

THE HON'BLE JUSTICE SRI T. SUNIL CHOWDARY

SECOND APPEAL No.1229 of 2013

JUDGMENT:

1 The plaintiff, who lost the battle in both the Courts for decree of specific performance, preferred this second appeal under Section 100 CPC, assailing the judgment and decree dated 27.07.2009 passed in A.S.No.16 of 2002 on the file of the Court of the Senior Civil Judge, Piler, upholding the judgment and decree dated 02.06.2001 passed in O.S.No.131 of 1990 on the file of the Court of the Junior Civil Judge, Piler.

2 The factual matrix that led to filing of the present second appeal, in nutshell, is as follows:

3 The case of the plaintiff is that the first defendant agreed to sell the suit schedule property in his favour on 25.07.1981 for a consideration of Rs.5,000/- and received an amount of Rs.4,500/- towards advance sale consideration on the even date and agreed to execute a regular sale deed. For one reason or the other, the first defendant did not execute the sale deed in favour of the plaintiff. The plaintiff came to know that the first defendant executed a sham and nominal sale deed in favour of the second defendant in respect of the suit schedule property with a view to defeat the rights of the plaintiff. Hence the plaintiff filed the suit for specific performance.

4 Resisting the suit, the first defendant filed written statement denying the various averments made in the plaint, *inter alia* contending that he did not execute the agreement of sale in favour of the plaintiff on 25.7.1981 and received an

amount of Rs.4,500/- towards advance sale consideration. The plaintiff migrated to Sorakayalapalli village and again returned to the village and picked up a quarrel with him. This defendant sold the suit schedule property in favour of the second defendant under a registered sale deed dated 29.5.1990, ever since the second defendant has been in possession and enjoyment of the suit schedule property. The plaintiff fabricated the agreement of sale with the help of the attestors. Hence the suit is liable to be dismissed.

5 The second defendant filed a separate written statement denying the averments made in the plaint including the agreement of sale alleged to have been executed by the first defendant in favour of the plaintiff. It is the contention of the second defendant that he purchased the suit schedule property from the first defendant on 29.5.1990 for a valuable consideration. This defendant filed O.S.No.94 of 1990 against the plaintiff seeking perpetual injunction in respect of the suit schedule property. Hence the suit is liable to be dismissed.

6 Basing on the above pleadings, the following issues were settled by the trial court:

1. Whether the agreement of sale dt:25.7.1981 is true, valid and binding on the defendant No.1?
2. Whether the plaintiff is ready and wiling to perform his part of contract?
3. Whether the defendant No.2 is bona fide purchaser of the suit schedule property for valuable consideration?
4. To what relief?

7 Before the trial Court, to substantiate the case, the plaintiff examined himself as P.W.1 and got marked Ex.A.1. P.Ws.2 and 3

were examined to prove the recitals of Ex.A.1. No oral or documentary evidence was adduced on behalf of the first defendant. The second defendant was examined as D.W.1 and Exs.B.1 to B.3 were marked. D.Ws.2 and 3 were examined to prove that the second defendant has been in possession and enjoyment of the suit schedule property.

8 Basing on the oral, documentary evidence and other material available on record, the trial court arrived at a conclusion that Ex.A.1 agreement of sale is not legally unenforceable and that the second defendant is a bona fide purchaser of the suit schedule property for a valuable consideration and consequently dismissed the suit. Feeling aggrieved by the judgment and decree passed by the trial Court the plaintiff preferred A.S.No.16 of 2002 on the file of the Senior Civil Judge, Piler. The learned Senior Civil Judge, Piler, having reappraised the oral, documentary evidence and other material available on record, arrived at a conclusion that the plaintiff is not entitled to the relief of specific performance and accordingly dismissed the appeal. Hence the unsuccessful plaintiff preferred the present second appeal.

9 Heard the learned counsel for the appellant/plaintiff and the learned counsel for the respondent/second defendant and perused the material available on record. The questions of law formulated by the learned counsel for the appellant are as follows:

(i) Whether the Courts below misconstrued the recitals of Ex.A.1?

(ii) Whether the findings recorded by the courts below are perverse?

10 Both question Nos.1 and 2 are intertwined with each other; hence this court is inclined to address both the questions simultaneously in order to avoid recapitulation of facts and evidence.

11 The plaintiff and first defendants are own brothers. As seen from the testimony of P.W.1 and D.W.1, the father of the plaintiff and first defendant purchased the suit schedule property under a registered sale deed. The testimony of D.Ws.1 to 3 reveals that the first defendant sold the suit schedule property in favour of the second defendant under Ex.B.1 dated 29.05.1990. Ex.B.3 is registered sale deed executed in favour of the father of the plaintiff and defendant dated 01.04.1948. There is no much dispute with regard to the title of the suit schedule property.

12 The person who seeks the discretionary relief of specific performance must come to the court with clean hands by placing all material facts. Section 20 of the Specific Relief Act confers jurisdiction on the court either to grant or refuse the relief of specific performance. Suffice it to say that the court has to exercise the discretionary power judiciously basing on sound principles of law. Merely because the plaintiff proved the agreement of sale that itself is not a valid ground to grant the relief of specific performance.

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

14 As seen from the testimony of P.Ws.1 and 2, the first defendant executed Ex.A.1 agreement of sale dated 25.7.1981 in favour of the plaintiff. The first defendant filed written statement denying the execution of Ex.A.1 in favour of the plaintiff. For one reason or the other, the first defendant did not choose to come into the witness box to substantiate the stand taken by him in the written statement. Therefore, much weight cannot be attached to the averments made in the written statement of the first defendant.

15 P.W.2 is none other than the brother-in-law of the plaintiff and first defendant. Second defendant is no way related to the plaintiff and first defendant. It is needless to say that a witness who is relative of one of the parties to the proceedings may depose evidence in favour of such person. One way P.W.1 is an interested witness. Though P.W.2 is close relative of P.W.1 and first defendant, he was examined before the trial Court as plaintiff's side witness. In view of the inter se relationship between P.Ws.1 and 2, Court has to scrutinise the testimony of P.W.2 meticulously so as to eliminate the exaggerations thereby to ascertain the truth.

16 A perusal of the record reveals that the plaintiff executed Ex.B.2 sale deed in favour of the first defendant on 13.5.1976, which was not denied by P.W.1. Surprisingly, P.W.2 denied the

suggestion that plaintiff executed Ex.B.2 sale deed in favour of first defendant. He further deposed that the first defendant obtained the signatures of the plaintiff on a white paper and prepared the sale deed. This court is unable to understand how the sale deed will be prepared on a white paper. This itself indicates that P.W.2 is not inclined to speak truth. The trial Court as well as the first appellate court arrived at a conclusion that the testimony of P.W.2 is not trust worthy for consideration. This Court also carefully perused the testimony of P.W.2, which is not inspiring the confidence of the court. Therefore, much weight cannot be attached to the oral testimony of P.W.2.

17 P.W.3 is scribe of Ex.A.1 agreement of sale. Both courts have carefully scanned Ex.A.1 and observed that the manner in which P.W.3 put the signature creates any amount of doubt. Admittedly, P.W.3 does not belong to the native village of plaintiff and the first defendant. In the cross examination P.W.3 deposed that he does not know about the particulars of the suit schedule property. He further deposed that consideration was not paid in his presence. A careful perusal of the testimony of P.W.3 reveals that he is not in a position to say the details of agreement of sale. In such circumstances, the possibility of taking the signature of P.W.3 without the presence of the first defendant cannot be ruled out. The trial Court as well as the first appellate court disbelieved the testimony of P.W.3. As observed earlier, P.W.2 who is brother-in-law to the plaintiff, the possibility of deposing false cannot be ruled out completely. In the light of the above factual situation, it can be held that the plaintiff failed to prove that the

first defendant executed Ex.A.1 agreement of sale in his favour agreeing to sell the suit schedule property for a consideration of Rs.5,000/- and received Rs.4,500/- as advance sale consideration.

18 Another interesting aspect is that the agreement of sale was executed in the year 1981. For a period of nine years the plaintiff did not take any steps to get the regular sale deed from the first defendant. The plaintiff did not choose even to issue a notice to the first defendant directing him to execute sale deed in his favour. The material available on record clinchingly establishes that the plaintiff failed to prove that he is ready and willing to perform his part of contract. The averments made in the plaint fall short to establish the ingredients of Section 16 of the Specific Relief Act.

19 As seen from the testimony of D.W.1 he filed O.S.No.94 of 1990 against the plaintiff seeking perpetual injunction in respect of the suit schedule property. The factum of filing of said suit by the second defendant against the plaintiff was not mentioned in the plaint. Filing of O.S.No.94 of 1990 by the second defendant against the plaintiff clearly establishes that he has been in possession and enjoyment of the suit schedule property with effect from 29.05.1990. The material available on record falls short to establish that the plaintiff came into possession of the suit schedule property by virtue of Ex.A.1 agreement of sale dated 25.7.1981. The trial court as well as the first appellate court arrived at a conclusion that the plaintiff is not entitled to

the discretionary relief of specific performance. The material available on record clinchingly establishes that the findings arrived at by the courts below are based on evidence much less legally admissible evidence. The courts below have exercised the discretionary power basing on sound principles of law while discarding Ex.A.1 agreement of sale.

20 For the foregoing discussion, 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. I am fully endorsing the findings recorded by both the courts below.

21 In **Municipal Committee, Hoshiarpur v. Punjab SEB**¹, while considering the scope of Section 100 of CPC, the Hon'ble apex Court held at paragraph No.16 as follows:

16. Thus, it is evident from the above that the right to appeal is a creation of statute and it cannot be created by acquiescence of the parties or by the order of the court. Jurisdiction cannot be conferred by mere acceptance, acquiescence, consent or by any other means as it can be conferred only by the legislature and conferring a court or authority with jurisdiction, is a legislative function. Thus, being a substantive statutory right, it has to be regulated in accordance with the law in force, ensuring full compliance with the conditions mentioned in the provision that creates it. Therefore, the court has no power to enlarge the scope of those grounds mentioned in the statutory provisions. 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. It is the obligation on the court to further clear the intent of the legislature and not to frustrate it by ignoring the same. (Vide **Santosh Hazari v. Purshottam Tiwari**, (2001) 3 SCC 179; **Sarjas Rai v. Bakshi Inderjit Singh**, (2005) 1 SCC 598; **Manicka Poosali v. Anjalai Ammal**, (2005) 10 SCC 38; **Sugani v. Rameshwar Das**, (2006) 11 SCC 587; **Hero Vinoth**

¹ (2010) 13 SCC 216

v. Seshammal, (2006) 5 SCC 545; **P. Chandrasekharan v. S. Kanakarajan**, (2007) 5 SCC 669; **Kashmir Singh v. Harnam Singh**, (2008) 12 SCC 796; **V. Ramaswamy v. Ramachandran**, (2009) 14 SCC 216 and **Bhag Singh v. Jaskirat Singh**, (2010) 2 SCC 250.)

22 Having regard to the facts and circumstances of the case and also the principle enunciated in the case cited supra, I am of the considered view that there is no question of law much less substantial question of law involved in this second appeal and hence the second appeal is liable to be dismissed.

23 In the result, the Second Appeal is dismissed at the stage of admission. There shall be no order as to costs. Consequently, Miscellaneous Petitions, if any, pending in this Second Appeal shall stand dismissed.

Date: 29.10.2018
Kvsn

T. SUNIL CHOWDARY, J.

