

Mohammed Ibrahim and anr. Vs. Mohammed Abdul Razzak

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Court : Andhra Pradesh

Decided On : Apr-02-2007

Reported in : AIR2007AP294; 2007(3)ALD617

Judge : D.S.R. Varma and ;D. Appa Rao, JJ.

Acts : [Income Tax Act, 1961](#) - Sections 230A(1); Indian Registration Act, 1908 - Sections 17(1); [Specific Relief Act, 1963](#) - Sections 9, 10, 16 and 20; [Evidence Act, 1872](#) - Sections 114; Specific Performance Act - Sections 16; Code of Civil Procedure (CPC) - Order 3, Rules 1 and 2

Appeal No. : CCCA No. 254 of 2002

Appellant : Mohammed Ibrahim and anr.

Respondent : Mohammed Abdul Razzak

Advocate for Def. : Sharath Kumar, Adv.

Advocate for Pet/Ap. : C. Raghu, Adv.

Disposition : Appeal dismissed

Judgement :

D. Appa Rao, J.

1 This is an appeal preferred by the unsuccessful plaintiff against refusal of relief of specific performance of agreement of sale dated 28-5-1997, in O.S. No. 492 of 1999, on the file of the III Additional Chief Judge, City Civil Courts, Hyderabad, pertaining to the house bearing No. 1-4-732/35, Bakaram, Musheerabad, Hyderabad.

2. The case of the plaintiff, in brief, is that the plaintiff schedule house belongs to the defendant and he has taken it on rent at Rs. 1,500/- per month. Later, he entered into an agreement of sale Ex.B1 dated 28-5-1997 for purchase of the property for Rs. 10,89,000/- and paid an advance of Rs. 2,72,250/-, evidenced under Ex.B2 receipt. He was always ready and willing to perform his part of contract, however the defendant has failed to perform his part of contract by not obtaining the Clearance Certificate from the Income Tax Department and in spite of negotiations held elder Bawar Mian, the defendant did not come and execute registered sale deed by receiving remaining balance sale consideration. When the defendant issued the notice, he gave a suitable reply. Therefore, he prayed for specific performance of the agreement, directing the defendant to execute a registered sale deed after receiving balance of sale consideration.

3. The defendant resisted the suit alleging that the plaintiff was the tenant on a monthly rent of Rs. 1,500/- and that the tenancy was month to month. He entered into an agreement of sale for Rs. 10,89,000/-and received an advance of Rs. 2,72,250/-. The plaintiff did not pay rent or the balance sale consideration. On that he got issued a registered notice under Ex.A2 dated 30-6-1998, directing him to perform his part of contract by extending time from 1-7-1998 to 8-7-1998 and also directed the plaintiff to pay an amount of Rs. 21,000/- being arrears of rent due by 30-6-1998. The plaintiff even refused to receive the notice evidenced under returned cover Ex.A3. He also sent it by certificate of posting under Ex.A4. Therefore, he again issued notice under Ex.A5 dated 16-7-1998 cancelling the agreement and terminating the lease. The plaintiff on receipt of it under Ex.A7 acknowledgment, got issued reply under Ex.A8 dated 22-8-1998, insisting the defendant to obtain Income Tax Clearance Certificate and that he was ready and willing to perform his part of contract. He gave a reply under Ex.A9 dated 28-8-1998 reiterating that the agreement was cancelled. He filed O.S. No. 354 of 2001

for ejectment of the plaintiff from the suit house and for recovery of arrears of rent and damages. As a counterblast, plaintiff in turn filed O.S. No. 492 of 1999 for specific performance of the agreement of sale.

4. Since both the suits were in between the same parties and in regard to the same subject-matter, both are clubbed together and evidence was recorded in O.S. No. 354 of 2001. The defendant in this appeal was described as plaintiff, in view of the fact that he was the plaintiff in O.S. No. 354 of 2001.

5. It may be stated herein that the suit filed by the defendant in O.S. No. 354 of 2001 for eviction of the plaintiff herein was decreed holding that he was in arrears of rent. He obtained possession, pursuant to the Decree. Therefore, we restrict our discussion to the suit O.S. No. 492 of 1999 against which this appeal is preferred.

6. Upon the pleadings, the trial Court framed the following issues:

(1) Whether the plaintiff is entitled for specific performance of agreement of sale as prayed for?

(2) To what relief?

7. The appellant herein has examined himself as DW.1 and two more witnesses as DWs.2 and 3 and filed Exs.B1 the suit agreement dated 25-5-1997 and Exs.B2 to B5 are exchange of notices. Refusing their evidence, the General Power of Attorney holder - son-in-law of respondent herein was examined as PW.1 and filed Exs.A1 to A10 i.e., G.P.A. and notices exchanged between them.

8. The trial Court, in view of the fact that the suit was clubbed with suit filed by the defendant for eviction, opined that the plaintiff committed default in payment of rent to a tune of Rs. 24,000/- from May, 1997 to August, 1998 at Rs. 1,500/- per month. It also held that the plaintiff was never ready and willing to perform his part of contract by tendering balance of sale consideration. There was no stipulation the defendant had to obtain Clearance Certificate from the Income Tax Department. Though time was stipulated as the essence of contract, it was no so. Since the plaintiff was never ready, the question of the defendant obtaining Clearance Certificate from the Income Tax Department did not arise. The conduct

of the plaintiff disentitles him for the specific performance of agreement. Therefore, the suit filed by him was dismissed.

9. Aggrieved by the said decision, the plaintiff preferred this appeal contending that the trial Court did not appreciate the facts or law in correct perspective. The trial Court ought to have seen that unless the defendant obtains Income Tax Clearance Certificate, the sale deed could not be executed. He left for Saudi Arabia. There was no occasion for him to come and execute sale deed. His son has sufficient balance of amount in his bank account to pay balance sale consideration. Therefore, he prayed that the appeal be allowed and consequently decree the suit.

10. The point that arise or consideration is: Whether the plaintiff is entitled to specific performance of agreement dated 25-5-1997?

11. It is an undisputed fact that the defendant is the owner of the suit house wherein the appellant was residing as a tenant in the suit house on monthly rent of Rs. 1,500/- per month. During the tenancy, he entered into an agreement of sale under Ex.B1 dated 25-5-1997. He agreed to purchase the house for consideration of Rs. 10,89,000/- and he paid Rs. 2,72,250/- as advance evidenced under Ex.B2.

12. Obviously, as the plaintiff was tenant, one of the clauses in the agreement was that he had to pay monthly rent of Rs. 1,500/- till the date of execution of the sale deed. The stipulation that the plaintiff/ appellant would pay balance of sale consideration of Rs. 8,16,750/- within a period of six months from the date of agreement and that time was the essence of the contract. The relevant Clauses 1(a) and 1(b) read as follows:

1(a) That if the VENDEE fails to pay the balance sale consideration of Rs. 8,16,750/- to the VENDOR within the stipulated period the earnest money and advance shall be forfeited and the VENDOR will be at liberty to sell the schedule property in favour of the third parties.

1(b) Time is the essence of Agreement.

Nearly one year after the execution of Ex.B1, the defendant in the first instance gave Ex.A2 notice dated 30-6-1998 to the appellant alleging that he neither paid rent nor balance of sale consideration. However he gave the plaintiff a grace period of one week time from 1-7-1998 to 8-7-1998, directing him to pay Rs. 8,16,750/- towards balance sale consideration and Rs. 21,000/-towards arrears of rent up to 30-6-1998.

13. Though DW.1 denied issuing Ex.A2 notice, the returned cover Ex.A3 discloses that he refused to receive it. The postman had made a categorical endorsement that 'the party refused'. DW.1 also sent it under certificate of posting by way of caution evidenced under Ex.A4. Again, the defendant gave a notice on 16-7-1998 under Ex.A5 mentioning that he sent a previous notice and that he terminated the lease and cancelled the agreement. He directed him to vacate the premises and pay the arrears of rent. The appellant herein gave a reply under Ex.A8 asserting that he was ready and willing to perform his part of contract and ready to pay balance of sale consideration. He directed the defendant to obtain Clearance Certificate from the Income Tax Department. The defendant by notice under Ex.A8 dated 22-8-1998 confirmed that the agreement was cancelled. He asserted that as he (DW.1) was not ready, the agreement was lapsed and insisted him to vacate the premises.

14. It is settled law, merely because, there is a mention in the agreement making time as essence of contract, it does not mean that such time is made an essence of contract. The Court has to decide the same while taking into consideration of intention of parties in making such a stipulation, their conduct and surrounding circumstances. Considering the fact that the very defendant had extended the period and neither of the parties issued notice within the time stipulated in Ex.B1 that time was essence. In fact, after expiry of the time the defendant himself had extended time. The trial Court referring the above proceedings, their conduct and surrounding circumstances that though there was a stipulation that the time was the essence of the contract, since the very defendant himself extended time and the parties were not having said intention to feel time is essence of contract, opined that the time was not the essence. Therefore, we are of the opinion that the trial Court was correct in stating the time stipulated was not the essence of the

contract.

15. The plaintiff, the appellant herein, who was the tenant, did not admittedly pay rent, though there was specific stipulation in the agreement that he had to pay rent till the execution of the registered sale deed. He was a tenant for about two decades. The respondent has been working in Saudi Arabia. Later he took his wife, who was earlier General Power of Attorney holder to Saudi. Probably, he intended to sell away his house. Since the appellant was tenant he entered into agreement. Time was also fixed. While the defendant alleges that the plaintiff was never ready and willing to perform his part of contract and that he had no money whatsoever with him, the appellant contends that unless Clearance Certificate from the Income Tax Department was obtained, the question of execution of sale deed would not arise. The appellant is harping on this sole point, justifying his conduct in not paying the balance of sale consideration.

16. Admittedly, there is no stipulation in the agreement for obtaining the Clearance Certificate from the Income Tax Department. The plaintiff did not issue any notice to the defendant that he was ready with the money and that due to non-production of Income Tax Clearance Certificate, he was unable to take sale deed. At the cost of repetition, it may be stated that the plaintiff never demanded the defendant to execute registered sale deed informing he was ready with the amount. During subsistence of the agreement and even thereafter, the plaintiff did not insist the defendant to produce Clearance Certificate from the Income Tax Department by issuing notice. Only by way of reply under Ex.A8, one year three months after execution of Ex.B1, he demanded Income Tax Clearance Certificate.

17. The plaintiff was examined as DW.1 (in view of the clubbing of the suit filed by the tenant) when he was questioned about his readiness with the money and in fact, the rent due by him, gave following explanation:

It is true, I am the tenant of the plaintiff. As nobody came on behalf of the plaintiff for collecting the rents, I did not pay the same.

To wriggle out of the situation he pleaded that he was not aware of the address of the plaintiff. When questioned, he admitted:..It is true, I went to the house of the

plaintiff while at the time of taking the PSP, on rent. So, I know about the location of the house of the plaintiff.

He himself admitted:.I have not paid the rents due from April, 1997....Six months time is stipulated under Ex.B1, to have specific performance. I have not paid the rents nor the balance sale consideration....It is not mentioned in Ex. that income tax permission and Urban LB1 and Ceiling permission are to be obtained for executing and registering the sale deed....I have not deposited the rents into Court so far.

Equally, he has not deposited balance sale consideration, in order to show his bona fides, in the light of his defence. No doubt he needs to deposit in Court provided the Court directs him to do so. In order to prove that he was having money, he examined his son as DW.3. He stated that he was having account in Andhra Bank. He filed Ex.X1 the statement of account for the period from 15-11-2001 to 31-3-2002. This is long subsequent to the filing of the suit. Evidently, the plaintiff could not show that he was having money with him during the agreement period. His non-payment of meager rent would itself shows that he was not having money by then.

18. Apart from it, the conduct of the appellant would show that there were laches on his part and he was never ready to perform his part of contract at any material point of time. When the agreement stipulates that the appellant must express his readiness and willingness to perform his part of contract within six months, he did not issue any notice that he was ready with the money and demanded the vendor to come for registration. On the other hand, the defendant issued notice after notice, asking the appellant to pay the amount even by extending time under Ex.A2. Instead of informing that he was ready with balance of amount, he refused to receive the said notice evidence from Ex.A3 postal cover. The appellant for the first time in Ex.A8 long one year three months after execution of the agreement, for the first time insisted for production of Clearance Certificate from the Income Tax Department.

19. The appellant took the plea that since the vendor was away for Saudi Arabia, after execution of Ex.B1, he could not contact him and therefore he could not pay

the balance sale consideration. However, DW.1 himself deposed:

Plaintiff met me in June, 1998. Then I asked him to execute and register the sale deed after receipt of balance sale consideration. Plaintiff has also agreed to obtain permission from Income Tax and other Departments to sell PSP.

Had it been true the appellant could not have kept quiet. He would have issued a notice mentioning the above said facts. He admitted that even subsequently, the plaintiff was coming to India, he deposed:

Plaintiff used to come every year for 45 days.

No suggestion whatsoever was made that he met him and requested him to obtain Income Tax Clearance Certificate and come for the execution of the sale deed.

20. The important contention that was taken is that the vendor did not obtain Income Tax Clearance Certificate without which no registration could be made, in view of specific bar under Section 230-A(1) of Income Tax Act. On the other hand, the learned Counsel for the vendor contended that there was no stipulation in Ex.B1 that Income Tax Clearance Certificate must be produced even before the vendee informs his willingness and ready with the balance of sale consideration. Had DW.1 was ready with money, he would have obtained such a Clearance Certificate. In fact that question did not arise when DW.1 could not show that he was ready with the amount. No doubt he must produce Clearance Certificate before the Registration Authority as required under Section 230-A(1) of Income Tax Act. Since DW-1 was never ready to perform his part of contract, he was not obliged to obtain all these certificates before hand.

21. Before considering the said question, it may be mentioned herein that though there was no stipulation in Ex.B1 agreement, Section 230-A(1) of Income Tax Act stipulates that Income Tax Clearance Certificate is required to be produced by the time of registration. The said section reads as follows:

Notwithstanding anything contained in any other law for the time being in force, where any document required to be registered under the provisions of Clause (a) to Clause (e) of Sub-section (1) of Section 17 of the Indian Registration Act, 1908

(16 of 1908), purports to transfer, assign, limit, or extinguish the right, title or interest of any person to or in any property (other than agricultural land) valued at more than (five lakh) rupees, no Registering Officer appointed under that Act shall register any such document, unless the (Assessing) Officer certifies that....

22. In Chand Rani v. Kamal Rani : AIR 1993 SC1742 , the Supreme Court while considering a plea as to the requirement of production of Income Tax Clearance Certificate held:

No doubt, there were obligations on the part of the defendant to clearoff the mortgage as well as to obtain the Income Tax Clearance Certificate. Those obligations will arise only after the payment of Rs. 98,000-00. In the absence of such a payment the plaintiff had no right to insist upon these obligations being performed.

23. The learned Counsel for the respondent contended that in order to get over the payment of amount the plaintiff introduced this plea on legal advise. He relied on the passage in the decision Mohd. Abdul Razak v. B. Venkatesh @ Venkataiah : AIR 2006 AP300 , to which one of us is a party. While dealing with a case where each party throwing blame against the other by claiming that the other party was not ready, observed:

As could be seen from the pleadings as well as evidence on both sides, each party is throwing blame against other. Section 9 of the [Specific Relief Act, 1963](#) (for short 'the Act') enables a defendant to raise, in a suit of specific performance, all those defences which he is eligible in a suit on contract. Section 10 enumerates the cases in which specific performance can be granted. Specific performance is a discretionary remedy. Section 16 lays down grounds on which the relief may be refused to the plaintiff on account of his conduct; and Section 20 direct the circumstances in which the discretion may or may not be exercised in granting the relief. It is settled proposition of law that where time is of the essence of the contract, and the plaintiff has failed to perform his part of the contract within the stipulated time, specific performance can be refused. Time, in contracts for sale of immovable property, is not of the essence of the contract, unless the nature of the property and surrounding circumstances make it so. Equity treats limits of time as

supporting to the main purpose of the parties. So long as the plaintiff is willing to make payment on or before the date which was prescribed, or within a reasonable time, the ordinary presumption, that the time is not of essence of the contract of sale of immovable property, would not be displaced. It is said that where the time is not of the essence of the contract for sale of immovable property, some delay in payment of consideration money is no bar to specific performance; provided the delay has caused no prejudice to the defendant or abandonment by the plaintiff or such a change as would make the relief inequitable. If a plaintiff is negligent and dilatory in carrying out his part of the contract for sale of immovable property, the plaintiff cannot get his contract specifically performed.

In identical situation, it was observed:

OBVIOUSLY in order to get over the delay in payment of balance of sale consideration amount, the plaintiff introduced a plea that the defendant agreed to produce the Income Tax Clearance Certificate for execution of the sale deed. The said stipulation was not made a mention either in Ex.A1 or in ExA2.... The defendant pleaded categorically that the plaintiff was not having the remaining balance of sale consideration. It was his case that he cancelled the agreement and forfeited the advance amount. The plaintiff could not prove that he was having requisite amount. He did not file account though he was businessman. He did not file bank account to show that he has capacity to pay the balance amount. Naturally, if the specific performance is ordered, it would cause injustice to the defendant.

The very same logic and reasoning applied in the above case would equally apply to the case on hand. The agreement holder was never ready and willing to complete his part of contract. He has no money even to pay rent. There were laches on his part. It did not come to the stage to furnish Income Tax Clearance Certificate. This plea is pressed in service to get over his only laches.

24. The learned Counsel for the appellant contended that the defendant was not examined himself and on the other hand, his G.P.A. holder his son-in-law was examined as PW.1. PW.1 did not act himself on behalf of the vendor. Except the facts reveal for exchange of notice, he did not depose any other fact. Therefore,

adverse inference has to be drawn from non-examination of party. The Supreme Court in *Janki Vashdeo Bhojwani and Anr. v. Indusind Bank Ltd., and Ors.* : AIR 2005 SC439 , opined:

Order III, Rules 1 and 2, CPC, empowers the holder of power of attorney to 'act' on behalf of the principal. In our view the word 'acts' employed in Order III, Rules 1 and 2, CPC, confines only in respect of 'acts' done by the power of attorney holder in exercise of power granted by the instrument. The term 'acts' would not include deposing in place and instead of the principal. In other words, if the power of attorney holder has rendered some 'acts' in pursuance to power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.

Apart from what has been stated, this Court in the case of *Vidhayadhar v. Manikrao and Anr.* : [1999]1SCR1168 , observed at Page 583 SCC that 'where a party to the suit does not appear in the witness-box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct.

In civil dispute the conduct of the parties is material. The appellants have not approached the Court with clean hands. From the conduct of the parties it is apparent that it was a ploy to salvage the property from sale in the execution of Decree.

In the above case, the Supreme Court was considering the question whether the plaintiffs have failed to discharge their burden that they had contributed for the purchase of the property from their own independent source of income as co-owners by examining themselves as witnesses. In the present case, in view of admission by DW.1 who was plaintiff, there is no need to examine him. The plaintiff has to win or lose on the case set up by him. When initial burden is not discharged, the defendant need not examine himself to rebut the case of plaintiff. He also relied on *Vidhyadhar v. Manikrao and Anr.* (supra), wherein the Supreme

Court observed if the party to the suit did not enter into the witness box, an adverse inference could be drawn against him by invoking Section 114 of Evidence Act.

25. It is settled proposition of law that burden of proof is generally on plaintiff. Decision should rest on rule as to burden of proof under law and also the admitted or proved circumstances of the case. The strict meaning of the word 'onus probandi' is that if no evidence is given by the party on whom the burden is cast the issue must be found against him and only then the other party has the onus of rebuttal. The first principle of the Evidence Act is that a party who is to prove an allegation must do so. The Court cannot imagine evidence in the absence of it. The plaintiff must succeed on the strength of his own case and is not assisted by any weakness, real or apparent in the case of the defendant. The defect in evidence of the party on whom the onus of proof lies cannot be cured by criticism of the evidence of the other party.

26. When the burden is on the agreement holder that he should in the first instance plead and prove that he would perform or has always ready and willing to perform his part of contract, the burden never shifts on the vendor.

27. In *B. Rajamani v. Azhar Sultana* : AIR 2005 AP260 , it was held if the plaintiff did not prove his case throughout, he is not entitled for discretionary relief of specific performance of agreement. Equally, the decision *V. Manohar Reddy v. Alopi Shanker* 2006-LAP-0-367, to which one of us is a party, reiterated the above proposition of law.

28. The basic principle behind Section 16(c) of the Specific Performance Act read with Explanation (ii) is that any person seeking benefit of the specific performance of contract must manifest that his conduct has been blemishless throughout entitling him to the specific relief and the Court is to grant relief on the basis of the conduct of the person seeking relief and that the meaning of such an averment of readiness and willingness must be that the non-completion of the contract was not the fault of the plaintiffs and that they were disposed and able to complete it had it not been renounced by the defendant. We do not intend to repeat the decisions relied for the same proposition of law. Vide *Sugani v. Rameshwar Das and Anr.*

2006 (4) ALD 41 (SC) : 2006 (5) ALT 10 (SC).

29. When the vendee was never ready and willing to perform his part of contract, evident from his own conduct revealed from the registered notices exchanged, we have no hesitation in stating that he was never ready and willing to perform his part of contract and as such he was not entitled to the relief of specific performance.

30. We have perused the entire evidence placed on record. The plaintiff could not prove that he was ready and willing to perform his part of contract although. There were laches on his part in performing his part of contract. Therefore, the defendant cannot be directed to execute a registered sssale deed. The trial Court appreciated the evidence in correct perspective. We do not see any ground whatsoever to interfere with the findings arrived at by the trial Court. There are no merits in the appeal.

31. In the result, the appeal is dismissed. No order as to costs.

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