

Vishnu Vs. Abdulgani

Vishnu Vs. Abdulgani

SooperKanoon Citation : sooperkanoon.com/1106652

Court : Karnataka Dharwad

Decided On : Aug-03-2012

Judge : N. Kumar

Appeal No. : R.S.A CR.OB No. 53 of 2009 Connected with R.S.A No. 3198 of 2006

Appellant : Vishnu

Respondent : Abdulgani

Judgement :

(Prayer: This appeal is filed under Section 100 of CPC against the judgment and decree dated 31.08.2006 passed in R.A No.134/2000 on the file of the I Addl. Civil Judge, (Sr.Dn.), Hubli, partly allowing the appeal and modifying the judgment and decree dated 28.08.2000 passed in O.S No.194/1989 on the file of the III Addl. Civil Judge (Jr.Dn.), Hubli.)

This is a plaintiff's second appeal against the concurrent findings recorded by the Courts below that the plaintiff is not entitled to decree of specific performance and is only entitled to decree of recovery of money paid under the agreement of sale. In fact, the defendant has also filed cross-objections challenging the findings of the Courts below regarding the proof of execution of the agreement of sale and payment of consideration under the agreement of sale.

2. For the purpose of convenience, the parties are referred to as they are referred to in the original suit.

3. The subject matter of the suit is the non- agricultural land comprised in CTS No.2093/B measuring 2889.10 sq. mtrs. situated in Ayodhya Nagar within the limits of Hubli-Dharwad Municipal Corporation in CTS Ward No.5. Prior to its conversion, the schedule property was a part of the southern portion of R.S.No.16 measuring 29 guntas. For short, the said property is referred to as 'the schedule property'.

4. Defendant is the owner of agricultural land bearing schedule property. He was interested to sell the schedule property and the plaintiff was willing to purchase the same. The terms of sale and purchase of the schedule land was settled between the parties, the price was fixed at Rs.8,000/-. On 07.02.1974. The defendant executed the agreement of sale in favour of the plaintiff. Under the agreement of sale, a sum of Rs.4,000/- was paid as earnest money in cash. On the date of execution of the agreement of sale, on receipt of Rs.4,000/-, defendant was to hand-over the physical possession of the schedule property to the plaintiff. The defendant agreed to accept the balance consideration of Rs.4,000/- from the plaintiff at the time of executing the registered sale deed in favour of the plaintiff before the Sub-Registrar, Hubli. On 10.06.1974, the defendant received a sum of Rs.2,000/- in cash from the plaintiff in terms of the agreement of sale. The said receipt of Rs.2,000/- was duly acknowledged in the very agreement itself. The remaining balance of Rs.2,000/- was received by the defendant on 08.12.1974 which is also duly acknowledgement by the defendant in the agreement of sale itself.

5. It is the case of the plaintiff that he spent huge amount for exempting the said land under the Urban Land (Ceiling and Regulation) Act. He also got the land converted from agricultural land into non-agricultural use. The plaintiff has made two plots in the suit property after complying with the legal formalities. Defendant has given his consent for getting the land converted and making plots. The plaintiff is in actual possession and enjoyment of the schedule property. Defendant filed a voluntary statement before the CTS Authorities on 21.12.1974. Both the plaintiff

and defendants have filed statement before the CTS Authorities on 03.03.1975. Accordingly, the name of the plaintiff was entered in the CTS records as 'E'. The defendant has agreed to execute the sale deed in favour of the plaintiff in respect of the schedule property as and when the plaintiff calls upon him to do so. The defendant has nothing to receive from the plaintiff towards sale consideration. The only part that remains to be performed by the defendant is to execute the registered sale deed in favour of the plaintiff before the Sub-Registrar, Hubli and convey absolute sale deed to him. The plaintiff was ready to pay stamp duty and registration charges relating to completion and registration of the sale deed. The plaintiff has been ever- ready and willing and even now ready and willing to perform his part of the contract. He is ready to get the sale deed executed from the defendant in respect of the schedule property. The plaintiff has performed his part of the contract. The plaintiff repeatedly requested the defendant to execute the registered sale deed in pursuance of the agreement of sale and complete the sale transaction. Defendant went on postponing performing his part of contract. The Defendant is ill- motivated to transfer or alienate the schedule property to some third party with a view to cause loss, injustice and injury to the plaintiff and to his right of possession of the schedule property. On coming to know of the ill motive of the defendant, the plaintiff got a legal notice issued to the defendant on 06.02.1989. The said notice was sent to the defendant both to the Hubli address and Belavanaki village of Ron taluk calling upon the defendant to perform his part of the contract and to execute the registered sale deed within 10 days of the said notice. Defendant deliberately did not claim the said notice. Therefore, it was returned with a shara 'left, non known'. Thus, the defendant refused to perform his part of the contract. Therefore, the plaintiff was constrained to file the suit for specific performance of the agreement of sale and for other consequential reliefs.

6. After service of summons, defendant entered appearance. He filed a detailed written statement contesting the claim of the plaintiff. He denied the execution of the agreement of sale. He contended that the said agreement is fabricated document. The suit schedule property did not exclusively belong to the defendant. His brothers Datta and Venkatesh also have a right in the schedule property. The schedule property is joint family property. The said property was purchased when they were all living together with their father. Therefore, the defendant and his two

brothers have 1/3rd undivided share in the suit schedule property. The property does not fall within the purview of Urban Land (Ceiling and Regulation) Act. Neither the defendant nor his brothers have any intent of selling the schedule property. The schedule property was never offered for sale. The defendant did not agree to sell the property to the plaintiff. The allegation that defendant executed an agreement of sale in favour of the plaintiff is imaginary and false. The allegation that property was agreed to be sold for Rs.8,000/- and a sum of Rs.4,000/- was paid under the agreement of sale is false. The signature on the agreement of sale is not that of the defendant. The documents on which the plaintiff is relying on are all false and fabricated documents. The defendant has not put the plaintiff in possession of the property. There was no reason for him to put the plaintiff in possession of the schedule property. The allegation that defendant received a sum of Rs.2,000/- on 10.06.1974 and Rs.2,000/- again on 08.12.1974 is false. The defendant and his brothers are represented by their maternal uncle Narayan Somayya Kurdekar. The plaintiff by creating fabricated documents got his name entered in the city survey records by giving false information and fabricated documents. On coming to know of the same, steps were taken to get the same cancelled. The defendant has not signed on any letter or reports or on general stamp paper or on any paper. The entries in the city survey records are all false. The defendant himself applied for conversion of agricultural lands into non-agricultural purpose and he has obtained the requisite permission. It is his specific case that the plaintiff himself was his power of attorney holder and he had trust in him and he paid money to the plaintiff to pay conversion fine and therefore, the challans showing the payment of conversion charges are in possession of the plaintiff. However, the plaintiff has no right. The plaintiff has given an application with an intention of knocking of this property. Defendant has not received Rs.2,000/- from the plaintiff on two occasions. He has not given any receipts to the plaintiff. All the allegations of the plaintiffs are false. The defendant has executed a power of attorney in favour of his sister's husband Narayan Somayya Kurdekar to manage the schedule property. However, the plaintiff claiming to be the power of attorney holder of the defendant gave false report and got his name entered as per ME No.403 and taking undue advantage of the same, he filed an application under Section 20 of the Urban Land Ceiling Act to knock of this property. The defendant

on coming to know of the same has taken steps to get the entries cancelled. The Deputy Commissioner of Dharwad, after enquiry, has held that the defendant has not executed any power of attorney in favour of the plaintiff and that the Village Accountant and the Revenue Inspector in collusion have made false entries and, therefore, he has kept the Village Accountant and the Revenue Inspector under suspension and passed an order withholding increment. This order came to be passed on an enquiry conducted by the Tahsildar. Therefore, the mutation entry No.403 came to be cancelled. The allegation that the plaintiff has spent huge amount for conversion of land use is false. Similarly, the allegation that he has made two plots in the schedule property is also false. The defendant has filed an application for conversion of the land into non-agricultural purpose and the plaintiff is in no way concerned with the said application. The defendant is working with Naryana Somayya Kurdekar as a goldsmith and therefore, he paid the money towards conversion fine. The defendant has not executed the agreement of sale. The said agreement is illegal. The facts stated therein are all false. Only on seeing the said document in the Court, the defendant came to know that his signature has been forged and false allegations are contained in the said agreement. On the date of the agreement of sale, the property was worth Rs.1,00,000/- and it is worth about Rs.4,00,000/- on the date of filing of the suit. The Court has no jurisdiction to entertain the suit. The schedule property belongs to joint family of defendant and his two brothers. Unless they are impleaded as parties, the suit cannot proceed. Thus, the suit is bad for non-joinder of necessary parties. The plaintiff is not an agriculturist and, therefore, the agricultural land cannot be transferred in his favour in law. Without prejudice to the aforesaid contentions, the suit is barred by law of limitation. There is no cause of action in the suit. The plaintiff has not issued any legal notice. The defendant has not refused to receive any notice. The cause of action mentioned in para 16 of the plaint is imaginary one and therefore he prayed for dismissal of the suit.

7. On the aforesaid pleadings, the trial Court framed the following issues:

"1. Whether the Plaintiff proves that the Defendant is the original owner of the agricultural land bearing R.S.No.16/2 of Ayodhya nagar?

2. Whether the Plaintiff proves that the Defendant has executed an Agreement of sale on 07/02/1974 agreeing to sell the Suit Property for the consideration of Rs.8,000/- and he has received Rs.4,000/- on the same day?
3. Whether the Plaintiff proves that the Defendant has handed over the actual possession of the Suit Property on 07/02/1974?
4. Whether the Plaintiff proves that the Defendant has received Rs.2,000-00 on 10/06/1974 and Rs.2,000-00 on 08/12/1974 towards the balance consideration amount and executed receipt for the same in pursuance of the Agreement of sale dated 07/02/1974?
5. Whether the Plaintiff proves that he is ready and willing to perform his part of the contracts prayed for?
6. Whether the Plaintiff alternatively proves that he is entitled for the damages of Rs.8,000/-?
7. Whether the Defendant proves that the Suit Property is the joint family property of the Defendant and his brothers Datta and Venkatesh without making them as necessary parties, the Suit of the Plaintiff is not maintainable?
8. Whether the Defendant proves that the Plaintiff is not an agriculturist therefore, he is not entitled for a decree?
9. Whether the Defendant proves that the suit of the Plaintiff is time barred?
10. What decree and Order?"

The plaintiff, in order to prove his case, examined himself as P.W.1. He examined two witnesses viz., Mehaboobsab and Narayan Venkatesh Anvekar as P.Ws.2 and 3 and produced 45 documents which are marked as Exs.P.1 to P.45. On behalf of the defendant, defendant was examined as D.W.1; his power of attorney viz., Narayanrao Somayya Kurdekar was examined as D.W.2. he also produced 5 documents which are marked as Exs.D.1 to D.5.

8. The trial Court on appreciation of the aforesaid oral and documentary evidence on record held, the plaintiff has proved that defendant is the owner of the suit schedule property, it is not a joint family property, his brothers have no right in the property and therefore defendant being the absolute owner is entitled to execute a Registered Sale Deed. Relying on the evidence of P.W.1 to P.W.3 coupled with the evidence of D.W.1 and D.W.2 it held that the agreement of sale dated 07.02.1974 is duly executed by the defendant, on the date of execution of agreement of sale, the defendant received Rs.4,000/- earnest money, subsequently on 10.06.1974 and on 08.12.1974 he received Rs.2,000/- each. Thus he has received the entire sale consideration of Rs.8,000/- agreed to be paid under the agreement of sale. It held that the signatures found on the agreement of sale and on the endorsements made at the time of paying Rs.2,000/- each, is also that of the plaintiff. However, it held, notwithstanding the recital in the agreement of sale, the possession of the schedule property is not delivered to the plaintiff, because the mutation entry made in the name of the plaintiff came to be deleted, and therefore came to the conclusion that the plaintiff has failed to prove that he is in possession of the suit schedule property. It also recorded a finding that the plaintiff was ready and willing to perform his part of the contract. Further it held, even though the plaintiff is not an agriculturist, there is no bar for him to enter into an agreement of sale and on that ground a decree for specific performance cannot be dismissed. It also held that the suit of the plaintiff is not barred by the Law of Limitation. Having recorded the findings in favour of the plaintiff, it declined to grant a relief of specific performance on the ground, that as the plaintiff has sought for alternative relief of refund of money coupled with the fact that he has failed to prove his possession over the suit schedule property, the plaintiff is not entitled to specific performance but only decree for refund of Rs.8,000/-. Thus, it decreed the suit for refund of the amount. Aggrieved by the said judgment and decree of the trial Court the plaintiff preferred an appeal. 9 months after the period fixed for filing the cross objection, the defendant also preferred cross objection. The lower appellate Court after considering the rival contentions framed the following points for its consideration in the appeal.

1. Whether the plaintiff proves that the defendant is the original owner of the agricultural land bearing R.S. No. 16/2 of Ayodhyanagar?

2. Whether the plaintiff proves that the defendant has executed an agreement of sale on 7.2.1974 agreeing to sell the suit property for the consideration of Rs.8,000/- and he has received Rs.4,000/- on the same day?
3. Whether the plaintiff proves that the defendant has handed over the actual possession of the suit property on 7.2.1974?
4. Whether the plaintiff proves that the defendant has received Rs.2,000/- on 10.6.1974 and Rs.2,000/- on 8.12.1974 towards the balance consideration amount and executed receipt for the same in pursuance of the agreement of sale dated 7.2.1974?
5. Whether the plaintiff proves that he is ready and willing to perform his part of the contract as prayed for?
6. Whether the plaintiff alternatively proves that he is entitled for the damages of Rs.8,000/-?
7. Whether the defendant proves that the suit property is the joint family property of the defendant and his brothers Datta and Venkatesh without making them as necessary parties, the suit of the plaintiff is not maintainable?
8. Whether the defendant proves that the plaintiff is not an agriculturist, therefore he is not entitled for a decree?
9. Whether the defendant proves that the suit of the plaintiff is time barred?
10. What decree and order?

9. It affirmed the finding of the trial Court on all issues in favour of the plaintiff. It dismissed the cross objection on the ground that it is barred by time. In so far as the relief of specific performance is concerned, it was of the view, with the lapse of time the market value of the property has increased considerably. Therefore if a decree for specific performance is granted, it would cause undue hardship and injustice to the defendant. Therefore on that ground it declined to grant the decree for specific performance. Aggrieved by the said judgment and decree of the Courts below, the plaintiff is in second appeal. It is relevant to point out that the defendant

who preferred a cross objection before the first appellate Court also has filed a cross objection. This appeal came to be admitted on 29.11.2007 to consider the following substantial question of law.

"Whether the Courts below were justified in non-suiting the plaintiff when they have recorded a finding that the suit document (agreement) itself has been proved, the plaintiff was ready and willing to perform his part of the Contract and the entire sale consideration has passed?

10. Sri V.P. Kulkarni, the learned counsel appearing for the appellant assailing the impugned judgment and decree of the Courts below contended, when once the suit agreement is proved, passing of the consideration is proved, when the Courts have recorded a finding that plaintiff was ready and willing to perform his part of the contract, when the suit was filed in time, on the ground that an alternative prayer for refund of the amount paid under the agreement of sale is made, the trial Court was not justified in refusing to grant a decree for specific performance. Similarly the lower appellate Court was not justified in refusing to grant specific performance on the ground with lapse of time, the market value of the property has increased and therefore great injustice would be done to the defendant. Though the market value of the property over the years has increased, the plaintiff has paid the agreed consideration within the time stipulated. Therefore the defendant had the benefit of the entire sale consideration and it is he who caused great loss to the plaintiff by not executing the Sale Deed and prolonging the matter. In such circumstances, the question of delay, rise in the market value of the property would not arise, which aspect has been completely missed by the lower appellate Court. Merely because an alternative relief of refund of sale consideration is made, that does not take away the right of the plaintiff to seek a decree for specific performance. This aspect has been ignored by the trial Court. Therefore he submitted a case for granting of decree for specific performance is made out.

11. Per contra, Sri F.V. Patil, the learned counsel appearing for the defendant submitted, the plaintiff has not come to the Court with clean hands, he represented before the revenue authorities that he is the power of attorney holder and got the

mutation changed on the basis of the agreement of sale. The said order was set aside by the Deputy Commissioner holding that he has played fraud and consequently the Village Accountant and the Revenue Inspector were kept under suspension. Secondly he contended, the plaintiff is not an agriculturist, he cannot have a Sale Deed in respect of agricultural land. Under the terms of agreement the Sale Deed is to be executed on payment of Rs.4,000/- and therefore the time for suit of specific performance commences on payment of Rs.4,000/-. If that is taken into consideration, the last payment was made on 8.12.1974 and three years is the time, from which date period is to be calculated. In which event, the suit filed is clearly barred by time. He also contended under the terms of the agreement there is no recital to the effect that the plaintiff has to remove the high tension wire or the agricultural land is to be converted for non agricultural purposes and therefore on that ground the plaintiff could not have postponed the execution of the Sale Deed and admittedly now nearly 38 years have lapsed from the date of the agreement of sale and if a decree for specific performance is to be granted at this stage, it would not be a case of proper exercise of discretion u/S 20 of the Specific Relief Act, 1963 and therefore he submits no case for interference with the decree passed by the Courts below is made out.

12. From the oral and documentary evidence on record, it is clear that the defendant purchased the schedule property on 31.8.1972 measuring in all 2 acres 33 guntas from Sri Krishnoji Desai. The Sale Deed stands in his name. There is no whisper about the name of his father or brothers. Out of 2 acres 33 guntas which he has purchased for a consideration of Rs.9,000/- he sold 2 acres 4 guntas on 31.8.1972 for a sum of Rs.22,000/-. That Sale Deed is executed only by the defendant and his father and his brothers were not executants to the said document. Therefore this undisputed documentary evidence, which came into existence at an undisputed point of time clearly shows that the schedule property exclusively belongs to the defendant and his brothers have no right in the same and it is not a joint family property as falsely contended by him in his written statement.

13. Ex.P.1 is the agreement of sale dated 7.2.1974 executed by the defendant in favour of the plaintiff agreeing to sell 29 guntas in the aforesaid survey number for

a consideration of Rs.8,000/- . Rs.4,000/- was paid under the agreement of sale. The agreement of sale recites that on the very same day possession of the schedule property is delivered to the plaintiff. Further it is recited that the balance sale consideration of Rs.4,000/- is to be paid at the time of registration of the Sale Deed. No time is stipulated for completion of the sale transaction. On 10.06.1974 a sum of Rs.2,000/- is paid by the defendant to the plaintiff which is duly acknowledged by the defendant in the very agreement of sale by making a requisite endorsement. Similarly the balance amount of Rs.2,000/- was paid on 08.12.1974 which is also duly acknowledged by the defendant by making necessary endorsement on the agreement of sale itself. Thus with this payment the entire agreed sale consideration of Rs.8,000/- is paid. The defendant has denied the execution of the agreement as well as denied his signature on this agreement of sale. P.W.1 has examined himself and also the scribe of the document as P.W.2. P.W.3 is the mediator, who brought about the sale transaction. All of them have spoken about the execution of the agreement of sale and signing of the said document by the defendant. The plaintiff got the admitted signature of the defendant along with the signatures found in the agreement referred to a hand writing expert. Hand writing expert has submitted his report which is marked as Ex.P.45. The defendant has not filed any objections to the said report. However, the said report was marked subject to objection. The defendant did not choose to summon the hand writing expert and cross examine him. The expert opinion says the signatures found in Ex.P.1 is the same as that of the person who has signed Ex.P.11-the power of attorney executed by the defendant in favour of DW2 his sister's husband. When once a Commissioner's report is secured by the Court and there is no objection to the said Commissioner's report, the said report of the Commissioner becomes a substantive piece of evidence in the case. Therefore that expert opinion shows that the defendant has executed the agreement of sale. That apart, in the oral evidence the defendant has admitted that the money which is received from the plaintiff, he has paid it to D.W.2 because he owed money to him, thereby he is indirectly admitting the execution of the agreement. However, we have on record Ex.P.11, the power of attorney executed by the defendant in favour of D.W.2 dated 13.08.1975. The recitals in the said document clearly demonstrates that the defendant has executed the

agreement of sale dated 07.02.1974 and he was paid consideration agreed to be paid under the agreement and because on account of business he will be travelling, he has authorized D.W.2 to execute the Sale Deed. Therefore when once Ex.P.11 is admitted, the recitals therein are also proved. The evidence of the hand writing expert, the admission in Ex.P.11 coupled with the evidence of P.W.1 to 3 and the admissions in the oral evidence of defendant nos. 1 and 2 clearly establish the factum of execution of the agreement of sale and that the said document bears the signature of the defendant. In fact, a declaration has been filed before the Urban Land Ceiling Authorities by the defendant. Proceedings were initiated; joint statements were recorded; notices have been sent by the authorities to both the plaintiff and the defendant; plaintiff was served with the notice because the agreement of sale was brought to their notice. This piece of evidence has remained unchallenged. All this clearly go to show that the agreement of sale has come into existence and the defendant has duly executed the said document. Therefore both the Courts on appreciation of these undisputed oral and documentary evidence on record, were justified in holding that the agreement of sale- Ex.P.1 is duly executed and it bears the signature of the defendant. In fact both of them have characterized the defendant as a "liar" and the said finding is based on legal evidence and do not call for any interference.

14. Both the Courts have concurrently held, all that is expected from the plaintiff was to pay Rs.8,000/- and ready with stamp duty and registration charges for obtaining a registered Sale Deed. The evidence on record demonstrates that the plaintiff has paid the entire sale consideration. After paying the sale consideration what came in the way of taking the Sale Deed was, the proceedings initiated by the Urban Land Ceiling Authorities. In fact, the order of the Urban Land Ceiling Authorities discloses that this land was sought to be forfeited on the ground that it is in excess of the ceiling limit. Therefore the Sale Deed was not executed. That apart, the evidence on record also shows, in this 29 guntas of land a high tension electric line passes. Therefore the plaintiff has taken steps to get that electric line removed. The bone of contention between the parties is, the plaintiff did not get the said electric line removed because there was no stipulation in the agreement of sale and therefore the question of his spending huge amount for the said purpose does not arise. But it is the defendant who has got the electric line

removed.

15. The oral evidence on record shows that defendant is innocent about the location of the land, existence of a high tension electric line and its removal because in his evidence he has stated that he has not gone to the place nearly 7 years prior to the date his giving evidence, but the fact remains there was an electric line passing through and on the day the trial commenced that line has been removed. In those circumstances, it is probable that it is the plaintiff who took the trouble of getting the said line shifted from that place because on the day he entered into the agreement he was a Corporator and he has used his influence and also the money to get this line removed from the said land. Secondly their evidence would show that the plaintiff had a power of attorney executed in his favour. On the basis of that power of attorney he has approached the Revenue Authorities for making mutation entries in his name. Based on the agreement of sale mutation entries was made. It appears subsequently the power of attorney was withdrawn, when defendant executed a power of attorney in favour of DW2. Then after the differences arose between the parties he preferred an appeal before the Deputy Commissioner contending that the mutation entry made is illegal. Admittedly the plaintiff could not have got mutation entry in his name on the basis of an agreement of sale, because the agreement of sale does not confer title. Unless a person who seeks mutation entry has interest in the immovable property his name cannot be entered. On that basis the mutation entry effected was cancelled. Stern action is also taken against the Village Accountant and the Revenue Inspector, who were involved in making this mutation entry. That in no way is relevant for the purpose of deciding whether the plaintiff is entitled to specific performance. On the contrary, those proceedings clearly show plaintiff was always ready and willing to perform his part of the contract and that all what was expected to, he has done. In the meanwhile he has also appeared before the Survey Authorities for surveying the land because the major portion of the land in question sold by the first defendant under a Registered Sale Deed. Therefore this portion has to be bifurcated from the portion which is held. Then only it would be appropriate to execute the Sale Deed in favour of the plaintiff. In that regard the plaintiff filed application before the Survey Authorities, gave his statement. In fact his submission recorded by them is a joint statement where the defendant in

unequivocal terms has stated that he has executed an agreement of sale. In fact the requisite fee paid was also in the name of the defendant. The payment is made by the plaintiff. Similarly applications are filed for conversion of the agricultural lands into non agricultural lands. The fee paid was in the name of the defendant but by the plaintiff as is clear from the documents produced in the case. An order of conversion is passed. Then both of them have contested the matter before the Urban Land Ceiling Authorities as otherwise this land was already forfeited to the Government being in excess. Probably with the repeal of Urban Land Ceiling Authorities Act and the possession continued with the parties, land did not vest and the authorities were entitled to the said property. So all this clearly demonstrates the plaintiff was very much active. Not only he paid sale consideration, he was taking all steps which are required to complete the sale transaction. Therefore both the Courts committed no illegality in recording a finding that the plaintiff was and is always ready and willing to perform his part of the contract. As no time was stipulated under the agreement of sale and the entire consideration was paid within 10 months from the date of agreement of sale, the question whether time was the essence of the contract would not arise.

16. In so far as limitation is concerned, as no period is prescribed under the agreement of sale, the first part of Article 54 has no application. Though the learned counsel for the respondent submitted, when there is a recital in the agreement of sale, that the balance sale consideration is to be paid at the time of registration and when the balance sale consideration was paid on 08.12.1974, that would be the starting point of Limitation and the case falls under the first part of Article 54. Article 54 is very very specific. First part will apply only if specifically the period is prescribed under the Agreement of Sale. If the period is not prescribed then first part of Article 54 has no application and the law is well settled, when the time is fixed, it should be done within a reasonable time.

17. The second part of Article 34 stipulates, if no time is fixed, it is from the date of knowledge of the refusal to perform the agreement of sale. In the instant case it is the case of the plaintiff, after making the payment he was requesting the defendant to execute the Sale Deed but he went on postponing, not that he refused. The refusal came only after the land was converted, the proceedings

before the Urban Land Ceiling Authorities concluded, the high tension electrical line shifted, when the plaintiff got a legal notice issued calling upon the defendant to come and execute the Sale Deed, the defendant avoided the receipt of notice. It is that act of avoiding to receive the legal notice, at best, may amount to refusal, i.e., the date of refusal. The date of refusal would be dated 06.02.1989 and plaintiff has filed the suit immediately thereafter, i.e., 16.03.1989. Therefore the suit is well within time. The finding recorded by the Courts below that the suit is well within time, cannot be found fault with.

18. Similarly, the contention the plaintiff being a non- agriculturist, is not entitled to the agricultural land, is without any substance. An agreement of sale entered into by a non agriculturist to purchase an agricultural land is not void and specific performance cannot be refused on that ground. Admittedly the said land is now converted. Therefore that question would not arise. In fact, the plaintiff has produced the record of rights to show that he is an agriculturist.

19. In the light of the aforesaid discussion when the agreement of sale is proved; when the entire sale consideration agreed upon under the agreement of sale is paid; when the plaintiff was held to be ready and willing to perform his part of the contract; when the suit is filed in time; and because of the Urban Land Ceiling Authorities proceedings where an order came to be passed forfeiting this land on the ground that the said land is in excess of the ceiling limit, which order stood vacated with the repeal of the Act, there is considerable delay. Whether on that ground, specific performance could be refused. The trial Court refused the specific performance on the ground the plaintiff has sought an alternative relief. In a suit for specific performance the plaintiff is entitled to seek the relief of specific performance or in the alternative for refund of the amount paid. If the refund of the amount paid is not prayed for, the law enjoins that the Court is precluded from granting that relief even it refuses the specific performance. Therefore by abundant caution, in a suit for specific performance it is customary to seek for specific relief and also in the alternative seek for refund of the amount paid in the agreement. Merely because the plaintiff has made a prayer for refund of the amount paid under the agreement of sale, that would not deprive the plaintiff of the relief of specific performance. This fundamental principle governing the Law of

Specific Performance has not been kept in mind by the trial Court and therefore the decree passed by the trial Court declining to grant the decree for Specific Performance on that ground is unsustainable and is hereby set aside.

20. In so far as the first appellate Court is concerned, it declined to grant the decree on the ground of the rise in the market price of the property. That would be a valid and justifiable ground to refuse to grant a decree of specific performance if the consideration agreed under the agreement of sale is not paid for a considerable time during which time there is a marked increase in the market value. The said principle will not apply to a case where entire consideration is paid within the period agreed upon and thereafter for various reasons the Sale Deed could not be executed. This distinction has not been kept in mind by the lower appellate Court while declining the relief of specific performance. In the instant case, the agreement of sale is dated 07.02.1974. On that day, admittedly Rs.4,000/- was paid out of the total consideration of Rs.8,000/-. The balance sale consideration was payable at the time of registration of the Sale Deed. No time was prescribed. Now the evidence on record shows, a high tension wire was passing on the land in question, that has to be removed before completing the sale transaction. Secondly, the land was an agricultural land, it has to be converted for non agricultural use. Therefore that took some considerable time, more importantly the Urban Land Ceiling Authorities proceedings were initiated and the land was forfeited to the Government on the ground that the said land being in excess of the ceiling limit. Therefore there was a delay in completing the sale transaction, but that did not come in the way of the defendant getting the balance sale consideration. On 10.6.74 Rs.2,000/- was paid to him, on 8.12.74 the balance amount of Rs.2,000/- was paid to him, i.e., within a period of 10 months from the date of the agreement of sale, he paid the entire sale consideration. Therefore if the market price has gone up it has no effect as far as the defendant is concerned, because he got market price as agreed upon within the period stipulated in the agreement of sale. It is the plaintiff who paid the entire amount, then went on removing one hurdle after another hurdle at a considerable cost and expense in the end of the day when all legal impediments were removed and he called upon him to execute a Sale Deed the defendant went to the extent of denying the agreement of sale, denying the receipt of consideration, denying the signature on

the agreement of sale. This conduct of the defendant as rightly described by the Courts below is unjustified, is a liar and his conduct disentitles him from any relief at the hands of this Court. Therefore the lower appellate Court was not justified in declining to grant a decree for specific performance on the ground of rise in the market price of the land.

21. The learned counsel for the respondent invoking Sec. 20 of the Specific Performance Act contended, this is a case when two Courts below have exercised their power to deny specific performance which is based on legal evidence and on good grounds, in second appeal could not interfere with the discretionary order. If both the Courts had declined to grant a decree for specific performance on the ground stipulated in Sec. 20 of the Act, the learned counsel for the respondent was right. The Courts below have not invoked Sec. 20. Sec. 20 is attracted only when the defendant admits the execution of the agreement; admits the receipt of consideration and then pleads his helplessness and explain the circumstances under which the agreement came to be executed and the injury which is caused to him was not thought of at the time of executing the agreement. That defence is not open to a person who denies the agreement, receipt of consideration and goes to the extent of denying even the signatures. When such a stand is taken and once it is proved agreement is executed, consideration paid it bears signature of the defendant, the defendant loses the sympathy of the Court and no Court can invoke Sec. 20 of the Act in aid of granting relief to such a defendant. Therefore Sec. 20 has no application in the facts of this case.

22. When the cross objection filed by the defendant before the lower appellate Court is dismissed he has not chosen to prefer any appeal. However, he has filed a cross appeal before this Court in this appeal urging the very same grounds, which he has urged in the cross appeal before the lower appellate Court. For the reasons set out above, I do not see any merit in any of the grounds urged in support of the said cross objection. In fact the very proceeding is not maintainable. Accordingly the cross objection is also dismissed.

23. In that view of the matter, the judgment and decree passed by the Courts below declining to grant a decree for specific performance is illegal and contrary to

law and is liable to be set aside. Accordingly it is set aside. Hence I pass the following order.

ORDER

- 1) Appeal is allowed;
- 2) The suit for specific performance filed by the plaintiff is decreed.
- 3) The defendant is directed to execute the Sale Deed in favour of the legal representatives of the deceased plaintiff within three months from today.
- 4) On his failure to execute the Sale Deed, the legal representatives of the plaintiff are entitled to get the Sale Deed executed, through Court.
- 5) Parties to bear their own costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com