

(2011) 08 AP CK 0121

In the Andhra Pradesh High Court

Case No : Second Appeal No : 1005 of 1999

E. Amarnath Rao (died) and Others

APPELLANT

Vs

Smt. G. Vijaya Gowri

RESPONDENT

Date of Decision : 19-08-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Limitation Act, 1963 — Article 54

Citation : (2011) 08 AP CK 0121

Hon'ble Judges : R. Kantha Rao, J

Bench : Single Bench

Advocate : D.V. Sitaramamurthy, for the Appellant; N.M. Krishnaiah, for the Respondent

Final Decision : Dismissed

Judgement

Hon"ble Sri. Justice R. Kantha Rao

1. This second appeal is filed against the decree and judgment dated 12.04.1999 passed by the I Additional District Judge, Ranga Reddy District at Saroornagar in A.S.No.103 of 1996 reversing the decree and judgment dated 25.09.1996 passed by the Principal District Munsif, Hyderabad East & North, Ranga Reddy District in O.S.No.226 of 1990.

2. I have heard Sri D.V.Seetharama Murthy, learned Senior Counsel appearing for the appellants/plaintiffs and Sri N.M.Krishnaiah, the learned counsel appearing for the respondent/defendant.

3. For the sake of convenience, the parties will be referred as "the plaintiffs and the defendant".

4. The plaintiffs instituted the suit for specific performance of agreement to sell dated 01.04.1987 in respect of Plot No.A-3 measuring 305-06 sq. yards in Survey No.271 in Asaf Gramam, Alwal Municipality, Ranga Reddy District. According to the plaintiffs, the defendant agreed to sell the schedule mentioned

property for consideration of Rs.45,000/-, the plaintiffs agreed to purchase and paid an advance of Rs.20,000/- under an agreement to sell executed on 01.04.1987. The amount was paid by means of a cheque and the balance of sale price was agreed to be paid within six months from the date of execution of the agreement to sell dated 01.04.1987. The plaintiffs Stated that in spite of repeated requests, the defendant had not come forward to execute the registered sale deed by receiving balance sale price which prompted the plaintiffs to issue a legal notice on 06.08.1989 expressing their willingness to perform their part of contract and the said notice was returned. Again, the plaintiffs issued another legal notice on 04.10.1989, which was also returned. Subsequently, the plaintiffs filed the suit for specific performance of contract in terms of Ex.A.1-agreement to sell dated 01.04.1987.

5. It was contended by the defendant in the course of the written statement filed before the trial Court that Ex.A.1-agreement to sell does not really reflect the sale transaction, the defendant in fact borrowed a sum of Rs.20,000/- from the plaintiffs on 29.06.1985 for business purpose of her husband and subsequently, the amount was cleared by installments. The alleged agreement to sell-Ex.A.1 was obtained as a security for the loan. According to the defendant, Ex.A.1-agreement to sell dated 01.04.1987 is not true, valid and not enforceable.

6. The issue came up for consideration before the learned trial Court was whether the plaintiffs are entitled for decree of specific performance of agreement to sell-Ex.A.1 dated 01.04.1987.

7. In the course of the trial, the first plaintiffs was examined as PW.1 and the plaintiffs marked Exs.A1 to A5. The defendant was examined as DW1 in chief, but as he had not turned up himself for cross examination, his evidence was eschewed by the order of the trial Court dated 14.02.1996. No documents were marked on behalf of the defendant.

8. The learned trial Court considering the agreement to sell-Ex.A.1, dated 01.04.1987 and accepting the version of the plaintiffs that they are ready and willing to perform their part of contract and that the time is not the essence of contract, held that the plaintiffs are entitled for a decree of specific performance of contract in terms of Ex.A.1-agreement to sell and accordingly, decreed the suit filed by the plaintiffs.

9. The first appellate Court, however, considered Ex.A.1-agreement to sell said to have been executed on 01.04.1987 as not genuine and held that the contention urged by the defendant that Ex.A.1- agreement to sell does not represent the contract mentioned therein and it might be obtained in connection with borrowing of an amount of Rs.20,000/- by the defendant. More particularly, in view of the fact that no date is mentioned on Ex.A.1 -agreement to sell arrived at the conclusion that the trial Court committed error in decreeing the suit filed by the plaintiffs. In support of its conclusion, the learned trial Court recorded the following findings:

(a) Since six months time is stipulated for performance of contract and in view of the abnormal escalation of land prices in and around the city of Hyderabad, the time can be said to be the essence of contract.

(b) The defendant had not placed any convincing evidence showing that he was ready to pay the balance of sale price. He only deposited the balance of sale price nearly three years after the agreement to sell i.e. in the year 1996. The relief of specific performance being discretionary, the learned trial Court ought not to have granted the said relief on account of laches on the part of the plaintiffs and the trial Court granted the said relief for mere asking by the plaintiffs.

(c) Since the document Ex.A.1-agreement to sell does not bear the date, it was quite possible that the said document allegedly executed on 01.04.1987 is on blank paper obtained from the defendant to hide the real transaction and for pressing into service Ex.A.1-agreement to sell at a subsequent stage as per the convenience of the plaintiffs.

(d) the balance of sale consideration was agreed to be paid within six months from the date of Ex.A1-agreement to sell, an option was given to the parties in the agreement to extend the time for performance and any such extension can only be in writing with the consent of the parties but as any such written extension has not been obtained by the plaintiffs, the time shall be considered as the essence of contract.

e) The first notice Ex.A.2 was issued by the plaintiffs after a period of two years and four months from the date of agreement. If really the plaintiffs were willing to perform their part of contract, they ought to have issued lawyers notice within six months period or soon after the period of six months had been expired.

10. The following substantial questions of law have been framed for consideration in the second appeal:

1. Whether the lower appellate court can reverse the findings of the trial Court without giving reasons as to how the findings of the trial court erroneous.

2. In the absence of a finding that the trial Court exercised its discretion either arbitrarily or against the sound judicial principles, the lower Appellate Court whether had not exceeded its jurisdiction in interfering with the discretion exercised by the trial Court in decreeing the specific performance of Ex.A.1-agreement of sale.

11. Sri D.V.Seetharama Murthy, learned Senior counsel appearing for the appellants/plaintiffs would contend that when the appellate Court either misconstrued a document or renders its decision on wrong application of principles of law while interpreting the document, this Court can interfere with the finding of the first appellate Court u/s 100 C.P.C. since it constitutes the substantial question of law.

12. In support of the said contention, he relied on Hero Vinoth (minor) Vs. Seshammal, wherein it is held as follows:

Though the scope for interference with concurrent findings of fact while exercising jurisdiction u/s 100 CPC is very limited, and re-appreciation of evidence is not permissible where the trial Court and/or the first Appellate Court misdirected themselves in appreciating the question of law or placed the onus on the wrong party certainly there is a scope for interference u/s 100 CPC after formulating a substantial question of law.

13. For the same proposition, the learned senior counsel relied on Panjak Bhargava and another Vs. Mohinder Nath and another, wherein the Supreme Court held as follows:

If construction of disputed document rising question of law, which directly and substantially affecting rights of parties, it can be considered as substantial one between the parties.

14. The proposition no doubt is well settled and it cannot at all be disputed. Any legal issue relating to the interpretation of document certainly constitutes a substantial question of law. But in the instant case, the learned first appellate Court gave several reasons which are mentioned in the foregoing paragraphs as to why it doubted the genuineness of Ex.A.1-agreement to sell and the said findings were recorded basing on evidence forthcoming before the trial Court. Therefore, I do not think that there is any such mis-construction or wrong application of principles of law while dealing with the genuineness and validity of Ex.A.1-agreement to sell. In view of the specific plea taken by the defendant that the transaction in fact, was a loan transaction and only to clear repayment of loan, the agreement to sell was obtained, the plaintiffs ought to have examined attestors of Ex.A.1-agreement to sell to prove the same, but the plaintiffs alone was examined and no other witness was examined to prove Ex.A.1-agreement to sell.

15. Another contention urged by the learned senior counsel is that for non-examination of the defendant, adverse inference has to be drawn against the case of the defendant to the effect that what he had set up in his written statement is not correct and in support of his contention he relied on a decision in Iswar Bhai C. Patel @ Bachu Bhai Patel Vs. Harihar Behera and Another, wherein it is held as follows:

where the defendant does not present himself for cross examination and refuses to enter the witness box in order to refute allegations made against him or to support his pleading in his written statement, adverse inference must be drawn against him.

The learned counsel also relied on another decision in Man Kaur (dead) by LRS. Vs. Hartar Singh Sangha, wherein the Supreme Court held as follows:

where a party to the suit does not appear in witness box and state his own case

on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that case set up by him is not correct.

16. In this context, it is to be kept in mind that in every case of non-examination of the party to the suit, the Court is not supposed to draw adverse inference against him automatically. Before drawing adverse inference, the Court has to take into consideration the pleadings of the parties, the effect of the evidence adduced by the opposite party, the evidence forthcoming on record and the justifiable circumstances to draw an adverse inference. Drawing of adverse inference cannot be said to be automatic whenever a party to the suit does not offer himself to be a witness in the course of the trial. In the instant case, the plaintiffs failed to prove that Ex.A.1-agreement to sell is true and genuine. No date is mentioned on Ex.A.1-agreement to sell. No attesting witness was examined to prove Ex.A.1. There is inordinate delay on the part of the plaintiffs in issuing legal notice to the defendant and also approaching the Court. The learned first appellate Court considering all the circumstances which are referred to herein above, rightly held that it is not a fit case wherein adverse inference can be drawn against the defendant.

17. It is true that in contracts relating to immoveable property there may be some unique and peculiar circumstances justifying the Courts to hold that the time is the essence of contract. But the crucial point is even if the time is not the essence of contract, the relief of specific performance cannot be granted to the plaintiffs if there are laches on their part and when there is inordinate delay in seeking such discretionary relief. In *K.S. Vidyanadam and Others v Vairavan* (1997) 3 SCC the Apex Court held as follows:

Even though the time is not the essence of contract of sale of immovable property and the suit can be filed within the period of three years provided under Article 54 of Limitation Act but it should be performed within a reasonable time having regard to terms of the contract prescribing a time limit and nature of the property. If the property is a house located in an urban area, continuing steep rise in price thereof would be a relevant factor for the court to decide whether the delay or laches on the part of the plaintiff to perform his part of the contract would disentitle him the relief of specific performance. Where agreement specifying period of six months within which plaintiff had to purchase the stamp papers, tender the balance amount of consideration and require the defendants to execute the sale deed, total inaction for two and half years after initial payment of a small amount as earnest money by the plaintiff would weigh against exercise of discretion for grant of specific performance of the agreement in favour of the plaintiff.

18. In the instant case also, though it is agreed upon by the parties under Ex.A.1-agreement to sell that the plaintiffs have to pay the balance of consideration within six months from 01.04.1987, there was no evidence adduced by the plaintiffs to prove that within the stipulated period, the plaintiffs were ready and willing to perform their part of contract, the very fact that the plaintiffs had

issued legal notice Ex.A.2, after a period of two years and four months and also as rightly held by the learned first appellate Court without proving any preparedness on their part in paying the balance of sale consideration and without depositing the said amount for a period of nine years, after the stipulated time, approached the trial Court for a decree and specific performance of contract in terms of Ex.A.1-agreement to sell. The learned first appellate Court going through the conduct of the plaintiffs, more particularly, considering the inordinate delay in pursuing their remedy of specific performance, rightly refused the said relief to them by reversing the judgment passed by the learned trial Court. I absolutely see no substance in the contention urged on behalf of the plaintiffs that the learned first appellate Court without assigning reasons reversed the finding of the trial Court. Equally, there is no substance in the contention that the trial Court had not recorded any finding that the discretion exercised by the trial Court is arbitrary, not based on sound principles and that it exceeded the jurisdiction in interfering with the discretion exercised by the trial Court. The learned first appellate Court in its well reasoned judgment clearly held that the discretion exercised by the trial Court in granting the relief of specific performance to the "plaintiffs is improper and therefore, interfered with the said findings and reversed the decree passed by the trial Court. The learned first appellate Court since gave elaborate reasons for its decision, it cannot be said that it had exceeded its jurisdiction by interfering with the findings of the trial Court in decreeing the suit granting relief of specific performance.

While reversing the finding of the trial Court and refusing the relief of specific performance to the plaintiffs, the learned first appellate Court, however, passed a decree in favour of the plaintiffs for recovery of Rs.20,000/- from the defendant with interest at the rate of 12% per annum from the date of decree till the date of realization on the ground that the defendant admitted borrowing of loan from the plaintiffs and failed to prove that he repaid the said loan amount.

19. For what all stated hereinabove, there are absolutely no valid grounds to interfere with the findings of fact and law recorded by the first appellate Court. The second appeal being devoid of any merit, fails and therefore, it is liable to be dismissed.

20. The second appeal is accordingly, dismissed. There shall be no order as to costs.