
(2004) 02 AP CK 0048
In the Andhra Pradesh High Court
Case No : SA No. 1053 of 2002

Mohd. Abdul Hakeem (died) per LRs. APPELLANT
Vs
Naiyaz Ahmed and Others RESPONDENT

Date of Decision : 24-02-2004

Acts Referred:

Contract Act, 1872 — Section 2
Specific Relief Act, 1963 — Section 15

Citation : AIR 2004 AP 299 : (2004) 3 ALD 501 : (2004) 3 ALT 585 : (2005) 1 CTLJ 97

Hon'ble Judges : P.S. Narayana, J

Bench : Single Bench

Advocate : Wasim Ahmed Khan, for the Appellant; P. Gangaiah Naidu, for B. Ramakrishna, for the Respondent

Judgement

P.S. Narayana, J.—Sri Wasim Ahmed Khan representing the appellants had pointed out that on 8-1-2003 this Court admitted the second appeal on the following grounds:

1. Whether u/s 2(d)(e) of the Contract Act, an agreement which is not signed by the vendee, but only signed by the vendor is a concluded contract or not ?
2. Whether under the provisions of the Specific Relief Act, a concluded contract which is not signed by the vendee can be a complete contract, and whether a suit on the basis of an unconcluded contract can be filed for specific performance of the same ?

In CMP No. 24829/2002 on the self-same day, an order of status quo was granted and the Second Appeal was directed to be posted immediately after Sankranti vacation. The learned Counsel also pointed out that apart from the substantial questions of law referred to supra, several other substantial questions of law also are involved and the said questions are as hereunder:

1. Whether the judgment and decree of the Appellate Court are not vitiated for

non-framing of Points for consideration in accordance with Order 41, Rule 31 of the Code of Civil Procedure?

2. Whether the suit as framed is maintainable in view of the Section 15 of the Specific Relief Act 1963 ?

3. Whether examination of GPA as PW-1 would be sufficient even in the absence of the plaintiff?

4. Whether denial of execution of agreement of sale by 2nd defendant in the written statement was appreciated in accordance with law by framing the relevant issue especially in view of Order 22, Rule 4(2) of the CPC ?

5. Whether the motive for fabrication of Exs.A-2 and A-3 had been appreciated in proper perspective ?

6. Whether the Courts below had not recorded perverse findings in relation to Exs.A-2 and A-3 especially in the light of the contradictory evidence of PW 1 and PW-2 on essential aspects ?

7. Whether the Courts below are justified in comparing the disputed signatures without the assistance of an expert opinion in the peculiar facts and circumstances of the case ?

The learned Counsel while elaborating his submissions had pointed out to the findings recorded by the Court of first instance and also the Appellate Court and the contradictory statements made by PW-1 and PW-2 in relation to payment of consideration and the place where the payment was made and had commented that though these are findings, in relation to facts, definitely they are perverse findings. The learned Counsel also had pointed out to Para 7 of the judgment of the Appellate Court where a cryptic point for consideration was framed which would not convey any meaning at all. The learned Counsel also made elaborate submissions on the aspect of validity of Exs.A-2 and A-3 and the specific denial relating to the same in the written statement filed by the 2nd defendant. The Counsel would maintain that along with the 1st defendant, the 2nd defendant . also was originally impleaded as a party and on whatever ground it may be, as a original party to the litigation, the 2nd defendant is entitled to take a specific stand of questioning the validity of Exs.A-2 and A-3 and hence the approach adopted by both the Courts below that the 1st defendant who was alive at the relevant point of time and who had the opportunity to deny the same had not denied and hence it can be taken that these documents Exs.A-2 and A-3 are genuine, cannot be sustained. The Counsel also would maintain that the 2nd defendant was impleaded as a party even while instituting the suit and the other defendants were brought on record after the death of the 1st defendant and hence the principle that the legal representatives cannot take any stand inconsistent or contrary to the stand taken by the original defendant may not be applicable in the facts and circumstances of the present case. The Counsel also would maintain that in this regard a specific issue may have to be framed and

proper findings are to be recorded. The learned Counsel also while further elaborating his submissions had taken this Court through the evidence of DW-1 where the motive for fabrication of Exs.A2 and A-3 also had been pointed out. In the light of the reasons in detail explained by DW-1, the Counsel contended that the relief of specific performance should not have been granted. The learned Counsel also had pointed out certain inherent improbabilities and would contend that no prudent man who had paid almost the total sale consideration except a paltry sum would keep quiet and for such sufficiently a long time and would not approach the Court after long lapse of time. The learned Counsel also contended that there was no prior notice even before the institution of the suit and whether the question of limitation is raised or not, it is the duty of the Court to record a finding even on the question of limitation and since the suit is barred by limitation, the relief should have been negated by the Court below. The learned Counsel also would point out that though the disputed signatures can be compared with the admitted signatures by the Court, normally that practice should not be resorted to and it is always better and safe to have an opinion of expert in this regard and inasmuch as the burden is on the plaintiff to prove this aspect, this question also should have been seriously considered by both the Courts below. The learned Counsel also made elaborate submissions relating to the nature of the contract and would contend that unless both the vendor and the vendee sign the agreement of sale it should be taken to be a unilateral contract and on the strength of such document a suit for specific performance cannot be maintained. Attention was drawn to several provisions of the Indian Contract Act, 1872 in this regard. Reliance also was placed on certain decisions to substantiate his contentions.

2. On the contrary, Sri Gangaiah Naidu, the learned Senior Counsel representing the 1st respondent/plaintiff would contend that the General Power of Attorney who has knowledge about the transaction is definitely entitled to depose and the language of Section 15 of the Specific Relief Act also is very clear since the representatives also can maintain the action. The learned Counsel also had taken this Court through Exs.A-2 and A-3 which had been duly proved by the evidence of PW1 and PW2. The Counsel also would maintain that the minor contradiction pointed out had been considered by both the Courts below and factual findings had been recorded in this regard. The learned Counsel also contended that though points for consideration in detail had not been framed by the Appellate Court, in substance Order 41, Rule 31 of the CPC had been complied with inasmuch as all the aspects, both oral and documentary evidence available on record had been dealt with in detail by the Appellate Court and hence the judgment and decree are not vitiated. The learned Senior Counsel also would maintain that the first issue framed by the Court of first instance is a comprehensive issue and hence no additional issues need be framed. The learned Counsel in detail had explained and distinguished the decisions relied upon by the Counsel representing the appellants and would contend that the contention that a suit for specific performance cannot be maintained unless both the vendor

and vendee of the transaction sign the transaction cannot be sustained since what is essential is only consensus ad idem between the parties. The Counsel also had clearly explained about the concept of proposal and the definition thereof under the Indian Contract Act, 1872. The learned Counsel also contended that it is not necessary that always a document should be sent to an expert for the purpose of comparison of the disputed signatures with the admitted signatures since it is only opinion evidence and when direct evidence is available, the opinion evidence even if obtained, may not be very significant. The learned Counsel also had drawn the attention of this Court to the concurrent findings recorded by both the Courts below and would conclude that in the light of the limitations imposed on this Court u/s 100 of the Code of Civil Procedure, this is not a fit case where the findings recorded by both the Courts below are liable to be interfered with.

3. Heard the Counsel at length. Perused the respective pleadings of the parties, the findings recorded by the Court of first instance and the evidence recorded by the Appellate Court.

4. The 1st respondent herein as plaintiff instituted OS No. 4/92 on the file of Senior Civil Judge, Vikarabad, Ranga Reddy District praying for the relief of specific performance pleading that the 1st defendant is the absolute owner and possessor of the building premises bearing Nos. 3-2-70 to 3-2-79, 3-2-82, 3-2-84 and 3-2-85 totally admeasuring 2250 sq.yards situated at Kumargali, Tandur, the schedule land. The 1st defendant agreed to sell the said property for a consideration of Rs. 1,00,000/- to meet his family necessities and realisation of family debts. The plaintiff accepted the said offer and purchased the suit property under agreement of sale dated 22-1-1986 and paid an amount of Rs. 90,000/- towards part of sale consideration. Having received the said amount, agreement of sale was executed in favour of the plaintiff and a receipt of acknowledgment was issued on the same day. It was agreed by both the parties that after receiving balance consideration of Rs. 10,000/- and after clearing of taxes and also vacating the premises of tenants, vacant portion has to be handed over to the plaintiff after clearing all encumbrances. However, the 1st defendant had not informed that the property was ready for delivery of possession. In spite of demand of the plaintiff, the 1st defendant did not do so and the plaintiff always had been ready to perform his part of the contract by paying Rs. 10,000/-. The 1st defendant developed and changed his mind and started offering to third parties by suppressing the agreement of sale. In the said circumstances having left with no other remedy, the plaintiff filed the present suit. It was also pleaded that the plaintiff learnt that the 2nd defendant was the General Power of Attorney and he is contracting third parties for alienation of the property.

5. As can be seen from the material available on record, no doubt the suit was instituted by Naiyaz Ahmed, the plaintiff. It is needless to say that this plaintiff was not examined, but only General Power of Attorney was examined. Inasmuch

as the 1st defendant died, after a couple of adjournments made by the Court for the purpose of filing written statement, the 2nd defendant filed a written statement in detail and the legal representatives of the 1st defendant brought on record also had adopted the written statement of the 2nd defendant. It was pleaded in the written statement that the allegations in the plaint are not correct to the extent of agreement of sale. It was further pleaded that Defendants 2 to 23 never agreed to sell the property for Rs. 1,00,000/- and never received any consideration and never executed any agreement and there were no family debts or necessities for selling the property and it is a fabricated story to knock away the property. It was also pleaded that the agreement and the receipt were fabricated. It was further pleaded that there was no agreement of evicting the tenants. It was pleaded that the alleged agreement of sale was got prepared just before last days of the 1st defendant who was seriously ill due to paralysis since 1991. The 1st plaintiff never demanded, muchless on 26-1-1992 and during that period the 1st defendant was totally bed ridden and was not in a position to move out of Hyderabad. The schedule property was worth more than Rs. 7,00,000/- in the year 1986 and it is unbelievable that the plaintiff paid 90% sale amount and waited years together without getting the sale deed and without issuing notice.

6. On the strength of the respective pleadings of the parties, the following issues were settled:

1. Whether the Defendant No. 1 has executed the agreement of sale and receipt dated 22-1-1986 during his life time?
2. Whether the plaintiff is entitled to get possession and registered sale deed as prayed for ?
3. To what relief ?

The General Power of Attorney was examined as PW-1 and yet another witness as PW-2 and Exs.A-1 to A7 were marked and the 2nd defendant was examined as DW-1 who is also incidentally a General Power of Attorney and Exs.B-1 to B-3 were marked. The Court of first instance appreciated the oral and documentary evidence available on record and believed Exs. A-2 and A3 especially in the light of the non-denial by the 1st defendant during his life time and Exs.B1, B-2 and B-3 also had been considered which were no doubt marked for the purpose of showing the motive for creating Exs.A-2 and A-3 and for initiating the present action. As can be seen from the material available on record, the Court had compared the signatures and had recorded a finding relating to Exs.A-2 and A3. It is no doubt true that the 1st defendant had not filed a written statement though the matter was adjourned on a couple of occasions. There is some evidence on record that he was suffering from paralysis for some time and no doubt the said fact was controverted by PW-1. Be that as it may, the fact remains that there is a specific denial relating to the execution of Exs.A-2 and A-3, no doubt by the 2nd defendant, the son of the 1st defendant. The main

contention advanced by the Counsel for the 1st respondent/plaintiff is that though the 1st defendant had an opportunity of denying, there was no such denial during his life time and no doubt after a couple of adjournments he passed away. It is pertinent to note that there may be several circumstances and on that ground only it cannot be said that Exs.A-2 and A3 can be taken as proved unless otherwise the Court is satisfied that the evidence of PW-1 and PW2 would be sufficient in relation to the proof thereof. In the Appeal, A.S.No. 51/2001 on the file of IV Additional District Judge-Fast Tract Court, Ranga Reddy District, the Appellate Court at Para 7 had framed the following point for consideration: "Whether the appellants are entitled to ask to allow the Appeal by setting aside the judgment of " the Trial Court and to dismiss the suit ?". No doubt all the decisions cited had been narrated and the same findings recorded by the Court of first instance had been repeated by the Appellate Court as well. The Counsel for the 1st respondent with all vehemence had pointed out to these factual findings and would contend that such findings cannot be disturbed in a Second Appeal. The Apex Court in a catena of decisions no doubt time and again had expressed an opinion relating to the limitations imposed on this Court while disturbing the factual findings in general and the concurrent findings in particular while exercising powers u/s 100 of the Code of Civil Procedure, but at any rate this is not an absolute rule and there are several exceptions. In the present case when the 2nd defendant had taken a specific stand, especially in the light of Order 22, Rule 4(2) of the Code of Civil Procedure, the discharge of burden of proof should have been appreciated on the footing that there is a specific denial in the written statement and not as though in view of the non-denial by the 1st defendant it may be taken to have been proved, especially in the light of the non-examination of the plaintiff. In Jagdish Chander Chatterjee and Others Vs. Shri Kishan and Another, , the Apex Court held:

"Under Sub-clause (ii) of Rule 4 of Order 22, CPC any person so made a party as a legal representatives of the deceased respondent was entitled to make any defence appropriate to his character as legal representative of the deceased respondent. In other words, the heirs and the legal representatives could urge all contentions which the deceased could have urged except only those which were personal to the deceased. Indeed this does not prevent the legal representatives from setting up also their own independent title, in which case there could be no objection to the Court impeaching them not merely as the legal representatives of the deceased but also in their personal capacity avoiding thereby a separate suit for a decision on the independent title."

Reliance also was placed on Peddi Sivaiah and Others Vs. Tekchand, . It is no doubt true that even a General Power of Attorney who is having knowledge about all the aspects of a particular transaction may depose. The same view was expressed in Podelly Chinna Chinnanna Vs. Bandari Pedda Bhumanna and Others, . But it is pertinent to note that in a suit of this nature, since the relief of specific performance itself being an equitable relief, the Court should be very careful and cautions and especially when a motive of this nature for the creation

of Exs.A-2 and A-3 had been so elaborately explained by the 2nd defendant as DW-1, it is but natural that the plaintiff should have been examined and in the absence of the same, adverse inference may have to be drawn. In *Malamma Vs. Permanand*, , it was held that the failure of the plaintiff going into witness box and failure to produce account book entitles drawing an inference that the plaintiff was not ready and willing to perform his part of the contract and not entitled to the relief of specific performance. It is also pertinent to note that several circumstances had been explained which would throw some cloud over Exs.A-2 and A3. While enforcing an agreement of sale, clear proof to the satisfaction of the consciotis of the Court may be essential especially in the light of the fact that the stand taken by the plaintiff is that almost total consideration was paid except a paltry sum and no reasons for postponing had been specified in the recitals of the agreement of sale Ex.A2 and such reasons were supplemented in evidence. The Courts below could have been more careful and cautions while appreciating the evidence in the light of this factual background. Whether contradiction between PW-1 and PW2 would be only a minor contradiction or a major contradiction would always depend upon the factual background. The contradictions relating to payment of consideration and the execution of Exs.A-2 and A-3 should have been taken a serious note especially in the light of the non-examination of the plaintiff. Hence in this view of the matter, both the Courts below had misdirected themselves in appreciating the evidence and had recorded findings which are unsustainable. It is no doubt true that as far as points for consideration is concerned, if all the aspects had been considered by the Appellate Court, on the mere non-framing of the Points for consideration, the judgment and decree of the Appellate Court cannot be disturbed.

7. On the aspect of comparison of disputed signatures with the admitted signatures, reliance also was placed on *Mohammed Sultan Vs. Miss Nawazunnisa*, and *O. Bharatan Vs. K. Sudhakaran* and another, . Reliance also was placed on *Parakunnam Veetill Joseph's Vs. Nedumbara Kuruvila's and Ors*, , wherein the Apex Court explaining the duty of the Court while granting the relief of specific performance observed that the Court should see that litigation is not used as instrument of oppression to have unfair advantage to plaintiff. Apart from the aspects which had been referred to supra, strong reliance was placed on *S.M. Gopal Chetty v. Raman*, AIR 1998 Mad. 169, wherein a learned Single Judge of Madras High Court held as hereunder:

"Before we go into the question of genuineness and validity of Exs.A-1 and A-2, one vital fact which was not noticed by the lower Court is that Exs.A-1 and A-2 do not contain the signature of the plaintiff at all. Exs. A1 and A-2 have been signed only by the Defendants 1 and 2. The first one is on a blank paper. The preamble of the said document Ex.A1 shows that the Defendants 1 and 2 have given the said document to the plaintiff. It shows that the Defendants 1 and 2 agreed to execute the sale deed within a period of three months. There is no agreement on the part of the plaintiff to pay the balance of sale consideration within the period mentioned in the said document and take the sale deed.

Similarly in Ex.A-2 also we find that Defendants 1 and 2 have given the agreement to the plaintiff. In the said document also the Defendants 1 and 2 have agreed to execute the sale deed on or before 17-1-1974 after receiving the balance of Rs,790/-. Again in the said document also there is no agreement on the part of the plaintiff to pay the balance within the period. It is therefore clear from the terms that these two documents are only agreements by Defendants 1 and 2 agreeing to do something in favour of the plaintiff on receipt of the amounts. But there is no agreement on the part of the plaintiff to do anything in favour of the Defendants 1 and 2. From the above it is clear that it is not an agreement between the two parties. It is not a mutual agreement or contract.

As per Section 2(b) of the Indian Contract Act, 1872 a proposal becomes a promise only when the person to whom the proposal is made signifies his assent thereto and when the proposal is accepted. As per Section 2(e), every promise and every set of promises forming the consideration of each other is an agreement.

From the two documents we are not able to find anything signifying the assent of the plaintiff. Therefore, there is no contract between the plaintiff and the defendants. At the most they may be termed as undertakings by the Defendants 1 and 2. As per Section 10 of the Indian Contract Act, 1872, all agreement are contracts, if they are made by free consent of the parties competent to the contract. As we have seen above, there is no agreement at all in the present case by the plaintiff.

If there is no contract at all, then the question of specific performance does not arise. As per Section 15 of the Specific Relief Act, 1963, the contract can be enforced only by a party to a contract. The plaintiff is not a party at all to the contract. Therefore, he is not entitled to obtain a decree from Court for specific performance. Hence the suit has to be dismissed on this ground alone."

The view expressed by the learned Single Judge of the Madras High Court that since the plaintiff had not signed the agreement of sale he is not a party at all to the contract and hence the relief of specific performance cannot be granted on the strength of such document, in my considered opinion, cannot be sustained. No doubt, attention was drawn to the definition of proposal and elaborate submission were made in this regard. What is essential for an enforceable contract is consensus ad idem. The contention that the mere fact that the plaintiff had not signed the agreement of sale and hence it can be taken as unilateral and he was not a consenting party to the terms and conditions of the agreement of sale, definitely cannot be sustained. I am not inclined to accept with the said view since it is the consensus ad idem between the parties which may have to be established for the purpose of enforcing a contract or an agreement of sale as well. It is also pertinent to note that a suit for specific performance can be maintained even on the strength of an oral agreement. When that being so, in law it cannot be said that merely because the plaintiff had not signed the agreement of sale, the same cannot be enforced and a suit for

specific performance itself cannot be maintained on the strength of such agreement on the ground that it is not a concluded contract. Hence, I am not inclined to accept with the view expressed by the learned Single Judge of Madras High Court in the decision referred S.M. Gopal Chetty v. Raman (supra).

8. Be that as it may, on a careful scrutiny of the complete material available on record, especially in the light of the fact that the relief of specific performance itself is a discretionary relief, an equitable relief, and always necessarily the Courts need not grant such relief merely because such relief can be granted and if there are other circumstances by virtue of which the same can be negated and in the light of the motive for creation of these documents which had been elaborately deposed by DW-1 and the delay on the part of the plaintiff in not approaching the Court within a reasonable time and the plaintiff not entering into the witness box at all except the alleged attestors being examined to the transaction and also taking into consideration that except the evidence of DW-1 there is no other evidence available and further in view of the fact that an attempt was made by the appellants to file certain additional documents at the appellate stage, I am inclined to frame the following additional issues:

1. Whether the equitable relief of specific performance be granted in the light of the evidence of PW-1 and PW-2 and the recitals in Ex.A-2 and the motive explained by DW-1?
2. Whether the conduct of the parties show the readiness and willingness to perform their part of the contract ?
3. Whether non-examination of the plaintiff would result in drawing adverse inference as against the plaintiff?
4. Whether the discretionary relief of specific performance which is also equitable be granted in the light of the facts and circumstances pleaded in the written statement and explained by DW-1 ?
5. Whether the suit filed is within limitation ?

Inasmuch as this Court is framing the additional issues specified supra, definitely it would be just and reasonable to permit both the parties to let in evidence to substantiate their respective contentions especially in the light of the elaborate submissions made by both the Counsel at the stage of Second Appeal. Hence, this Court is of the considered opinion that the judgments and decrees of the Courts below cannot be sustained and it is a fit matter where the suit be remanded to the Court of first instance for giving opportunity to both the parties to let in both oral and documentary evidence to substantiate their respective contentions and to prove their respective cases in accordance with law especially in the light of the additional issues referred to supra.

9. Accordingly, the matter is remanded for the purpose specified supra, to the Court of first instance, Senior Civil Judge, Vikarabad. The Second Appeal is allowed to the extent indicated above. Inasmuch as an order of remand is being

made, parties are directed to bear their own costs.