, the agreement holders did not take any steps that were necessary. Therefore, this Court holds that they were not willing to develop to fulfill their part of the agreement. Even as far as readiness is concerned, which as per settled law is the ability/capacity to pay the money, there is no proof. While it is clear that the entire balance sale consideration need not be deposited, the law is well settled that the person claiming specific performance must show that he had money in his possession or he has an arrangement or a proper method to raise the money within the time

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[2] AIR 1995 AP 189

stipulated. In this case, the evidence on record does not show that the plaintiffs had necessary money or the capacity to pay required sale consideration. The continuous readiness that is needed from the date of the agreement till the date of hearing of the suit is not borne out by the record. The available documents not support the plaintiffs' case. It is the specific case of the defendants/land owners that the first plaintiff is a real estate agent and that he does not have the capacity to pay. The evidence on record clearly shows that there were differences between the agreement holders and this is the reason why some of the agreement holders were shown as defendants in the suit. Later, the second plaintiff was added as a party after she purchased a half share of the agreement from the first plaintiff for Rs.1,60,000/-.

31. It is also specific case of the first defendant that there were disputes between the agreement holders which lead her to seek a direction of the Court for sale of the property in OP No.316 of 1981 to others. In the said OP, the present plaintiff tried to join the matter, which was discussed earlier in the judgment and it is clear that the District Court, Guntur did not permit the present first plaintiff to join in OP No.316 of 1981.

32. This Court finds considerable force in the submissions made by the learned counsel for the respondents that even though the first plaintiff was aware of the fact that the defendants cancelled the agreement and were openly

trying to sell the property to third parties, he did not act with the promptitude as required under law. The plaintiff has not taken steps to file a suit for specific performance, immediately after February, 1983. Therefore, this Court is of the opinion that the first plaintiff did not prove his readiness and willingness as required under law. The plaintiffs are therefore not entitled to a decree for specific performance. The order of the lower Court on these issues is a reasoned and well thought out order which discussed the entire evidence on record. This Court concentrated on the points that are urged during the course of hearing of the appeal. However, on reading of the entire judgment, this Court is of the opinion that the findings on the issues by the lower Court are correct.

33. The other issue that vehemently argued by the respondents is that as 4th defendant did not sign on the agreement of sale, the said agreement is invalid. It is the contention that all the co-sharers of the property should be joined in the agreement of sale. In the absence of one co-sharer, according to the learned counsel for the respondents, the agreement is voidable. The learned counsel relied upon ***Pemmada Prabhakar and others v. Youngmen's Vysya Association and others***[3]. In this case, it is true that the Hon'ble Supreme Court held that if all the co-shares are not joined, the agreement of sale cannot be specifically enforced. However, the learned counsel for the appellants pointed out

[3] 2014 (7) SCJ 457

and rightly says that the judgment may not be applicable to the facts of the present case for the reason that the orders in OP No.316 of 1981 upheld the present agreement of sale and granted permission for the sale of the minors' interest. In the facts and circumstances of this case, this Court holds that because of the orders passed in OP No.316 of 1981, the said argument does not survive for determination in this case.

34. The last point urged is that the appeal has abated as the first plaintiff died. The learned counsel cited two judgments reported in ***Ramagya Prasad Gupta and others v. Murli Prasa and others***[4] and ***Arigela Laxmi and another v. Bodireddy Chandraiah and others***[5] for the proposition that if during pendency of the appeal, one plaintiff dies and the legal representatives are not brought on record, the entire appeal abates. However, it is noticed from the memo filed in this Court on 01.11.2014 by the learned counsel for the appellants and also the facts of the case that it is the second appellant alone, who is now continuing the appeal. The second appellant, has purchased the shares of K. Sambasiva Rao and other two agreement holders S. Gopala Krishna Reddy and S. Vasudeva Reddy. Therefore, the cause of action survives in this case and the second appellant has the legal right to continue the appeal. This Court holds that the

[4] AIR 1972 SCC 1181
[5] 2003 (2) ALD 530

appeal has not abated in the facts and circumstances of the case.

35. On a review of the entire evidence, submissions made and the law on the subject, this Court finds that the plaintiffs/appellants are not entitled to a decree for specific performance. There is no infirmity pointed out to this Court in the orders of the lower Court to interfere with the same.

36. In the result, the appeal is dismissed. The judgment and decree of the lower Court are confirmed in all respects including the refund ordered but to the second appellant after deducting 1/3rd share of the sixth defendant. However, 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: 29.01.2018
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