

THE HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

S.A.NO.1256 OF 2017

JUDGMENT

Aggrieved by the judgment and decree dated 1.6.2017 passed by the court of X Additional District Judge, Narsapur, in A.S.No.117 of 2012, in dismissing the appeal filed by defendants 4 and 5, and thereby confirming the judgment and decree of the Principal Junior Civil Judge's Court, Palakol in O.S.No.65 of 2003 dated 15.03.2011, in decreeing the suit of the plaintiffs for specific performance and permanent injunction, the present second appeal is filed. Thus the defendants 4 and 5 in the original suit are the appellants herein.

2. For the sake of convenience, the parties will be referred to as their ranking in the trial court.

3. The plaintiff filed the suit for specific performance of agreement of sale of plaint schedule house and for permanent injunction to restrain the defendants 4 and 5 from interfering with her possession and enjoyment over the plaint schedule house.

4. The case of the plaintiff is that she has been allotted MIG house bearing No.87 at Palkol by the Andhra Pradesh Housing Board vide proceedings of the 3rd defendant – Executive Engineer dated 10.03.1996 and possession was delivered on 9.5.1988. Even since, she has been in possession and enjoyment, paying installments of sale price regularly, except some installments, due to failure on the part of defendants 2 and 3 in intimating balance amount payable. Then the plaintiff got issued legal notice on 1.03.2002 to defendant No.3. By reply dated 21.03.2002, the defendant No.3 stated that the plaintiff has to clear due amounts and that there is no proposal for registration of schedule house of the plaintiff in favour of third parties. The grievance of the plaintiff is that the details of balance amount and registration charges, were not furnished, in spite of repeated requests.

5. Government issued G.O.Ms.No.67 dated 18.09.2001 allowing the Housing Board, to register their houses in favour of third parties on receipt of required documents of agreement of sale and general power of attorney (G.P.A.),. executed by original allottees in favour of third parties. Taking advantage of the said Government Order, as third parties are attempting to get the suit house registered in their favour, plaintiff got issued legal notice dated 01.08.2002 stating that she has not authorized any third party to obtain registration of plaint schedule house.

6. The further case of the plaintiff is that she executed a general power of attorney (G.P.A.) in favour of 4th defendant on 05.03.1990, authorizing him to effect repairs. As he has been misusing the said G.P.A. and committing acts of waste and acting against her interest, she got issued legal notice dated 07.03.2002 intimating the Sub Registrar, Palakol and defendant No.4, that power of attorney executed in favour of defendant No.4 dated 5.3.1990, was cancelled. The plaintiff executed deed of cancellation on 30.03.2002.

7. It is stated that the alleged agreement of sale deed dated 25.02.1990 in favour of defendant No.5 is a forged document. As defendants 2 and 3, who are the officials of A.P. Housing Board, are not coming forward for registration of suit house, she got issued statutory notice dated 25.10.2002, under Section 68 of A.P. Housing Board Act, to defendants 1 to 3, expressing her willingness to pay the balance amount and calling upon them to receive the said amount and to register the sale deed in respect of suit schedule house. It is stated that defendant No.3 got issued letter dated 21.11.2002 to the plaintiff with false and untenable allegations. The plaintiff was always ready and willing to perform her part of contract, and as defendants 1 to 3 failed to register the suit house, she filed the suit for specific performance and as defendants 4 and 5 are interfering with her possession, sought permanent injunction restraining them from interfering with her peaceful possession and enjoyment of the suit schedule house.

8. After receipt of summons, as the defendants failed to file written statement even after grant of several adjournments, under Order 8 Rule 10 of CPC., the trial court decreed the suit ex parte on 19.08.2003. Thereafter, Defendant No.3 filed I.A.No.1750 of 2002 and defendant No.4 and 5 filed I.A.No.1751 of 2001 along with written statements, to set aside ex parte decree dated 19.08.2003. I.A.No.1751 of 2001 filed by defendants 4 and 5 was dismissed on 29.08.2005 and the I.A.No.1750 of 2003 filed by defendant No.3 was allowed on 08.09.2005 and written statement was filed. The ex parte decree dated 19.08.2003 in respect of defendants 4 and 5, attained finality, as the same was not challenged.

9. In the written statement filed by 3rd defendant it is stated that the suit schedule house was allotted to the plaintiff and possession was delivered. As per condition Nos.5 and 12 of the lease-cum-sale agreement, the sale of houses to 3rd parties is not permissible, as the allottee will not acquire title or absolute rights and that allottee, is treated only as tenant. Government issued G.O.Ms.No.67 dated 18.09.2001, allowing registration of houses in favour of 3rd parties on receipt of required documents of agreement of sale and G.P.A. in favour of third parties. To the legal notice of the plaintiff dated 2.3.2002, this defendant gave reply notice dated 17.03.2003, stating that she will be intimated about the dues for getting the registration of the house, since there are no other claims from 3rd parties by that date. Subsequently, defendant No.5 submitted a representation along with photo copies of sale agreement and G.P.A. in her favour, said to have been executed by the plaintiff and her husband. In order to verify the genuineness of the said documents, defendant No.3 addressed letter on 21.01.2002, asking defendant No.5, to submit original documents, which were furnished by defendant No.5, and on verification, it was found that the signatures on the agreement of sale and G.P.A., are tallying with the signatures of the plaintiff available on record. In the meanwhile, plaintiff got issued another legal notice dated 4.10.2002, for which this defendant gave reply informing the claim of defendant No.5 and her entitlement in terms of regulation number 27(iii) in

G.O.Ms.No.67 dated 08.09.2001. As per amended Rules, Housing Board started registration in favour of 3rd parties by collecting 7 per cent towards transfer fee on the market value by duly publishing notification in the newspaper calling for objections from the original allottees, by giving 15 days time. In the present case Housing Board has not issued any such notification so far. The plaintiff got issued legal notice dated 23.09.2002 for which, this defendant gave reply on 02.11.2002 informing that balance amount of Rs.18,736/- was due and defendant No.5 is claiming registration in her favour. It is stated that plaintiff and her husband executed G.P.A. dated 05.03.1990 in favour of defendant No.4 who is husband of defendant No.5. The defendant No.5 claimed that she purchased schedule house from the plaintiff for Rs.39,500/- as per agreement of sale dated 25.02.1990 and that this defendant has to pay the remaining due installments to the Housing Board and obtain registration in her favor. Subsequently, the 4th defendant paid installments due to the Housing Board and defendant No.5 submitted letters of office bearers of MIG allottees' association stating that the sale transaction between the plaintiff and defendant No.5 is true and genuine. The plaintiff conveniently suppressed these material facts and came to the court with unclean hands with a view to have unlawful gain at the expense of defendants 4 and 5. With these averments, the 3rd defendant sought for dismissal of suit.

10. The 5th defendant filed written statement and the 4th defendant filed memo adopting the same, along with interlocutory application to set aside ex parte decree, which was dismissed. As already noted above, they were set ex parte and they also failed to participate in trial.

11. In the written statement filed by 5th defendant, it is stated that the plaintiff was the original allottee. She was irregular in payment of installments and she offered to sell the plaint schedule house. This defendant purchased the suit schedule house for a consideration of Rs.39,500/- and plaintiff received sale consideration and executed agreement of sale dated 25.02.1990 in favour of this

defendant. It was mutually agreed at that time, that the plaintiff shall execute registered G.P.A., either in favour of this defendant or her nominee, empowering G.P.A. to pay future installments to the Housing Board and obtain registered sale deed and to maintain and develop the plaint schedule house. The plaint schedule house was handed-over to this defendant on the date of agreement of sale on 25.02.1990. The plaintiff and her husband executed G.P.A. on 05.03.1990 in favour of defendant No.4 and this defendant paid due installments totaling to 33, to the Housing Board till 8.8.1997. This defendant also paid property tax to the Municipality and obtained receipts. After G.P.A. was executed, defendant No.4 intimated the same by letters dated 18.04.1990 and 20.03.2002 to defendant No.3, requesting to register the house in the name of this defendant by receiving the balance sale price, if any. This defendant renovated the schedule house by spending huge amounts. When defendant No.3 demanded to produce original agreement of sale and G.P.A., she produced the same for verification. As this defendant obtained agreement of sale in her favour and G.P.A. in favour of defendant No.4, there is no possibility for the plaintiff to obtain sale deed, as she has no absolute title over the schedule house. The plaintiff got issued legal notice to defendant No.4 with a *mala fide* intention to grab the property, and cancelled the G.P.A. It is stated that this defendant is a *bona fide* purchase and is entitled for registration in her favour in terms of G.O.Ms.No.67 dated 8.9.2001. The plaintiff has no right, title or possession over the plaint schedule property to seek any relief and the suit is not maintainable under law. With these averments, the suit was sought to be dismissed.

12. Based on above pleadings, the trial court framed the following issues:

1. Whether the plaintiff is entitled to the relief of specific performance as prayed for?
2. Whether the plaintiff is entitled to the relief of permanent injunction against defendants 4 and 5?
3. Whether the plaintiff is entitled to the reliefs as prayed for?
4. To what relief?

13. In support of the case of the plaintiff, her husband was examined as P.W.1 and got marked Exs.A-1 to A-23. On behalf of defendants 1 to 3, one

A.Krishna Mohan Raju, Assistant Engineer in Housing Board, was examined as D.W.1 and got marked Exs.B-1 and B-2. Though defendant No.3 got examined K.G.Jaya Kumar, the then Assistant Executive Engineer, in Chief, in part, as D.W.2, his evidence was eschewed on 01.02.2011.

14. Considering the evidence, both oral and documentary available on record, the trial court decreed the suit. Aggrieved thereby, defendants 4 and 5 filed first appeal. The lower appellate court, re-appreciating the entire evidence, confirmed the judgment and decree of the trial court. Hence the present second appeal by defendants 4 and 5 in the original suit.

15. The learned counsel appearing for the appellants submit that the plaintiff is the original allottee and she was irregular in payment of installments. She sold the suit schedule house and executed possessory agreement of sale dated 25.02.1990, after receipt of sale consideration of Rs.39,500/- and possession was delivered on the same date. She also executed G.P.A. on 5.3.1990 in favour of 4th defendant and he paid due installments totaling to 33 in number and also paid property tax. By letters dated 18.04.1990 and 20.03.2002, 4th defendant intimated 3rd defendant about G.P.A. and agreement of sale executed by the plaintiff, and sought for registration in terms of G.O.Ms.No.67 dated 08.09.2001. Vide letter dated 21.01.2002, the defendant No.3 required defendant No.5 to submit original documents, for verification. On verification of said documents by 3rd defendant, it was found that the signatures of plaintiff on G.P.A. and agreement of sale, tallied with her admitted signatures, available on record. So the said documents have to be treated as genuine and executed by the plaintiff. As per the guidelines under G.O.Ms.No.67 dated 8.9.2011, defendant No.5, being holder of agreement of sale with possession and also paid all the installments, is entitled for registration of sale deed. The learned counsel submits that all these facts have been admitted by the 3rd defendant in his written statement. As the original documents were submitted to D-3, defendant No.5 produced photo copies of the same along with written statement. Since these

facts have been admitted by defendant No.3 in the written statement, for non-production of originals of agreement of sale and G.P.A. and for not participating in trial, no adverse inference can be drawn. He contended that as the courts below, without appreciating these facts and without affording the appellants reasonable opportunity, allowed the claim of the plaintiff, the same is liable to set aside.

16. Heard learned counsel for 1st respondent.

17. In view of above contentions, the points that fall for my consideration in this second appeal are:

- (a) Whether concurrent findings of fact are based on evidence, and whether the same can be interfered with by re-appreciating evidence?
- (b) Whether any substantial questions of law are involved in this appeal?

18. P.W.1, who is the husband of the plaintiff, deposed as per the plaintiff averments and got marked Exs.A-1 to A-23. On behalf of defendants 1 to 3, D.W.1 was examined. Based on the evidence on record, the courts below found that there is no dispute that under Ex.A-11 legal notice dated 1.03.2002, plaintiff sought defendant No.3 to furnish details of balance amount and registration charges, in order to obtain registration of house in her favour. It is also further not in dispute that D-3 replied under Ex.A-10 on 21.03.2002, informing that there is no proposal to register the schedule house in the name of 3rd parties and that due amount will be informed shortly and after fulfilling the required formalities, suit house will be registered in her favour. The grievance of the plaintiff is that in spite of several requests, she has not been furnished with balance amount. This was also admitted by D.W.1 in his cross-examination. The plaintiff also got issued statutory notice under Section 68 of A.P. House Board Act, under Ex.A-8 dated 25.10.2002, expressing her willingness to pay the balance amount and calling upon them to receive balance sale consideration and to register the sale deed.

19. Defendants 3 and 4 alleged that plaintiff executed agreement of sale dated 25.02.1990 and also G.P.A. dated 5.3.1990. The specific case of the plaintiff is that the alleged agreement of sale dated 25.02.1990 is forged and that the G.P.A., which is executed for effecting repairs of suit house and for payment of property tax, was cancelled under Ex.A-7 dated 30.03.2002 deed of cancellation, as D-4 was acting against the interest of the plaintiff and causing damage to the plaint schedule house and also committing acts of waste.

20. Though in written statement filed by D-3 it is stated that the defendant No.4 filed agreement of sale and G.P.A. for registration of sale deed in terms of G.O. and that the signatures of plaintiff tallied; the plaintiff, as already noted above, specifically denied the execution of agreement of sale and stated that it is a forged document and under Ex.A-7, registered deed of cancellation, the G.P.A. executed in favour of D-4, was cancelled. When the defendants 4 and 5 are relying on the said document, they are bound to prove the same by adducing evidence. They were set ex parte, and they did not take part in the trial. In the absence of any evidence, their averments in the written statement, cannot be taken into consideration. However, trial court has also considered written statement filed by appellants. It is not for D-3 to decide the genuineness of the documents produced by defendants 4 and 5, when the same are disputed by plaintiff.

21. As already noted above, agreement of sale alleged to have been executed by the plaintiff in favour of D-5, remained unproved and G.P.A. stood cancelled by virtue of Ex.A-7. Based on these documents, defendants 4 and 5 are seeking registration of suit house in favour of D-5 in terms of G.O.Ms.No.67 dated 08.09.2001. As per the conditions of the said G.O., for registration in favour of third parties by collecting 7% towards transfer fee on the market value, notification has to be given by publishing in newspapers calling for objections from the original allottee. Admittedly, this notification was not issued calling for any objections from the plaintiff, who is the original allottee. D.W.1, who was

examined on behalf of defendants 1 to 3, also admitted this fact. On the other hand, the admitted case is that through the legal notice dated 1.08.2002 under Ex.A-4, the plaintiff has categorically informed that she has never authorized any third party to obtain registration of the plaint schedule house.

22. In view of above circumstances, when the plaintiff got issued statutory notice under Ex.A-8 dated 25.10.2002 intimating her willingness to pay the balance amount, defendants 1 to 3 cannot deny the registration of suit house in her favour.

23. Considering the evidence of P.W.1 and Exs.A-1 to A-23 and also the evidence of D.W.1 and Exs.B-1 and B-2, and as defendants 4 and 5, who were set ex parte and did not participate in trial, both the courts below recorded concurrent findings of fact that the plaintiff established that she is entitled to specific performance of sale of suit schedule house and as defendants are denying the right, title and possession of the plaintiff, she is entitled to the relief of permanent injunction. Accordingly both the points are answered in favour of 1st respondent / plaintiff.

24. The grounds raised in the second appeal pertain to appreciation of evidence regarding questions of facts, over which both the courts below, based on evidence, recorded concurrent findings, and as such, cannot be gone into in the second appeal by re-appreciating evidence.

25. For the foregoing reasons, I do not find any question of law, muchless substantial for interference of this court under Section 100 C.P.C. and the second appeal is accordingly dismissed at the stage of admission.

26. Miscellaneous petitions pending, if any, shall stand closed. No costs.

A.RAJASHEKER REDDY,J

DATE:12—02—2018

AVS