
(1955) 09 AP CK 0015

In the Andhra Pradesh High Court

Case No : Second Appeal No. 136 of 1952 and C. M. P. No. 5454 of 1955

P. Ramayya and Others

APPELLANT

Vs

C. Krishnaiah and Others

RESPONDENT

Date of Decision : 23-09-1955

Acts Referred:

Limitation Act, 1963 — Article 113

Citation : AIR 1957 AP 26

Hon'ble Judges : Chandra Reddy, J

Bench : Single Bench

Advocate : A. Kuppuswami, for the Appellant; M.S. Ramachandra and M. Krishna Rao, for the Respondent

Final Decision : Allowed

Judgement

Chandra Reddy, J.—Defendants 1 to 3 and 5 have brought this second appeal from the judgment and decree of the Subordinate Judge, Nellore, setting aside the decree of the trial court dismissing O. S. No. 271/47. The facts giving rise to this second appeal may be briefly narrated:

2. The property originally belonged to the joint family of the Plaintiffs. For arrears of cist, the zamindar of Venkatagiri brought the properties to sale and they were purchased in auction by the 1st Defendant as representing his joint family for a sum of Rs. 170/- on 25-12-1937. The 2nd and 3rd Defendants are his brOrs. . The 5th Defendant is a subsequent purchaser of 1/3rd of the properties thus acquired under Ex. B-I, dated 16-8-1944.

This suit is instituted on the allegations that the 1st Defendant purchased the property for the benefit of the Plaintiff's family which was not possessed of sufficient means to avert the sale, that the amount paid for the acquisition of the properties should be treated as a loan by the 1st Defendant and that the latter should recoup himself of the money so advanced out of the income from the property and as soon as the debt stood discharged he should put the Plaintiffs in

possession of the property.

In order to give effect to this oral agreement, a document was executed a month later, but that was lost. Coming to know of the loss of the document and taking advantage of it, the 1st Defendant was evading to execute the contract. This necessitated the Plaintiff's issuing a registered notice on 2-6-1944 which was refused by the addressee. Soon after/and as a result of the mediation an arrangement was entered into between the parties on 15-8-1944 by and under which the 1st Defendant had to convey 2/3rds of the property purchased by him in auction to the Plaintiff on receipt of Rs. 400/-. This was embodied in Ex. A-I. As the 1st Defendant had not fulfilled the terms of the agreement, the Plaintiff was obliged to file the suit.

3. The defence to the suit was that the agreements pleaded were untrue, and that Ex. A-I is not a true and a genuine document.

4. The trial court upheld the defence and dismissed the suit. On appeal, the Subordinate Judge came to the opposite conclusion regarding the agreement and genuineness of Ex. A-I. But he thought that Ex. A-I could not be enforced because of the averments in the plaint and the suit could not be decreed on that basis. Curiously enough, he gave the larger relief based upon the alleged earlier agreement. In the result, the suit was decreed as prayed for. The aggrieved Defendants have preferred this second appeal.

5. The main point for consideration is whether the Plaintiffs could recover judgment on the basis of the allegations contained in the plaint. I will first deal with the question whether the view of the learned Judge that a decree could be founded on an agreement said to have been reached in 1937 is sustainable. The case set up in the plaint is that the oral agreement was prior to the date of the sale and this was reduced to writing a month later. The 1st Defendant indicated his refusal to stand by the contract some time prior to the issue of his notice dated 2-6-1944.

The suit was filed on 16-8-1947. This shows that the institution of the suit was beyond three years of the refusal of the 1st Defendant. Article 113, Limitation Act, required a suit for specific performance of a contract to be filed within three years from the date fixed for the performance, or, if no such date is fixed, when the Plaintiff has notice that performance is refused. It is the case of the Plaintiff that because the 1st Defendant was not willing to abide by the agreement he had issued the notice. Clearly the suit was not brought within 3 years of the refusal envisaged in Article 113. In these circumstances, the suit is obviously barred.

6. There is Anr. reason why the earlier contract could not furnish any cause of action to the Plaintiff. It is evident from the plaint that the agreement of 1937 was superseded by Ex. A-I. Therefore, the alleged agreement of 1937 can have no independent existence. Any rights which he might have had on the basis of the alleged agreement were merged in Ex. A-I. The lower appellate court was therefore in error in giving a relief to the Plaintiff on the basis of this agreement.

7. This leads me to the question whether a decree could be claimed by the Plaintiff by reason of Ex. A-I. This in its turn depends upon certain recitals in the plaint. Paragraph 9 of the plaint recites:

Thus taking advantage of the situation and putting the Plaintiff under coercion and undue influence the 1st Defendant executed an agreement dated 15-8-1944 in favour of the Plaintiff in renewal of the prior agreement, stipulating therein that he should be entitled to a 1/3rd share in the scheduled mentioned property and the Plaintiff to the remaining 2/3rd share.....

8. Again it is stated in paragraph 10 as follows:

The agreement dated 15-8-1944 obtained by the 1st Defendant is vitiated by coercion and undue influence and is not binding on the Plaintiff. The Plaintiff is therefore entitled to ignore the said agreement and sue for possession of the scheduled mentioned property and other reliefs for himself and for --the benefit of Defendants 6 to 13.

In paragraph 13 of the plaint, the Plaintiff submits that

the agreement dated 15-8-1944 not being enforceable against him for the reasons above stated he is entitled to recover possession of the entirety of the scheduled mentioned property from the 1st Defendant in pursuance of the original title and the provisions of the prior agreement.

9. In view of the above statements, the Subordinate Judge held that the Plaintiff by his conduct put an end to the agreement and thus disabled himself from using Ex. A-I for claiming specific performance. In support of this conclusion he placed reliance on the pronouncement of the Privy Council in *Srish Chandra Roy v. Banomali Roy* ILR 31 Cal 584 (A). There a compromise was entered into between two parties by which the title of one of the parties to the properties in dispute was acknowledged as to the adopted son and the other party was to be granted a lease of the property for a number of years on certain conditions. Shortly thereafter, the latter repudiated the compromise by filing a suit to set aside the adoption and alleging that the agreement was obtained from him by fraud. This attempt proved unsuccessful as the EKRAR in favour of the adopted son and the rights flowing there from were upheld by courts.

Having failed in this attempt the legal representatives of the original parties who were to be given a lease of the properties filed a suit for enforcing the terms of the original EKRAR. This suit was dismissed on the ground that the conduct of his predecessor-in-interest was at variance with and amounted to a subversion of the relation intended to be created by the compromise and that specific performance of the agreement could not be granted to a party who had tried to rescind the agreement or to his heirs as there was failure of consideration.

This was confirmed by the High Court of Calcutta and the Judicial Committee on appeal and further appeal. The High Court sustained the judgment of the trial court on the principle of *Blackest v. Bates* (1865) 1 Ch A 117 (B), stated by Lord

Cnunvorth L. C. in these words:

It is a strange thing to say that after a party has denied the validity of an agreement and taken proceedings to set it aside, he can when the result of those proceedings has proved adverse turn round and insist on specific performance

The learned Judges observed that, though there might be cases in which an attempt to avoid the agreement may not be a ground for refusing specific performance the case before them did not belong to that category, because ever since the date of the compromise the predecessor-in-interest of the Plaintiff therein directed all his efforts to annul its effects. The Privy Council while affirming the judgment of the High Court remarked:

Their Lordships are not prepared to lay down as an abstract proposition that there is any necessary inconsistency in a party, who has unsuccessfully tried to rescind an agreement afterwards claiming performance of it. But in the present case they think that Krishna not only tried to deprive Banwari Lal of the benefit of the agreement, but in a large measure succeeded in doing so.

The security of his title to the zamindari was of immeasurably greater importance to Banwari Lal than the mere question of the PATNI. And their Lordships have already expressed their opinion that the principal consideration to Banwarilal for the agreement was to obtain such security and immunity from future attacks. In short they do not give the EKRAR the restricted effect suggested by the learned Counsel, but they think that its language necessarily imports an agreement by Krishna to be staid from questioning the validity of the adoption for the future.

10. Mr. Krishnarao for the Respondents urges that the lower appellate court misapplied the decision of the Privy Council to the present case. The observations extracted above clearly indicate, argues the learned Counsel, that it is not an absolute proposition that in every case where the party adopts an inconsistent attitude specific performance should be refused. In the case under citation the Plaintiff was non-suited for the reason that his predecessor-in-interest agreed to abstain from questioning the validity of the adoption and having gone back upon it the Plaintiff could not sue on the basis of the agreement.

The situation is different here. The plaint contains a prayer that a decree could be granted on the basis of Ex. A-I if, for any reason the court could come to the conclusion that the Plaintiff was not entitled to the higher relief in accordance with the first agreement. In order to debar a party from claiming specific performance of an agreement repudiation of the contract by him should be absolute in other words the conduct of the party should amount to a renunciation or absolute refusal to perform the contract continues the counsel.

11. To substantiate this proposition, reliance was placed by him on *Mersey Steel and Iron Co. v. Naylor Benzon and Co.* (1884) 9 ACC 434 (C) and *Freeth v. Burr* (1874) 9 CP 208 (D) The proposition as stated by Mr. Krishnarao is unacceptable. In order to shut out a party from asking for specific relief it should be shown that

he has abandoned the contract altogether and the mere fact that he was not willing to abide by one of the terms of the contract at an earlier stage may not be sufficient to non-suit him.

12. But, that does not help the Plaintiff in this case. In a suit for specific performance the Plaintiff should allege that he is ready and willing to perform his part of the contract. It is true that it need not be stated in so many words and the purport of the allegations in the plaint should amount to his readiness and willingness to perform his part the contract.

That is a sufficient compliance with the requirements in that behalf. Now in this case, is it possible to spell out such a thing? Far from stating that he was ready and willing to perform his part of the contract that he has repudiated and renounced the document forming the basis of the suit in no uncertain terms. He had alleged that Ex. A-1 was the result of fraud undue influence and coercion and therefore un forcible against him. How is it open to him to claim specific performance of this document. In my opinion, it does not lie in his mouth Jo, say that a particular document is vitiated by fraud, undue influence and coercion and therefore unenforceable .and at the same time should ask for a decree on the basis of it if on other issues the court should find against him.

The attitude adopted by the Plaintiff seems rather novel. No decree, in the circumstances, could be passed in favour of the Plaintiff on the basis of Ex. A-1. It may be mentioned here that even if Ex. A-1 was enforceable the Plaintiff could get only a decree for 1/3rd share of the 1st Defendant out of the properties acquired in 1937 because admittedly the property was acquired for the benefit of the joint family and Ex. A-1 was not executed by the 1st Defendant as representing) the joint family. Therefore the shares of 2nd and 3rd Defendants are unaffected even assuming a decree could be granted on the basis of this document. This need not however, be pursued in the view I have expressed above.

13. In the circumstances the second appeal is allowed and the suit is dismissed. The parties will bear their own costs throughout.

14. The petition for amendments of the pleadings is dismissed in the view I have taken above.