
(2011) 06 AP CK 0005

In the Andhra Pradesh High Court

Case No : Second Appeal No. 1282 of 2008

Pydi Ramana @ Ramulu

APPELLANT

Vs

Davarasetty Manmadha Rao

RESPONDENT

Date of Decision : 07-06-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Contract Act, 1872 — Section 51, 52, 55
Specific Relief Act, 1963 — Section 10, 16, 20

Citation : (2011) 5 ALD 362 : (2011) 6 ALT 505

Hon'ble Judges : C.V. Nagarjuna Reddy, J

Bench : Single Bench

Advocate : P. Raja Sripathi Rao, for the Appellant; P. Veera Reddy, for the Respondent

Judgement

C.V. Nagarjuna Reddy, J.—The judgment of the learned II Additional District Judge-cum-Fast Track Court, Srikakulam in A.S. No. 39/2004 dated 16-10-2008, reversing the judgment of the learned II Additional Junior Civil Judge, Srikakulam in O.S. No. 226/98 and decreeing the suit for specific performance of agreement of sale in favour of the Respondent/Plaintiff is questioned in this Second Appeal.

2. For convenience, the parties are referred as they are arrayed in the suit and the courts below are referred as "trial court" and "lower appellate court" respectively.

3. The Defendant executed an agreement of sale on 7-6-1993 whereby he has agreed to sell land approximately admeasuring Ac. 1-38 cents (hereinafter referred as "suit schedule property") for a total sale consideration of Rs. 97,290/-. The Plaintiff allegedly paid an amount of Rs. 2005/- as advance sale consideration and the Defendant agreed to register the suit schedule property in favour of the Plaintiff on or before 6-6-1994 after getting the same surveyed with reference to the Field Measurement Book by a qualified Surveyor. It is the

Plaintiff's case that he has paid a further sum of Rs. 17,000/- in addition to the initial payment of Rs. 2005/- on 23-6-1993 and that as the Defendant neither got the land measured as agreed under the agreement of sale nor registered the sale deed, he has got issued a registered legal notice on 30-5-1996. As there was no response from the Defendant, the Plaintiff filed O.S. No. 226/98 for specific performance of the agreement of sale or in the alternative for the relief of refund of part sale consideration of Rs. 19,005/- with interest.

3. The Defendant contested the suit by filing a written statement wherein he has inter alia averred that he has not executed the agreement of sale nor he has received the sale consideration and that he has sold some of his lands to one person by name Addhavarapu Varaha Narasimham who is closely related to the Plaintiff and that in connection with the said transaction, the purchaser has taken the Defendant's signatures on many stamped papers which were misused by the Plaintiff with a view to grab his land, which is situated adjacent to the land sold to Varaha Narasimham.

4. Based on the respective pleadings, the following issues were framed by the trial court:

(i) Whether the sale agreement dated 7-6-1993 is created and not binding on the Defendant?

(ii) Whether the Plaintiff is entitled for specific performance of the agreement as prayed for?

(iii) Whether the Plaintiff is entitled for alternative relief as prayed for?

(iv) To what relief?

5. Both parties adduced oral and documentary evidence. The Plaintiff examined himself as PW-1 and has also examined PW-2 and PW-3 on his behalf. He has marked Exs. A-1 to A-4 on his side. The Defendant examined himself as DW-1 and marked Ex. B-1 on his side. On appreciation of the oral and documentary evidence, the trial court answered Issue No. 1 in favour of the Plaintiff by holding that the agreement of sale marked as Ex. A-1 was proved by the Plaintiff and disbelieving the version of the Defendant that Ex. A-1 was brought into existence by the Plaintiff. Issue No. 2 was however held in favour of the Defendant. It has held that even though the suit was filed within the period of limitation, the Plaintiff failed to prove that he was ready and willing to complete his part of obligation under the agreement of sale and has also failed to explain the reason for his not approaching the Defendant with a demand for execution of a registered sale deed nearly for a period of two years after the expiry of one year period stipulated under the agreement for completion of survey and measurement of the land. On this premise, the trial court declined to grant the decree for specific performance of the agreement of sale. On Issue No. 3, the trial court held that the Plaintiff is entitled to the alternative relief of refund of the advance sale consideration together with interest at 24% per annum.

Accordingly, the trial court partly decreed the suit by ordering refund of the advance sale amount with interest.

6. While the Defendant was satisfied with the judgment and decree of the trial court, the Plaintiff has filed A. S. No. 39/2004 and the lower appellate court by its judgment dated 16-10-2008 reversed the finding on Issue No. 2 and decreed the suit in to. Feeling aggrieved by this judgment and decree, the Defendant filed the present Second Appeal.

7. A perusal of the proceeding sheet shows that this case underwent many adjournments at the admission stage. When the case came up before me, after a few adjournments Sri K. Venkata Rao, learned Counsel for the Appellant/Defendant advanced his submissions on 18-2-2011 and requested for an adjournment by stating that the parties are exploring the possibility of an out-of-court settlement. Accordingly, the case was adjourned. However, on 8-4-2011, Sri Raja Sripathi Rao, learned Counsel represented that he has instructions to appear in place of Sri K. Venkata Rao for the Appellant/Defendant and he has therefore sought for an adjournment and accordingly the case was adjourned to 15-4-2011, on which date the case was heard and judgment reserved.

8. At the hearing, the learned Counsel for the Defendant submitted that the lower appellate court has committed a serious error in reversing the judgment of the trial court on Issue No. 2. The learned Counsel further submitted that as rightly held by the trial court for nearly two years after the expiry of the period stipulated in the agreement of sale for completion of the survey and measurement of the land by the Defendant, the Plaintiff failed to approach the Defendant demanding specific performance of the agreement of sale and that the trial court has taken into consideration this conduct of the Plaintiff in holding that he has failed to prove that he is ready and willing to perform his part of contract.

9. While opposing the above submissions Sri P. Veera Reddy, learned Counsel for the Plaintiff supported the findings of the lower appellate court. He has submitted that there is no stipulation in the agreement that time is essence of the contract and that merely because of lapse of some time before the Plaintiff has set the legal process into motion, it cannot be presumed that he is not ready and willing to perform his part of contract. He has further submitted that the findings rendered by the lower appellate court on Issue No. 2, based on evidence on record and also on the settled legal position, do not give rise to any substantial question of law which requires interference of this Court while exercising its jurisdiction u/s 100 of the Code of Civil Procedure, 1908.

10. In order to claim specific performance of a contract, it is necessary for the Plaintiff to plead and prove that he has always been ready and willing to perform the essential terms of the contract, which are to be performed by him, other than the terms the performance of which has been prevented or waived by the Defendant. This principle is embodied in Section 16(c) of the Specific Relief Act, 1963 (for short, "the 1963 Act"). Explanation to the said provision, however,

relieves the Plaintiff from the task of tendering the payment to the Defendant or deposit of the money in Court except when so directed by the Court, where a contract involves the payment of money. This provision, however, makes it incumbent for the Plaintiff to aver performance of or readiness and willingness to perform the contract according to its true construction.

11. Another legal principle which needs to be kept in mind for considering the claim for specific performance of contract is whether time is essence of the contract. Section 55 of the Indian Contract Act, 1872 (for short, the 1872 Act"), which posits of this principle, fell for interpretation of Courts many a time. While interpreting the terms of the contract relating to sale of immovable properties, the Courts are loath to literally construe the contract even if it contains the specific term of time being essence of the contract and do insist that despite the express stipulation to the time being essence of the contract, the intention of the parties needs to be gathered.

In *Tilley v. Thomas* (1867)3 Ch A61 Lord Cairns observed:

Prima facie, equity treats the importance of such time limits as being subordinate to the main purpose of the parties, and it will enjoin specific performance notwithstanding that from the point of view of a Court of Law the contract has not been literally performed by the Plaintiff as regards the time limit specified.

In *Jamshed Kodaram Irani v. Burjorji Dhunjibhai* ILR 40 Bombay 289 : AIR 1915 PC 83 the Judicial Committee of the privy council, while referring to the law of England, observed:

Under that law equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. Their Lordships are of opinion that this is the doctrine which the section of the Indian Statute adopts and embodies in reference to sales of land.

In *Gomathinayagam Pillai and Others Vs. Pallaniswami Nadar*, while interpreting Section 55 of the 1872 Act, the Supreme Court held:

It is not merely because of specification of time at or before which the thing to be done under the contract is promised to be done and default in compliance therewith, that the other party may avoid the contract. Such an option arises only if it is intended by the parties that time is of the essence of the contract. Intention to make time of the essence, if expressed in writing, must be in language which is unmistakable; it may also be inferred from the nature of the property agreed to be sold, conduct of the parties and the surrounding circumstances at or before the contract. Specific performance of a contract will ordinarily be granted, notwithstanding default in carrying out the contract within

the specified period, if having regard to the express stipulations of the parties, nature of the property and the surrounding circumstances, it is not inequitable to grant the relief. If the contract relates to sale of immovable property, it would normally be presumed that time was not of the essence of the contract. Mere incorporation in the written agreement of a clause imposing penalty in case of default does not by itself evidence an intention to make time of the essence.

(Emphasis added)

12. Before embarking upon the facts of the present case, I find it appropriate to refer to the provisions of the 1872 Act dealing with reciprocal promises, as the contract in the present case contains such promises. Section 51 of the 1872 Act provides that when a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise. u/s 52, where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order and where the order is not expressly fixed by the contract, they shall be performed in that order, which the nature of the transaction requires.

13. Though the parties have not placed the copy of Ex. A1 -agreement before this Court, its terms could be culled out from the discussion undertaken by the Courts below. Under the agreement, the total sale consideration was not fixed evidently for the reason that there, appeared to be uncertainty regarding the total extent of land that was agreed to be sold. The price per cent was fixed at Rs. 705/- and the extent of the land that was agreed to be sold depended upon the ascertainment of the actual extent, which was undertaken to be done by the vendor by measuring the same with the help of the field measurement book within one year from the date of agreement. The agreement further stipulated that in addition to the sum of Rs. 2005/-, which was paid at the time of execution of the agreement towards earnest money, the balance sale consideration shall be paid within one year and the registration to be completed and that if the vendee fails to get the registration done within one year, the agreement shall stand cancelled.

14. The above discussed terms of the agreement would reveal that the parties have made reciprocal promises. The foremost promise to be performed by the Defendant is that he shall get the land physically measured with the help of field measurement book within a period of one year from the date of agreement. The Plaintiff's promise of paying the balance sale consideration and getting the registration of the sale deed completed was thus made completely dependent upon the fulfillment of the Defendant's promise that he should get the land physically measured obviously to enable the Plaintiff to calculate the exact sale consideration with reference to the physical measurements of the land agreed to be sold. Unless the Defendant performed his part of contract, the Plaintiff's obligation to perform his promise did not commence. Section 52 of the 1872 Act is thus squarely attracted to the present case. The Defendant cannot therefore

try to avoid the contract by relying upon the circumstance that with the expiry of one year from the date of the agreement, the agreement stood cancelled. Accepting such a plea would only amount to conferring undue advantage on the Defendant on account of his own default as he has admittedly failed to get the land physically measured as promised by him under the agreement of sale. Therefore, on a true and proper construction of Ex. A1, it cannot be concluded that the parties intended that time is essence of the contract. The trial Court has committed a serious error in placing reliance on the recitals in Ex. A1 - agreement that if the Plaintiff fails to get the sale deed registered within one year, the agreement stands cancelled ignoring the failure of the Defendant to perform his part of contract and declining to grant the decree for specific performance.

15. As regards the requirement of the Plaintiff's readiness and willingness to perform his part of contract, it is not in dispute that both in the plaint and also in Ex. A3 - notice, he has specifically averred that he was ready and willing to perform his part of contract. The Defendant, far from denying this averment, has taken the plea, which was found false by the trial Court and was not challenged by the Defendant before the, appellate Court that Exs. A1 - agreement and A2 - endorsement relating to receipt of part consideration were not executed by him. The requirement of Section 16(c) of the 1963 Act that the Plaintiff should aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him is thus satisfied by the Plaintiff. The trial Court has, however, declined to grant the relief of specific performance mainly on the ground that the Plaintiff kept quiet without calling upon the Defendant to perform his part of contract for nearly two years after the expiry of the one year period stipulated in the agreement. Reference to Section 20 of the 1963 Act is necessary in this context. This provision vests discretion in the Courts in granting decree for specific performance. It envisages that jurisdiction to decree specific performance is discretionary and the Court is not bound to grant such relief merely because it is lawful to do so. It, however, contains a caveat that the discretion of the Court is not arbitrary, but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal. Sub-section (2) of Section 20, which is held to be illustrative, but not exhaustive, contains circumstances under which a Court may decline to decree specific performance. While declining granting of decree, the trial Court has not found that the present case falls in any one of the circumstances falling under this provision.

16. The lower appellate Court has considered the terms of the contract and the conduct of the parties and has concluded that by paying a further sum of Rs. 17,000/- on 23. 06. 1993, by making specific averments in the plaint and also by giving Ex. A4 - notice, albeit after a gap of nearly three years after the agreement, the Plaintiff has proved that he has always been ready and willing to perform his part of contract and decreed the suit for specific performance. In my considered opinion, barring the time gap after payment of the further sale consideration before the Plaintiff has issued the legal notice, there is no

circumstance by which it can be construed that the Plaintiff was not interested in specific performance of contract. From the conduct of parties, it is reasonable to presume that the Plaintiff was only waiting for the Defendant to perform his part of contract, namely; to get the land physically measured in order to ascertain the exact extent of the land to enable him to make the payment of the balance sale consideration. On a careful consideration of the conduct of the parties, especially from the false plea put-forth by the Defendant that he has not executed the agreement and not received the sale consideration, it is evident that the Defendant was trying to avoid the performance of his part of contract. I do not therefore find any reason to interfere with the judgment and decree of the lower appellate Court to the extent of granting specific performance of contract.

17. There is, however, one aspect to be finally considered, namely; whether by allowing the Plaintiff to get the sale deed executed at the price at which the Defendant agreed to sell, the former is not conferred with unfair advantage. It is not in dispute that before the Plaintiff called upon the Defendant to execute the sale deed, two years had expired from the time stipulated for execution of the sale deed. No explanation is forthcoming from the Plaintiff for his silence for nearly two years. While the agreement of sale was of the year 1993, the suit was filed in the year 1998 and more than 12 years had elapsed since then. Under these circumstances, it would be wholly inequitable to allow the Plaintiff to gain unfair advantage of getting the property at the price, which was agreed nearly 20 years back, as escalation of prices of land is a well known phenomenon.

18. In Gobind Ram Vs. Gian Chand, a similar situation arose, wherein the Supreme Court, while taking note of explanation (i) to Section 10 and Section 20 of the 1963 Act, which prescribe that mere inadequacy of consideration per se is no ground to deny the relief of specific performance, however, emphasized that the Court has to consider whether it will be fair, just and equitable to grant a decree therefore and in order to balance equities and ensure justice to both the parties, it has directed deposit of further sum for the benefit of the vendor in addition to the consideration stipulated in the agreement.

19. In Nirmala Anand Vs. Advent Corporation Pvt. Ltd. and Others, while Doraiswamy Raju, J., placing reliance on the said judgment directed the Plaintiff to pay additional consideration, Ashok Bhan, J., however, dissented from the said view and held that the Plaintiff therein was entitled to the specific relief performance of the agreement without payment of additional sale consideration.

20. The suit schedule land is located near Srikakulam town, which is the district head quarter. Intense urbanization during the past two decades is a well known fact which deserves to be taken judicial notice. The price of the land would have gone up multifold since the date of the agreement even if the escalation in price is estimated at 25% per year. At the same time, it needs to be noted that the Defendant had the advantage of holding substantial amount paid by the Plaintiff towards part consideration.

21. Taking into consideration the above facts and circumstances of the case, I am of the opinion that it would be just and equitable that the Plaintiff pays additional sale consideration in order to at least partly offset the price escalation that could have inevitably taken place from the year 1993. Accordingly, the judgment and decree of the lower appellate Court is confirmed with the modification that the Plaintiff shall pay twice the sale consideration as stipulated in Ex. A1 to the Defendant. He shall deposit the same in the trial Court within three months from today. While calculating the amount, the sum of Rs. 19,005/- already paid by the Plaintiff shall be given credit to.

The Second Appeal is partly allowed and the judgment and decree of the lower appellate Court is modified to the extent indicated above.