
(2008) 09 AP CK 0010

In the Andhra Pradesh High Court

Case No : Appeal Suit No. 3145 of 1990

Smt. Budda Adeyyamma

APPELLANT

Vs

Kandregula Simhachalam and Others

RESPONDENT

Date of Decision : 18-09-2008

Acts Referred:

Contract Act, 1872 — Section 40
Specific Relief Act, 1877 — Section 23
Specific Relief Act, 1963 — Section 15, 16, 20

Citation : (2009) 1 ALD 285 : (2009) 2 ALT 196 : (2009) 2 CivCC 309

Hon'ble Judges : Vilas V. Afzulpurkar, J

Bench : Single Bench

Advocate : P. Sri Raghuram, for the Appellant; M.S.R. Subrahmanyam, to 6 and B. Ram Prasad, for the Respondent

Final Decision : Allowed

Judgement

Vilas V. Afzulpurkar, J.—The sole plaintiff is the appellant. The suit for specific performance of an agreement of sale, dated 06.11.1979 (Ex.A.1), was dismissed by the trial Court and the said decree is under challenge in this appeal.

2. The facts, in brief, are as follows:

The first defendant is the father and defendants 2 to 4 are his undivided sons. Fifth defendant is the son of second defendant and sixth defendant is the son of third defendant. First defendant is the absolute owner of a terraced house (suit schedule property). It is alleged that the suit schedule property is the self-acquired property of the first defendant. It is further alleged that defendants 1 to 3 representing themselves and defendants 4 to 6, who were minors then entered into Ex.A. 1-agreement of sale with seventh defendant for a price of Rs. 40,000/- and have received an advance of Rs. 5,000/- on the date of agreement. As per the terms of the agreement it is alleged that the seventh defendant agreed to pay the balance consideration and obtain registration in her favour or her nominee or transferee, within three months from the date of agreement of sale.

It was also agreed that expenses of registration and stamp will be borne by the seventh defendant/purchaser and defendants 1 to 6/sellers in equal shares. The plaintiff further alleges that she sent a notice on 03.02.1980 (Ex.A.2) to defendants 1 to 6 calling upon them to execute the sale deed, but they failed to give any reply. Thereafter, it appears that the seventh defendant has transferred the entire agreement in favour of the plaintiff by making an endorsement on the suit agreement (endorsement was marked as Ex.A.6, dated 11.08.1982) and the said fact was informed to defendants 1 to 6 by the plaintiff as well as by the seventh defendant under Exs.A.7 and A.8, each dated 12.08.1982. The postal receipts and acknowledgments of each of the addressee were marked as Exs.A.9 to A. 16. Ex.A.7, dated 12.08.1982 is relevant inasmuch as it is a notice issued by the plaintiff calling upon defendants 1 to 6 to specifically perform the contract and confirming that the plaintiff will discharge all the obligations undertaken by the seventh defendant including sharing of the registration and stamp expenses in equal share. The present suit thereafter came to be filed seeking specific performance as there was no reply to the said notice. The seventh defendant was also impleaded as proforma defendant in the suit. Though the plaintiff claimed relief for specific performance primarily against defendants 1 to 6, she had also claimed alternative for the refund of advance and damages in the event of she being found not entitled to specific relief for any reason.

3. All the defendants except the fourth defendant remained ex parte and did not contest the suit. The fourth defendant, who is one of the sons of the first defendant, however, contested the suit by filing a written statement inter alia claiming that the suit schedule house is ancestral and not self acquired property of the first defendant; the said claim was not within the knowledge of the fourth defendant; the fourth defendant was already major on the date of the suit agreement and as such the said agreement is not binding on him; defendants 1 to 3 are addicted to all vices and there is no necessity to sell the suit house also. The fourth defendant had also filed additional written statement disputing the transfer of suit agreement by the seventh defendant on the ground that the said agreement cannot be transferred and that the plaintiff is not entitled to sue and cannot discharge obligations of the seventh defendant.

4. Based on the above pleadings, the trial Court framed the following issues:

1. Whether the suit schedule property is the self acquired property of the 1st defendant?
2. Whether the agreement dt.6.11.79 is true, valid and binding on this defendant?

Additional issues:

3. Whether the transfer of the suit agreement in favour of the plaintiff is not valid?
4. Whether the suit is not maintainable?

5. To what relief?

5. During the course of trial, on behalf of the plaintiff P.Ws.1 to 5 were examined. On behalf of the fourth defendant he himself was examined as D.W.I. The documents filed by the plaintiff, which are briefly referred to above, were marked as "A" series documents and the documents filed by the fourth defendant were marked as "B" series documents.

6. Exs.B.1 and B.2 are registration extracts of sale deeds of different properties executed by the first defendant on 27.09.1971 and 03.05.1967 respectively. These documents were filed for the purpose of showing that the sale proceeds from these properties were utilized by the first defendant for purchasing the land of the suit schedule property and building the house thereof and thereby the fourth defendant claims that the suit schedule property is the ancestral property. Ex.B.3 is the Birth Certificate dated 19.02.1983 issued by the Registrar of Birth and death said to be relating to the correct date of birth of the fourth defendant. This document was relied upon by the fourth defendant to prove that he was major on the date of Ex.A.1.

7. On elaborate consideration of the material on record, the trial Court held that (1) the suit schedule property is the self acquired property of the first defendant and it is immaterial as to whether the fourth defendant was a major or a minor on the date of Ex.A.1 agreement; and that (2) Ex.A.1, agreement of sale, dated 06.11.1979 is true, valid and binding.

8. On additional issue No. 1, which was framed as issue No. 3, the trial Court held that transfer of the suit agreement by the seventh defendant in favour of the plaintiff is not valid and consequently on issue No. 4 held that the plaintiff cannot maintain the suit as transferee of the seventh defendant. Though there was no specific issue framed, the trial Court also considered the aspect of readiness and willingness u/s 16(c) of the Specific Relief Act, 1963 (for short "the Act") and held that the seventh defendant had failed to prove that he was ready and willing at all times and to perform his contract and consequently dismissed the suit.

9. In appeal, the learned Counsel for the appellant contends against the findings that dismissal of the suit by the trial Court primarily on the ground that transfer of the suit agreement in favour of the plaintiff is not valid and secondly the seventh defendant has failed to prove his readiness and willingness to perform the contract, is erroneous.

10. The learned Counsel for the respondents has supported the impugned judgment mainly by contending that the seventh defendant was not examined and in any case there was no evidence of compliance with Section 16(c) of the Act either by the seventh defendant or by the plaintiff. It is also contended that the assignment of the agreement in favour of the plaintiff is impermissible, under law as it is only an executory contract and in support of his contention he relied upon a decision of the Supreme Court in Indu Kakkar v. Haryana State Industrial

Development Corporation Ltd. and Anr. AIR 1999 SC SC 296 particularly paragraph 19 thereof.

11. The points for consideration in this appeal are:

(1) Whether the finding of the trial Court on Ex.A.6 (endorsement on sale agreement - Ex.A.1) is true, valid and legally enforceable?

(2) Whether the finding of the trial Court in coming on the aspect of readiness and willingness of the seventh defendant is justified and if so, whether the plaintiffs suit is liable to be dismissed?

12. I have heard the learned Counsel for both the parties as briefly indicated above and have examined the evidence on record.

13. So far as the first aspect is concerned, Section 15 of the Act clearly governs the issue. Section 15 of the Act reads as under:

15. Who may obtain specific performance

Except as otherwise provided by this Chapter, the specific performance of a contract may be obtained by-

(a) any party thereto;

(b) the representative in interest or the principal, of any party thereto:

Provided that where the learning, skill, solvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative in interest or his principal shall not be entitled to specific performance of the contract, unless such party has already performed his part of the contract, or the performance thereof by his representative in interest, or his principal, has been accepted by the other party;

(c)....

(d)....

(e)....

(f)....

(g)....

(h)....

14. This legal position is also examined by the Supreme Court in *Habiba Khatoon Vs. Ubaidul Huq and Others*, holding that normally any interest in a contract could be assigned to any representative-in-interest who also can enforce the specific performance of the contract against the contracting party. However, if the terms of the contract, expressly or by necessary implication, prohibited the beneficiary from transferring his contractual interest to third parties, then only such an assignee cannot sue for specific performance.

15. In the present case, terms of Ex.A.1 indisputably recognize that the seventh defendant is entitled to obtain the benefit of the said agreement namely the sale deed, in her name or in the name of her nominee/nominees/transferees whatsoever. Clause 2 of Ex.A.1 specifically permits and recognizes that the beneficiary i.e., the seventh defendant may obtain the sale deed in her name or in the name of her transferee or nominee. Section 15 of the Act also permits such transfer unless the nature of the contract as such falls within the proviso to Clause (b). In the present case, it cannot be said that Ex.A.1 agreement either prohibits the transfer by the beneficiary i.e., seventh defendant nor the said agreement can be said to fall within any of the categories mentioned under the proviso to Clause (b) of Section 15 of the Act.

16. The finding of the trial Court on the said issue No. 3 is therefore, clearly opposed to the legal position as mentioned above. Further, even the decision relied upon by the learned Counsel for the respondents in Indu Kakkar's case (paragraph 19) also supports the above conclusion. For the sake of convenience paragraph 19 of the said judgment is extracted hereunder:

In fact, the question is not whether there is any legal bar for the allottee to make assignment of the plot. The real question is whether the assignee has a legal right to claim performance of any part from the allottor. Answer of the said question depends upon the terms of allotment. Assignment by Act of parties may cause assignment of rights or of liabilities under a contract. As a rule a party to a contract cannot transfer his liabilities under the contract without consent of the other party. This rule applies both at the Common Law and in Equity (vide para 337 of Halsburys Laws of England, Fourth Edition; Part 9). Where a contract involves mutual rights and obligations as assignee of a right cannot enforce that right without fulfilling the co-relative obligations. The aforesaid principle has been recognized by a Constitution Bench of this Court in Kihardah Co. Ltd. v. Raymon and Co. India Venkataramaiah J. who spoke for the Bench has observed thus (at p. 1817 of AIR):

The law on the subject is well settled and might be stated in simple terms. An assignment of a contract might result by transfer either of the rights or of the obligations thereunder. But there is a well-recognized distinction between these two classes of assignments. As a rule obligations under a contract cannot be assigned except with the consent of the promisee, and when such consent is given, it is really a novation resulting in substitution of liabilities. On the other hand rights under a contract are assignable unless the contract is personal in its nature or the rights are incapable of assignment either under the law or under an agreement between the parties.

17. A look at the above exposition of law clearly envisages that the rights under a contract are assignable unless the contract is personal in its nature or rights are incapable of assignment either under the law or under an agreement between the parties. In the present case, Clause 2 of Ex.A.1 itself shows that the agreement is assignable and even otherwise Ex.A.1 agreement cannot be said to

be agreement, which is personal in its nature and it cannot be said that there is any prohibition for such transfer.

18. Apart from the two decisions referred to above, the following decisions also throw light on the issue involved.

In T.M. Balakrishna Mudaliar Vs. M. Satyanarayana Rao and others, a , the Supreme Court was called upon to consider the rights of assignee to a re-conveyance agreement in seeking specific performance. The Supreme Court relied upon the decision of Privy Council in Sakalaguna v. Munnuswami AIR 1928 PC 174, wherein it was held that the benefit of a contract of repurchase, which did not show that it was intended only for the benefit of parties contracting was assignable and such contract is an enforceable. The Supreme Court also referred to the decision in Visweswar v. Durgappa AIR 1940 Bombay 339, wherein it was held that both under the common law as well as u/s 23(b) of the Specific Relief Act, 1877, an option given to repurchase the property sold would prima facie be assignable, though it might also be so worded as to show that it was to be personal to the grantee and not assignable. On the particular facts of that case, it was held that the contract was assignable. The Supreme Court also approved the following passage from the decision of the Madras High Court in Sinnakaruppa Gounder Vs. M. Karuppuswami Gounder and Another, , which reads thus:

In our view, generally speaking, the benefits of a contract of repurchase must be assignable, unless the terms of the contract are such as to show that the right of repurchase is personal to the vendor. In the latter case, it will be for the person who pleads that the contract is not enforceable, to show that the intention of the parties thereto was that it was to be enforced only by the persons named therein and not by the assignee.

Thus from the above, it is clear that the issue involved in the present case is squarely covered by the decisions referred to above and is in accordance with the principle .and the policy u/s 15(b) of the Specific Relief Act read with Section 40 of the Indian Contracts Act and as such deserve to be answered in favour of the appellant.

19. So far as the second question is concerned, readiness and willingness of the plaintiff has not been gone into and not been considered by the trial Court. In fact the trial Court proceeded on the footing that as the seventh defendant's readiness and willingness has not been proved, the necessity of the plaintiffs readiness and willingness did not arise. In view of the finding reached by this Court on the first point referred to above, readiness and willingness of the plaintiff for the purpose of satisfaction of Section 16(c) of the Act therefore necessarily to be considered by the trial Court. The effect of legal notice issued by the seventh defendant as well as the other evidence on the part relating to readiness and willingness of the plaintiff will have to be considered by the trial Court afresh as the said exercise has not been done under the impugned

judgment. The discretion u/s 20 of the Act would be exercisable by the trial Court only after reaching its conclusion on the said question of readiness and willingness so far as the plaintiff is concerned.

Therefore, the appeal is allowed by setting aside the impugned judgment on the aspects as mentioned above and the suit is remitted to the trial Court to decide the same afresh in accordance with law. It is needless to point out that both the parties shall have liberty to lead such further evidence, as they deem fit and proper. In the light of the findings and observations made herein and keeping in view the fact that originally suit was instituted in 1982, all such exercise including the very consideration in the suit shall be completed before the end of December, 2008. The costs of this appeal shall abide the result of the suit.