

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

A.S.No.1577 of 1998

JUDGMENT:

This appeal is filed by the plaintiff against the judgment and decree dated 24.04.1998 in O.S.No.14 of 1991 passed by the Senior Civil Judge, Razole, East Godavari District.

The suit was filed in the lower Court for a relief of specific performance of the agreement of sale with respect to items 1 and 2 of plaint-C schedule property and for delivery of possession. After hearing both the parties and considering the evidence etc., the suit was dismissed. Questioning the same, the present appeal is filed.

The brief facts of the plaint are that the plaint 'A' schedule properties belong to the defendants 1 to 8; that defendants 9 and 10 are the children of 1st defendant; that defendants 1 to 8 have agreed to sell the plaint 'A' schedule properties, that the plaintiff came forward to purchase the same and defendants 1, 2, 4 and 8 have executed the suit agreement of sale with respect to the plaint 'A' schedule properties in favour of the plaintiff on 11.10.1989 for Rs.5,10,000/- and received Rs.50,000/- as advance under it; that as per the terms and conditions, the plaintiff has to pay Rs.2,00,000/- by the

end of December, 1989 and Rs.2,60,000/- by the end of April, 1990 that after receipt of such balance sale consideration, defendants 1 to 8 have to execute and register the sale deed or sale deeds with respect to the above said properties either in the name of the plaintiff or in the name of nominees; that the plaintiff made a part payment of Rs.96,250/- on 30.12.1989 and another part payment of Rs.1,71,484/- on 27.06.1990 and got them endorsed on the reverse of the suit agreement of sale; that 3rd defendant got a registered General Power of Attorney dated 12.03.1990 from the defendants 4 to 8 so as to execute and register the sale deeds; that while making the above said part payment on 27.06.1990, the plaintiff got sale deeds executed and registered in his name, in the name of his younger brother-Siva and in the name of V. Laxmi relating to the part of plaint 'A' schedule shown as item Nos.2 to 4 of plaint B schedule; that the plaintiff was ready and willing to pay the balance sale consideration of Rs.1,92,266/- and get the sale deed executed and registered with respect to plaint 'C' schedule properties; that it is the defendants 1 to 8 who failed to perform their part of the contract; that on the other hand, the 12th defendant who is aware of the above said suit agreement of sale brought a registered sale deed

dated 29.08.1990 relating to item No.2 of plaint 'C' schedule into existence in collusion with the defendants 1 to 10 so as to defeat his legal and legitimate rights over the same; that the said sale is invalid, inoperative and not binding on him; that the above said defendants have no such right to execute and register such sale deed in favour of 12th defendant; that 11th defendant, who was in possession of item No.2 of plaint 'C' schedule property, did not cooperate with the plaintiff in getting the sale deed executed and registered; that the plaintiff got issued a telegram notice for specific performance of agreement of sale with respect to item Nos.1 and 2 of plaint 'C' schedule after evicting the 11th defendant; and that the plaintiff has filed the suit for specific performance of the suit agreement of sale with respect to item Nos.1 and 2 of plaint 'C' schedule property, delivery of possession of the same and for costs.

The 2nd defendant has filed his detailed written statement denying the material allegations made in the plaint and mainly contended that the plaint schedules are not correct; that the plaintiff made a part payment of Rs.96,250/- only on 30.12.1989 as against the agreed part payment of Rs.2,00,000/-; that he would pay the balance consideration by the end of April 1990 that with

a hope that the plaintiff would be ready with the balance sale consideration, defendants 4 to 8 have executed a registered power of attorney dated 12.03.1990 in favour of the 3rd defendant so as to execute and register the sale deeds on their behalf that without making any such payment as agreed, the plaintiff during June 1990 requested him and the other concerned defendants to come to Kothapeta to receive the balance sale consideration and accordingly on 27.06.1990 the plaintiff paid a part payment of Rs.1,17,000/- and got three registered sale deeds executed in his name, in the name of his younger brother-Siva and in the name of V. Laxmi with respect to part of plaintiff 'A' schedule; that the plaintiff undertook to complete the transaction by 4.00 p.m. on 16.07.1990 and executed an agreement also to that effect that the said agreement amounts to novation that as the plaintiff did not keep up his promise; he and the other concerned defendants sold item No.2 of plaintiff 'C' schedule to the 12th defendant for valuable consideration of Rs.50,000/- and executed a registered sale deed dated 29.08.1990 after treating the suit agreement of sale as cancelled as per the agreement dated 27.06.1990; that the plaintiff was not at all ready and willing to perform his part of contract at all material

times that it is not agreed by him and other concerned defendants to deliver vacant possession of the properties to the plaintiff that the plaintiff is not entitled to any of the reliefs as prayed for and that the suit is liable to be dismissed with costs.

The defendants 1 and 3 to 10 have filed a memo adopting the written statement of the 2nd defendant as their written statement.

While denying the material allegations made in the plaint, the 12th defendant has filed his written statement mainly contending that he purchased item No.2 of plaint 'C' schedule for a valuable consideration of Rs.50,000/- from the defendants 1 to 8 under a registered sale deed 29.08.1990 with the consent of the tenant therein i.e., 11th defendant and took possession of the same, that he has no knowledge with regard to the suit agreement of sale, that he is a bona fide purchaser for full value and that the suit is liable to be dismissed with costs against him.

Based on the above said pleadings, the lower Court initially framed the following issues:

1. Whether the plaint schedules are correct?
2. Whether the agreement of sale dated 11.10.1989 is true and valid?

3. Whether the payment of Rs.96,250/- as alleged in the plaint and the endorsement dated 30.12.1989 are true and valid?
4. Whether the plaintiff is always ready and willing to perform his part of contract?
5. Whether the plaintiff is entitled to specific performance of agreement of sale dated 11.10.89?
6. Whether the agreement dated 11.10.1989 was cancelled as alleged by the defendants?
7. Whether the 12th defendant is a bona fide purchaser?
8. To what reliefs is the plaintiff entitled?

Initially about the eight issues were framed. Later, the Court after considering the pleadings etc., decided to *suo motu* delete the issue Nos.2 and 3, which were initially framed. The rest of the issues were retained.

For the plaintiff, PWs.1 to 3 were examined and Exs.A.1 to A.10 were marked. For the defendants, DWs.1 to 3 were examined and Exs.B.1 to B.5 were marked. As mentioned earlier, the suit was dismissed and contesting the same, the present appeal is filed.

This Court has heard Sri S. Subba Reddy, learned counsel for the appellant/plaintiff and Smt. K. Kavitha Gottipati and Sri Y. Neela Lohitha Sastry, learned counsel for the respondents/defendants.

As the suit is for one of specific performance of the agreement of sale(the execution of which is not

disputed), the crux of the matter is whether the plaintiff was ready and willing to perform his obligation and consequently whether he was entitled to the specific performance of the agreement of sale. The contest of the defendants is that the agreement dated 11.10.1989 was cancelled in view of the subsequent agreement. Therefore, the point that arises for consideration is whether the plaintiff was ready and willing to perform the part of the contract and whether he was entitled to a specific performance of the agreement of sale. This point is a combination of issues 4 and 5. Included in this would be the defence that the agreement dated 11.10.1989 was cancelled. Therefore, issues 4, 5 and 6 are covered by this point. A reading of the grounds of appeal shows that the bulk of the points raised in the grounds of appeal are about the readiness and willingness of the plaintiff and also the payment of the balance sale consideration.

The argument of the learned counsel for the appellant/plaintiff is that his client is always ready and willing to get the sale deed executed. He contends that the time fixed in the agreement dated 30.04.1990 has lost its significance, in view of the fact that Exs.A.4, 9 and 10 were executed on 27.06.1990. Therefore,

according to him, time has ceased to be the essence of the contract. The learned counsel also argued that the lower Court held that the cancellation of Ex.A.1 is not correct and that 12th defendant is a bona fide purchaser, but still did not decree the suit.

In response to this, the learned counsel for the respondents argued that the crux of the matter is about readiness and willingness which in the opinion of the learned counsel is not proved at all. The availability of the money and the willingness of the appellant/plaintiff to pay the same are not borne out by record as per the learned counsel for the respondents. The conduct of the appellant, according to the respondent, disentitles him to seek a relief of specific performance.

This Court is therefore proceeding to examine whether the appellant/plaintiff has proved his readiness and willingness for decreeing the suit.

The facts are really not in dispute that the defendants 1, 2, 4 and 8 have executed the agreement of sale dated 11.10.1989 for Rs.5,10,000/-. An advance of Rs.50,000/- was paid, later a part payment of Rs.96,250/- was made and acknowledged under Ex.A.2 on the reverse of Ex.A.1. Part of the plaint schedule property was sold by sale deeds dated 27.06.1990, which

are covered by Ex.A.4, 9 and 10. The defendants 1 to 8 have also sold the property on 29.08.1990 i.e., item-2 of the C-schedule property to the 12th defendant. These facts are clearly visible from the record.

As per the settled law on the subject including the judgments of the Hon'ble Supreme Court of India reported in ***N.P. Thirugnanam (D) by L.Rs. v. R. Jagan Mohan Rao***¹ and ***Narinder Kumar Malik v. Surinder Kumar Malik***², the plaintiff in a suit for specific performance should prove his continuous readiness and willingness from the date of the agreement up to the date of the decree to get a relief of specific performance. Readiness has been interpreted to mean the possession of the balance sale consideration or an arrangement being made for paying the balance sale consideration. Willingness has been interpreted to mean the eagerness of the plaintiff to tender the balance sale consideration and to get the sale deed registered. The law is so well settled that it does not require repetition now. Therefore, this Court is proceeding to analyze the evidence in line with the case law; the submissions made by both the learned counsel to see whether these conditions are fulfilled or not.

¹ 1995 (5) SCC 115

² 2009 (8) SCC 743

The agreement dated 11.10.1989 stipulates a total payment of Rs.5,10,000/-, of which an advance of Rs.50,000/- was paid and the balance payable is Rs.4,60,000/-. This is payable in two instalments viz., Rs.2,00,000/- by the end of December 1989 and Rs.2,60,000/- by the end of April, 1990. By the end of December 2017, only Rs.96,250/- was paid, out of Rs.2,00,000/- stipulated. The learned counsel for the appellant argued that as time is not the essence of the contract in case of sale of immovable property his client was not obligated to pay the same. In addition, he also argued that the execution of three sale deeds Exs.A.4, 9, and 10 (27.06.1990) after the time fixed in the agreement clearly shows that the time was not treated as the essence of the contract. Therefore, the learned counsel argued that the lower Court placed undue emphasis on the rule that the time is the essence of the contract.

In response to this, the learned counsel for the respondents argued that the plaintiff could not demonstrate his continuous willingness and readiness to get the sale deed executed. The possession of financial resources is clearly not proved as per the learned counsel for the respondents. Therefore, the learned counsel submits that even if Ex.B.3 sale deed is taken into

consideration, still the plaintiff/appellant has failed to prove his readiness and willingness as per the learned counsel for the respondents. Both the learned counsel also agreed that Ex.A.1 does not contain the stipulation that the tenants have to be vacated by the plaintiff before the sale deed is registered.

The learned counsel for the respondents essentially concentrated on the cross-examination of PW.1. He points out that PW.1 was working as an LIC agent only and that he was not an income tax assessee. According to PW.1, he gets Rs.900/- per month towards rents from the shops leased out and a sum of Rs.800/- to Rs.1,000/- per month from the floor and oil mill. Apart from that the plaintiff had no fixed avocation or income. He also points out that the sale deeds that were marked under Exs.A.4, 9 and 10 were executed in favour of others and even that sale consideration was paid by the said vendees and not by the plaintiff. He points out from the cross-examination that few days prior to Ex.A.4, one Laxmi who is a tenant and a vendee under Ex.A.4 paid Rs.66,000/-. In addition the property purchased by plaintiff's brother under Ex.A.10 is located on the east of Ex.A.9. The learned counsel points out that in the further cross-examination, the witness agrees that balance amount of Rs.2,60,000/-

is payable by him by the end of April, 1990. The witness admitted that he did not issue any notice or write a letter before 30.04.1990 expressing his readiness. The witness stated that except asking orally he did not give any notice and that he has no details of such oral demands. The witness also admitted that after April 1990 he did not issue any notice expressing his readiness to perform his part of the contract. The witness admitted that after Ex.A.2 which is dated 30.12.1989 he met the defendants in December 1990 only. The witness admitted that on the date of Ex.A.4, the vendor gave Rs.66,000/- to him and Siva gave Rs.1,00,500/- to him on the date of Ex.A.10.

The learned counsel also pointed out that a suggestion was put to the witness that he did not have a capacity to purchase suit schedule property by himself and that for the said reason only he has gathered the above persons to get the sale deeds registered in their names. Therefore, it is the contention of the learned counsel that a reading of the entire evidence shows that PW.1 was never ready with the entire sale consideration as required under law. Whatever was paid for execution of the sale deeds like Ex.A.4 and other documents was paid by the respective vendors and not by PW.1. The counsel argued that continuous readiness and

willingness which are necessary in such a case have not been proved. The learned counsel also pointed out that in the written statement also, he has taken a specific plea that from the conduct of the plaintiff, it is very clear that he did not have means to pay the balance sale consideration, apart from a lack of willingness. Despite the same, no proof was shown of this important aspect.

The learned counsel for the defendants also pointed out that in the written statement they have taken a specific plea that the plaintiff came forward to purchase the property as they were unable to manage the same. The plaintiff, according to the defendants, undertook the responsibility to vacate the tenants. The learned counsel pointed out that in the cross-examination, PW.1 talks about the possession of the property in the hands of the tenants. He pointed out that tenants Laxmi, Siva, and Surya Bhaskara Rao have contemplated to get the sale deeds in respect of the respective portions in their occupation as per another understanding/agreement. This agreement dated 13.07.1990 is marked as Ex.B.2. The said exhibit was not cancelled as admitted by the plaintiff. Ex.B.2 is a document dated 13.07.1990 executed between the plaintiff and four other people by which they jointly agreed to purchase the properties

belonging to Evani Somayajulu who admittedly is the father of the defendants 1 to 8 and is the original owner of the property. There is a default clause stating that the property cannot be sold to third parties unless it is first offered for sale to the other parties to this document. The learned counsel pointed out that this document makes it clear that in effect the plaintiff is not the sole agreement holder and that he along with others suppressed this agreement in the course of pleading and evidence. The learned counsel pointed out that the defendants have clearly come forward with this document and marked it in the course of the chief examination of DW.1. Ex.B.2 is the document which was marked in the evidence of DW.1. The learned counsel pointed out that as the defendants did not want to enter into the multiple agreements for different portions, they agreed to execute Ex.A.1 as a single consolidated agreement. The learned counsel pointed out that this agreement (Ex.B.2) makes it clear that the plaintiff and others had an internal arrangement before Ex.A.1 agreement. Therefore, it is the submission of the learned counsel for the plaintiff that he is the sole agreement holder is not correct and his conduct disentitles him from seeking the relief of specific performance. He pointed out that the entire case is filed

as if he is the sole agreement of holder and there is no reference of the earlier agreement (Ex.B.2). Apart from that the learned counsel submits that the source of funds for the plaintiff is not explained. The sale deeds that were obtained in the name of Laxmi and Siva were obtained with the finances that were proved by such parties as can be seen from the evidence. The plaintiff therefore cannot claim that he had necessary financial capacity to procure the property.

This Court after examining the submissions made particularly on Ex.B.2 notices that despite marking of Ex.B.2 in the evidence, there is no clear and categorical cross-examination on the contents of Ex.B.2. Ex.B.2 clearly shows that four others apart from the plaintiff wanted to procure the property. The funds also came from two out of four people as can be seen from the admissions made by the witness that Laxmi paid him Rs.66,000/- on the date of Ex.A.4 and Siva gave him Rs.1,00,500/- on the date of Ex.A.1. The sale consideration in Ex.A.1 is Rs.1,00,500/-. The sale consideration gave under Ex.A.4 is Rs.66,000/-. Therefore, it is clear that the plaintiff did not have financial capacity to procure necessary funds for getting the sale deed executed in his name. The entire theory

that he is the sole agreement holder and he has necessary financial capacity to pay the entire consideration falls to the ground. His contention that the vendors of the other documents are his nominees is not really correct, because Ex.B.2 makes it clear that they are not merely nominees but are a part of an overall agreement to purchase this property. In all fairness, the plaintiff should have disclosed that this agreement (Ex.B.2) exists and that pursuant to the said agreement, the sale deeds were executed in favour of others. In spite of that he filed the entire evidence as if he is the sole agreement holder. It is therefore clear that from a reading of the entire evidence that the plaintiff was not the individual purchaser of the entire property for Rs.5,10,000/- and that he did not have the capacity to raise and pay this amount. The consideration that is supposedly paid by him was collected by the plaintiff from third parties as per their own internal arrangement. The plaintiff could not prove that he has necessary financial capacity (readiness) from the date of the agreement till the date of the decree. Despite clear objections in the written statement and in the cross-examination, the plaintiff could not prove either his readiness or his willingness to get the sale deed executed

in his name. His admissions about the agreement dated 13.07.1989 (Ex.B.2) clearly shows that he had suppressed this fact. The conduct of the plaintiff thus disentitles him from seeking any relief of specific performance. The mere fact that there is an agreement of sale will not entitle him to seek a decree. His conduct is an important factor for granting or refusing the discretionary remedy of specific performance.

Therefore, issues 4, 5 and 6 are held against the appellant/plaintiff. Even if the case set up by the defendants is that the agreement Ex.A.1 cancelled is not really proved, the fact remains that the plaintiff failed to discharge the burden that is cast upon him. The continuous readiness and willingness which is necessary is not borne out by the record. This Court on the ultimate analysis concurs with the finding of the lower Court on issues 4, 5 and 6.

As far as issue No.7 is concerned, it is contended that the 12th respondent is a bona fide purchaser for the value. This Court has already come to a conclusion that the cancellation of Ex.A.1 is not proved. Therefore, the further conduct of the defendants/respondents in alienating property treating the agreement as cancelled cannot be sustained. This Court also agrees with the

finding of the lower Court that 12th defendant is not a bona fide purchaser for the value. However, in view of the findings of this Court and in line with the judgments of the Hon'ble Supreme Court of India that the readiness and willingness is not really established, this Court is of the opinion that there are no merits in the appeal.

Accordingly, the appeal is dismissed. The judgment and decree dated 24.04.1998 in O.S.No.14 of 1991 passed by the Senior Civil Judge, Razole, East Godavari District is confirmed. 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: 31.12.2018
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