
(1996) 04 AP CK 0076

In the Andhra Pradesh High Court

Case No : Letters Patent Appeal No. 219 of 1993

S. Indira and Another

APPELLANT

Vs

Netyam Venkataramana and Others

RESPONDENT

Date of Decision : 25-04-1996

Acts Referred:

Specific Relief Act, 1963 — Section 16

Citation : (1996) 3 ALT 1080 : (1996) 2 CivCC 584

Hon'ble Judges : S. Dasaradha Rama Reddy, J;Lingaraja Rath, J

Bench : Division Bench

Advocate : N. Subba Reddy, for the Appellant; D. Vijay Kumar, for the Respondent

Final Decision : Dismissed

Judgement

S. Dasaradha Rama Reddy, J.—One Thippanna filed suit O.S.No. 43 of 1968 on the file of the Additional Subordinate Judge, Ananthapur, against the appellant, for specific performance of the agreement dated 8-4-1965 (Ex. A-4) for sale of agricultural lands measuring Ac. 20-60 cents for Rs. 20,500/-. He paid Rs. 1,000/- towards advance. The suit was filed on 8-4-1968 with a Court Fee of Rs. 24/- and the deficit Court Fee of Rs 1,402/- was paid on 11-4-1968. Pending suit, the plaintiff died and the respondents herein were brought on record as his legal representatives. As per the terms of the agreement, after the balance of the consideration is paid, the defendant has to execute the registered sale deed. As the defendant was postponing the registration of the sale deed, the plaintiff issued legal notice on 24-8-1965 (Ex. A-1) informing that he was ready and willing to perform his part of the contract and was ready to take the sale deed paying the balance consideration. The defendant replied on 5-9-1965 (Ex. A-2) stating that his father during his life time sold away the property to the family of Kondappa, Obanna and Pullappa and that in any event he is not sole owner and that his two brothers have shares. Along with the reply the defendant returned the amount of Rs. 1,000/- by crossed demand draft. The plaintiff returned the

draft to the defendant saying that he would be enforcing his right in Court of law. As the defendant failed to perform his part of the contract, the plaintiff filed the suit stating that he is ready and willing to perform his part of the contract. The defendant filed written statement stating, inter-alia, that he is neither owner nor is he in possession of the suit land which was inam land originally, that he never applied for the grant of ryotwari patta after inams were abolished, that the land belonged to the joint family consisting of his late father, himself and his two brothers, viz., Dr. M. Krishna Murthy and Dr. M.S. Rao, that it was sold to the family of Kondappa, Obanna and Pullappa and that even assuming that patta was still in his name, his brothers also have shares in the property. It was also contended that the silence of the plaintiff from 5-9-1965 to 8-4-1968 goes to show that plaintiff's case is not true.

2. The trial Court held that the suit agreement is vitiated by fraud and misrepresentation, that there is no evidence to show that the first plaintiff and after his death, plaintiffs 2 to 4 have been ready and (sic) to perform their part of the contract and hence are not entitled to the specific performance. The trial Court also found that the suit is not barred by limitation. It gave its findings on other issues which are not relevant for disposal of this appeal. Accordingly, the trial Court dismissed the suit, but granted a decree for refund of Rs. 1,000/- with interest at 6% per annum from the date of suit. The plaintiffs filed appeal against this judgment and pending appeal, the defendant died and the appellants herein were brought on record as his legal representatives. The learned Single Judge held that the suit is within time, having been filed on the last date of limitation and that the plaintiff has not abandoned his rights for specific performance. Regarding readiness and willingness of the plaintiff to perform his part of the agreement the learned Judge held that the fact that the first notice Ex. A-1 was issued within 4 1/2 months of the execution of the agreement, clearly shows that in spite of the oral demands made several times, the defendant refused to receive the balance amount, that in the reply Ex. A-2, there is no specific plea that the plaintiff was not ready and willing to perform his part of the contract, that in his evidence also D.W-1 never stated that the plaintiff was not ready to perform his part of the contract, that merely because the suit was filed with deficit Court Fee, it cannot be said that the plaintiff came to the Court with unclean hands or that it is an indication of his unreadiness to pay the Court Fee and that payment of entire deficit Court Fee within one day after return of the plaint is proof of his readiness. The other points which were dealt with by the learned Judge are not relevant for the purpose of this Letters Patent Appeal. Accordingly, the learned Single Judge reversed the judgment of the trial Court and decreed the suit. Against this the defendants have preferred this Letters Patent Appeal.

3. Mr. N. Subba Reddy, learned Senior Counsel for the appellants has contended that (1) the plaintiff was never ready and willing to perform his part of the contract inasmuch as (a) he was not having even Rs. 1,402/- to pay the Court Fee on the plaint, (b) he did not have Rs. 19,500/- readily with him right from

the date of agreement till the date of the hearing of the suit, and (c) the fact that he kept quiet for nearly 21/2 years after receipt of the reply to the legal notice before filing the suit, shows that he has abandoned his right and (2) in any event due to extraordinary delay of 21/2 years, the plaintiff is not entitled to the discretionary relief of specific performance.

4. Regarding the first contention about deposit of Court Fee, Mr. D. Vijay Kumar, learned counsel for the respondents, has relied on the decision of the Supreme Court in *Surya Narain Upadhyaya Vs. Ram Roop Pandey and others*, ; wherein it was held that payment of inadequate Court Fee does not necessarily indicate that the plaintiff was not ready and willing to perform his part of the contract. In view of this decision the first contention of Mr. N. Subba Reddy, has to be rejected and is accordingly rejected.

5. Regarding the second contention, Mr. N. Subba Reddy, relied on the evidence of P.W-1, Karnam of the village, through whom the transaction was entered into. He said in his evidence that the deceased-plaintiff told him that he had no money when he received Ex. A-2 from the deceased-defendant and that only after twenty days he could secure the money. The learned counsel for the appellants relied on *Gomathinayagam Pillai and Others Vs. Pallaniswami Nadar*, . In that case the agreement dated 4-4-1959 was for sale of immovable property for Rs. 15,106/- and though as per the subsequent agreements entered into, sale deed had to be executed before 30-4-1959, the buyer paid Rs. 3,006/- by 4th April, 1959 and deposited the balance consideration on 3-8-1959 in the Bank and informed the sellers that the time was not of the essence of the contract and that he was ready and willing to carry out his part of the contract. The trial Court dismissed the suit holding that the buyer was never ready and willing to perform his part of the contract, that he was not ready on 30-4-1959 to purchase the stamp paper or to take sale deed, that he was trying to invent excuses to explain away his own unwillingness to take the sale deed and that he was undecided as to whether he should go through with the contract or not. The High Court was of the view that the time was not the essence of the contract, that the delay between 30-4-1959 and 3-8-1959 cannot be said to be unreasonable and that there was neither abandonment nor waiver of the contract. On appeal, the Supreme Court held that the High Court ought to have considered the correctness of the decision of the trial Court, that the buyer was not ready and willing to perform his part of the contract for the reasons given by it. The Supreme Court observed that it was not inclined to disturb the finding of the trial Court on reappraisal of the evidence under Art 136, though it was open to the High Court to have taken a different view had the question been argued before it. Mr. D. Vijay kumar, learned counsel for the respondents has rightly contended that this decision is distinguishable and in fact supports his case. We agree with Mr. Vijay kumar. P.W-3, the second plaintiff, says in his deposition that his father owned about Ac. 80-00 acres of black cotton and Ac. 100-00 of red soil and that the family has surrendered Ac 40-00 of land under the Land Ceiling Act. This shows that the plaintiffs have enough capacity to raise funds of Rs. 19,500/-. It

is also to be noted that the suit agreement relates to sale of immovable property and in the absence of stipulation to the contrary in the agreement, time is not of the essence of the contract. There was no demand by the defendant on the plaintiff to perform his part of the contract within a particular time in which case it can be said that the plaintiff has failed to perform his part of the contract. Thus merely because he had no money for a brief period of twenty days, it cannot be said that the plaintiff was not ready and willing to perform his part of the contract. In fact Explanation (i) to Section 16(c) of the Specific Relief Act, 1963 says that where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in Court any money except when so directed by the Court. Thus, from the mere fact that the plaintiff had no sufficient funds to pay the sale consideration for twenty days after the reply to the suit notice was received, it does not follow that he was not ready and willing to perform his part of the contract. Accordingly the second contention of Mr. Subba Reddy, is rejected.

6. The next contention of the learned counsel for the appellants is that by long silence of 2 1/2 years after the receipt of reply notice before filing the suit, the plaintiff is deemed to have abandoned and waived his right and consequently was not ready and willing to perform his part of the contract. Mr. Subba Reddy, contends that no explanation is forthcoming in the evidence of the plaintiffs for the silence of 2 1/2 years. Mr. N. Subba Reddy, relied on, *Sriram Cotton Pressing Factory (P) Ltd. Vs. K.E. Narayanaswami Naidu*, . There the plaintiff-buyer entered into an agreement to purchase the land on 26-1-1957. Though two months time was fixed for performance of the contract, time was extended from time to time till 15-7-1958. The buyer kept quiet for a period of 9 months and on 22-4-1959 gave notice to the seller calling upon him to complete the sale transaction. On those facts, the Division Bench of the Madras High Court held as follows: -

"Similarly a Bench of this Court consisting of Rajamannar, C.J., and Venkatarama Aiyar, J. held in *Sankaralinga v. Ratnaswami* AIR 1952 Mad 359:-

"Mere delay does not by itself preclude the plaintiff from obtaining specific performance if his suit is otherwise in time. The delay must be such that it may be properly inferred that the plaintiff has abandoned his right or on account of delay there must have been such a change of circumstances that the grant of specific performance would prejudice the defendant. It is also well settled that waiver is not to be inferred merely from delay in the institution of the suit."

In the instant case, there was a delay of about nine months between the last extended time and the notice given by the plaintiff to the defendant calling upon the latter to execute a sale deed. There was no correspondence during this period between the plaintiff and the defendant with regard to extension of time for completion of the contract and there is nothing to show that anything was done by the plaintiff to keep alive the agreement of sale. In the above circumstances, the principles laid down in the above case and from the

considerable delay and laches on the part of the plaintiff, we can easily infer that there was a waiver or abandonment of the contract.

7. The decision of the Madras High Court refusing to grant specific performance is based on two reasons (i) that the delay is such that it may be properly inferred that the plaintiff has abandoned his right, though waiver is not to be inferred merely from delay in the institution of the suit and (ii) that on Account of delay there must have been such a change of circumstances that the grant of specific performance would prejudice the defendant. While coming to the conclusion that by the unreasonable delay of 9 months waiver or abandonment of the contract can be inferred the Division Bench was influenced by the fact that time is of the essence of the contract. It is obvious that the question of waiver or abandonment is a question of fact which has to be inferred from the circumstances of a particular case. As succinctly laid down by Justice Subba Rao (as he then was), speaking for the Bench in *Madamsetty Satyanarayana Vs. G. Yellogi Rao and Others*, delay is one thing and abandonment and waiver is another; the former is relevant for the purpose of exercising discretion of the Court in granting specific performance while in case of latter if abandonment or waiver is proved, no question of discretion arises and the plaintiff must fail automatically. Applying these principles let us now examine whether there has been abandonment or waiver. There is no stipulation in the agreement of sale for immovable property about the time nor time is made essence of the contract by any subsequent conduct of the parties. There is no evidence on record regarding any positive acts on the part of the plaintiff to show that he has abandoned or waived his right. Thus, it cannot be held that merely because of delay the respondent has abandoned his right.

8. The last contention of Mr. Subba Reddy, is that in any event due to the extraordinary delay of 21/2 years, the respondents are not entitled to discretionary relief of specific performance. He relied on *Sriram Cotton Pressing Factory v. Narayanaswami* (3 supra) and *Samineni Venkateswarlu and another Vs. Nagubandi Venkata Narasiah* (died) and others, . In *Sriram Cotton Pressing Factory v. Narayanaswami* (3 supra), as already seen, time was of the essence of the contract and because of the delay, the Court was not inclined to give relief on the ground that the defendant would be put to inconvenience and hardship due to enormous increase in the value of the property at the time of enforcement of the contract. In *Samineni Venkateswarlu and another Vs. Nagubandi Venkata Narasiah* (died) and others, the plaintiff paid Rs. 40,000/- towards advance pursuant to the agreement of sale dated 11-9-1975 for purchase of Ac. 1-20 guntas of land for Rs. 1,10,000/-. The balance of Rs. 70,000/- was agreed to be paid within three months. There was exchange of notices between the parties and the last one was dated 4-12-1977 issued by the vendor asking the buyer to pay the balance consideration within one week from the date of receipt of notice, failing which the advance paid was threatened to be forfeited. After receipt of the notice the buyer kept quiet till 16-1-1980 when the suit was filed for specific performance. It was held by the Division Bench that time was of the essence of

the contract and as the buyer has not deposited the balance sale consideration within the time specified, he is not entitled to the decree for specific performance, which is discretionary relief, keeping in view the escalation of prices prevailing at the time of enforcement of the agreement. This decision is also distinguishable since in the instant case time is not of the essence of the contract and the vendor has not given any notice asking the buyer to pay the amount within a particular time. Further there is no evidence to show that the vendor has been prejudiced by the delay, by way of escalation of price. In fact his contention is that he is not the owner of the land. Thus, this contention is also rejected.

9. In view of the above, we confirm the order of the learned Single Judge and dismiss the appeal with costs.