

**SUPREME COURT OF INDIA**

Nadiminti Suryanarayan Murthy

Vs.

Kothurthi Krishna Bhaskara Rao

C.A.No.5517 of 2007

(R.K.Agrawal and Abhay Manohar Sapre, JJ.,)

09.10.2017

**JUDGMENT**

**Abhay Manohar Sapre, J.,**

1. This appeal is filed by original defendant No.6 against the final judgment and order dated 02. 07.2003 passed by the High Court of Judicature of Andhra Pradesh at Hyderabad in L.P.A. No. 121 of 1998 whereby the High Court set aside the judgment and order dated 02.02.1996 in Appeal No. 2061 of 1989 and upheld the judgment and decree dated 13.09.1989 passed by the subordinate Judge, Amalapuram in O.S. No.50 of 1983 thereby decreeing the plaintiff' s (respondent No.1 herein) suit against defendant No.6 (original appellant herein) for specific performance of agreement in relation to the suit house.

2. In order to appreciate the controversy raised in the appeal, it is necessary to state the relevant facts hereinbelow.

3. Nadiminti Suryanarayan Murthy-the original appellant herein (since dead and represented now by the present appellants as his legal representatives) was defendant No.6 whereas respondent No.1 herein is the plaintiff and original respondent No.2 (defendant No.1), since dead and represented through legal heirs (defendant Nos.2-3) whereas Respondent Nos.3-4 are defendant Nos. 4 and 5 in the suit out of which this appeal arises.

4. One Surya Narayana was the owner of a house situated in village Amalapuram in Andhra Pradesh (described in detail in schedule appended to the plaint - hereinafter referred to as "suit house"). He died in 1980 leaving behind his wife (defendant No.1) and daughters (defendant Nos. 2 and 3) and grand children (defendant Nos. 4 and 5). He left a will in favour of his wife giving her life interest. She, therefore, got the suit house. These defendants claiming to be the co-owners of the suit house then let out the suit house to defendant No. 6 in 1981 on monthly rent of Rs.150/-.

5. On 18.01.1983, defendant Nos. 1 to 5 entered into an agreement with the plaintiff (respondent No.1) for sale of the suit house in favour of the plaintiff for a sum of Rs.46,000/- . The plaintiff accordingly paid Rs.1000/- as advance money to defendant Nos. 1 to 5 and the balance amount was to be paid by the plaintiff to defendant Nos. 1 to 5 at the time of the registration of the sale deed, which was to be executed within six months. The plaintiff (respondent No. 1) accordingly arranged for the balance money. However, defendant Nos. 1 to 5, on the other hand, went on promising the plaintiff to execute the sale deed in his favour as agreed upon between them as per agreement dated 18.01.1983 and on the other hand, defendant Nos. 1 to 5, instead of executing a sale deed in favour of the plaintiff, executed the sale deed on 09.02.1983 in favour of defendant No. 6 for Rs.45000/-.

6. This gave rise to filing of the civil suit by the plaintiff (respondent No. 1) on 14.07.1983 against all the six defendants in the Court of Subordinate Judge, Amalapuram out of which this appeal arises. The suit was for specific performance of agreement dated 18.01.1983 and in alternate for refund of consideration paid by the plaintiff and also for the damages sustained by the plaintiff.

7. The plaintiff inter alia averred that he was and has always been ready and willing to perform his part of the agreement and, in fact, performed his part by paying advance amount of Rs.1000/- in terms of the agreement to defendant Nos. 1 to 5 and was/is always ready and willing to pay the balance consideration at the time of registration of sale deed. It was averred that even before expiry of six months' period, which was to expire in July 1983, defendant Nos. 1 to 5 sold the suit house to defendant No. 6 on 09.02.1983 itself and thus committed breach of agreement dated 18.01.1983 by not performing their part of the agreement by executing the sale deed in plaintiff' s favour and hence the suit to seek specific performance of agreement dated 18.01.1983 for execution of the sale deed in relation to the suit house and, in alternative, for refund of money paid to defendant Nos. 1 to 5 and for damages for the loss suffered.

8. Defendant Nos. 1 to 5 filed their common written statement whereas defendant No. 6 filed his written statement. So far as defendant Nos. 1 to 5 are concerned, they came out with a case that they had first entered into an agreement on 04.01.1983 with defendant No. 6 to sell the suit house for Rs.45,000/-. However, the plaintiff, on coming to know of the transaction, approached defendant Nos. 1 to 5 and requested them to sell the suit house to him and said that he will persuade defendant No. 6 to withdraw from the deal and instead allow him to purchase the suit house. It was averred that the plaintiff further assured to defendant Nos. 1 to 5 that in case, if for any reason, he fails to persuade defendant No. 6 to withdraw from the transaction then he will back out to which defendant Nos. 1 to 5 agreed and accordingly entered into an agreement with the plaintiff on 18.01.1983. Defendants (1 to 5) then averred the background as to why they agreed to sell the suit house to defendant No. 6. According to them, Late Surayanarayna had borrowed some money (Rs.1400/- and Rs.1200/-) during his lifetime from one creditor (Smt. M. Venkatalakshmi) but before he could repay the loan, he died. The creditor, therefore, went on pressing defendant Nos. 1 to 5 for its repayment and it is with this background defendant Nos. 1 to 5 entered into the sale agreement with defendant

No. 6 on 04.01.1983 for sale of suit house to defendant No. 6. The defendants also gave some more details to justify the prior agreement with defendant No. 6.

9. So far as defendant No. 6 is concerned, while denying the plaintiff's claim more or less reiterated the stand taken by defendant Nos. 1 to 5. He defended the sale in his favour being made for valid consideration with bona fide intention. He also alleged that his agreement being prior in point of time to the plaintiff's agreement, the same was legal and valid.

10. Parties adduced evidence. The Trial Court, by judgment dated 13.09.1989, decreed the plaintiff's suit. The Trial Court held that the agreement dated 04.01.1983 with defendant No. 6 for sale of suit house was not genuine and bona fide agreement. It was also held that the sale deed dated 09.02.1983 executed pursuant to such agreement was not a genuine sale deed and no consideration was passed between defendant Nos. 1 to 5 and defendant No. 6 for sale and purchase of the suit house. It was further held that the agreement dated 18.01.1983 between the plaintiff and defendant Nos. 1 to 5 was a genuine agreement which was also acted upon pursuant to which defendant Nos. 1 to 5 had received part payment from the plaintiff. It was then held that the plaintiff was willing to perform his part of the agreement but it were the defendant Nos. 1 to 5, who committed the breach. The Trial Court, with these findings, decreed the suit against the defendants and passed the decree for specific performance in relation to the suit house directing the defendants to execute the sale deed in plaintiff's favour on accepting Rs.45,000/- from the plaintiff.

11. Felt aggrieved, defendant No. 6 filed first appeal before the High Court. The learned Single Judge allowed defendant No. 6's appeal and set aside the judgment/decreed of the Trial Court and, in consequence, dismissed the plaintiff's suit. Felt aggrieved, the plaintiff filed letters patent appeal before the Division Bench of the High Court. By impugned order, the Division Bench allowed the plaintiff's appeal and while setting aside of the judgment of the Single Judge restored that of the Trial Court. As a result, the plaintiff's suit stood decreed against the defendants in relation to the suit house, which directed performance of the agreement dated 18.01.1983 in plaintiff's favour. Felt aggrieved, defendant No. 6 has filed the present appeal by way of special leave before this Court.

12. Heard Ms. Manjeet Kirpal, learned counsel for the appellant and Mr. Sri Harsha Peechara, learned counsel for the respondents.

13. Having heard the learned counsel for the parties and on perusal of the record of the case, we find no merit in the appeal.

14. The main question involved in this case is which agreement is bona fide and genuine - the one dated 04.01.1983 between defendant Nos. 1 to 5 and defendant No. 6 or the other dated 18.01.1983 between defendant Nos. 1 to 5 and the plaintiff? The other question is whether the plaintiff was ready and willing to perform his part of the agreement dated 18.01.1983 and secondly, whether he was able to prove the breach committed by defendant Nos. 1 to 5 in not performing their part of the agreement? This question would arise only if

the agreement dated 18.01.1983 is held bona fide and genuine and the other dated 04.01.1983 is held bogus.

15. In our opinion, the Trial Court and Division Bench were right in holding that the agreement dated 18.01.1983 was a genuine and bona fide agreement with defendant Nos. 1 to 5 whereas the agreement dated 04.01.1983 set up by defendant Nos. 1 to 6 claiming to be prior in point of time as against the plaintiff's agreement a bogus agreement brought into existence only to somehow avoid execution of the agreement dated 18.01.1983 of the plaintiff.

16. In our view, the reasoning and the conclusion arrived at by the Division Bench is proper and reasonable. It is based on proper appreciation of evidence and hence does not call for any interference in our appellate jurisdiction. This we say for the following reasons.

17. On perusal of the pleadings and the evidence, it is also evident to us that defendant Nos. 1 to 5, in clear terms, admitted the execution of the agreement with the plaintiff which they had entered into on 18.01.1983. They further admitted its part performance when they accepted advance money from the plaintiff. In the light of these material facts, if they had already entered into an agreement on 04.01.1983 with defendant No. 6 then where was any occasion for them to have entered into another agreement thereafter much less on 18.01.1983 to sell the same property to the plaintiff. Indeed, in such circumstances, they should have simply expressed their inability to sell the suit house to the plaintiff telling him about their prior agreement with defendant No. 6. In other words, in such situation, they could have simply informed the plaintiff that he was late in approaching them and it is not possible for them to sell the suit house to him. They, however, did not do so.

18. The conduct of defendant Nos. 1 to 5 and 6 was, in our opinion, clear. They somehow wanted to avoid execution of the plaintiff's agreement and wanted to sell the suit house to defendant No.6. This they could achieve only by creating an agreement which was prior to that of the plaintiff's agreement.

19. Both the Courts, on appreciating the evidence, therefore, rightly concluded that the agreement dated 04.01.1983 between defendant Nos. 1 to 5 and defendant No. 6 was a bogus agreement and was created to scuttle the execution of plaintiff's agreement dated 18.01.1983. It was rightly held that they even got the sale deed executed on 09.02.1983 before the expiry of six months' period to avoid performance of plaintiff's agreement dated 18.01.1983.

20. Once we affirm the findings of the Courts below (Trial Court and Division Bench) that the agreement dated 18.01.1983 was a bona fide agreement whereas the agreement dated 04.01.1983 was a bogus agreement, the next question arises for consideration is whether the plaintiff has proved the necessary ingredients of Section 16 (C) of the Specific Reliefs Act so as to enable him to claim specific performance of his agreement. In other words, the next question is whether the plaintiff was able to prove that he was ready and willing to perform

his part of the agreement and that he has always been ready and willing to perform his part of the agreement and has, in fact, performed his part and secondly, whether defendant Nos. 1 to 5 committed the breach in not performing their part and, if so, its effect?

21. On going through the record, we are inclined to concur with the findings of the two courts (Trial Court and Division Bench) on these issues as, in our opinion, both the Courts below were right in recording the findings in plaintiff's favour for the following reasons.

22. It is not in dispute that the plaintiff did perform his part when he paid advance money of Rs.1000/- to defendant Nos. 1 to 5 in terms of the agreement dated 18.01.1983. It is also not in dispute that the sale deed was to be executed within 6 months, i.e., up to July 1983. It is also not in dispute that defendant Nos. 1 to 5 executed the sale deed in favour of defendant No. 6 on 09.02.1983. So the breach on the part of defendant Nos. 1 to 5 was apparent inasmuch as nothing more was required to be proved by the plaintiff once these facts became undisputed. In spite of that, the plaintiff sent a notice (Ex-A-2) calling upon defendant Nos. 1 to 5 to execute the sale deed in his favour but it was not adhered to by the defendants.

23. In our considered opinion, the story set up by both the sets of defendants in their respective written statements, as to in what circumstances, the agreement dated 04.01.1983 came to be executed between defendant Nos. 1 to 5 and defendant No. 6 was wholly unrealistic, irrelevant and cooked up one. The two Courts below (Trial Court and Division Bench), therefore, rightly disbelieved it and we fully concur with their reasoning.

24. Indeed, if the main intention of defendant Nos. 1 to 5 was to sell the suit house and to liquidate the debts of the family and we accept their story to that extent for the sake of argument, yet, in our view, the said purpose could have been achieved by the defendants by sale of suit house to the plaintiff also. The sale consideration agreed with the plaintiff was rather more (Rs.46,000/-) as against defendant No. 6, who purchased it for Rs. 45,000/-. In other words, if the intention of defendant Nos. 1 to 5 was to liquidate the debt by sale of suit house then such purpose could be achieved by selling the suit house to the plaintiff as well and there was no special reason to sell it only to defendant No. 6. It was rather clear that he was keen to purchase the suit house at any cost because being a tenant of the suit house, he was in its occupation.

25. So far as the other story that how and why Late Surya Narayana took loan and from whom he took etc. was of no relevance for deciding the question of specific performance between the parties for the simple reason that it was an internal matter of defendant Nos.1-5, Surya Narayana and his creditor. Both the Courts below (Trial Court and Division Bench), therefore, rightly rejected this part of story pleaded by the defendants as being wholly irrelevant.

26. In the light of foregoing discussion, we are of the considered opinion that both the Courts below were right in decreeing the plaintiff's suit for specific performance of the agreement dated 18.01.1983 against the defendants and we uphold this finding.

27. Now coming to another question though not pressed in service by the parties but, in our view, it does arise in the case as a result of the plaintiff's suit being decreed against the defendants by the Trial Court and affirmed by the Division Bench of the High Court and lastly by this Court.

28. The question arose before this Court in the case of *Durga Prasad & Anr. Vs. Deep Chand & Ors<sup>l</sup>.*, as to what form of decree should be passed in the case of specific performance of contract where the suit property is sold by the defendant, i.e., the owner of the suit property to another person and later he suffers a decree for specific performance of contract directing him to transfer the suit property to the plaintiff in term of contract.

29. The learned Judge-Vivian Bose, J. examined this issue and speaking for the Bench in his inimitable style of writing, held as under:

“Where there is a sale of the same property in favour of a prior and subsequent transferee and the subsequent transferee has, under the conveyance outstanding in his favour, paid the purchase-money to the vendor, then in a suit for specific performance brought by the prior transferee, in case he succeeds, the question arises as to the proper form of decree in such a case. The practice of the Courts in India has not been uniform and three distinct lines of thought emerge. According to one point of view, the proper form of decree is to declare the subsequent purchase void as against the prior transferee and direct conveyance by the vendor alone. A second considers that both vendor and vendee should join, while a third would limit execution of the conveyance to the subsequent purchaser alone. According to the Supreme Court, the proper form of decree is to direct specific performance of the contract between the vendor and the prior transferee and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the prior transferee. He does not join in any special covenants made between the prior transferee and his vendor; all he does is to pass on his title to the prior transferee.”

30. The question, in this case, arises this way. The effect of the decree now is that the plaintiff is required to pay the balance sale consideration to defendant Nos.1 to 5 in terms of agreement dated 18.01.1983 and, in turn, defendant Nos.1 to 5 have to execute the sale deed of the suit house in plaintiff's favour and give possession of the suit house to the plaintiff. Since, in the meantime, defendant Nos.1 to 5 have sold the suit house to defendant No.6, vide sale deed dated 09.02.1983 for Rs.45,000/- such sale would not bind the plaintiff. Indeed the sale deed dated 09.02.1983 now has become bad in law and the transaction of sale between defendant Nos.1 to 5 and defendant No.6 has failed. In such circumstances, the seller, i.e., (defendant Nos.1 to 5) has no right to retain the sale consideration of Rs.45,000/- which they received from defendant No.6 or any part thereof, as the case may be, and has to, therefore, refund the same to the buyer (defendant No.6). In other words, whatever amount which defendant Nos.1-5 received from defendant No.6 (whether Rs.45,000/- or any part thereof), the same has to be refunded by defendant Nos.1-5 to defendant No.6-(see Section

65 of the Contract Act). Nevertheless, defendant No.6 would join in execution of sale deed in plaintiff's favour along with defendant Nos.1-5 as held by this Court in Durga Prasad (supra) for conveying the valid title of the suit house to the plaintiff.

31. We, therefore, consider it just and proper and with a view to end this litigation between the parties which is pending since last more than 3 decades and to balance the equities amongst the parties to the suit/appeal, direct that defendant Nos. 1 to 5 would return to defendant No.6 a sum of Rs.45,000/- or whatever amount which they (defendant Nos.1-5) received as part of sale consideration from defendant No.6. This direction we give to the defendants by taking recourse to our powers under Article 142 of the Constitution of India to do complete justice because we do not want another round of litigation to go on for years in future between the defendants inter se for recovery of this amount.

32. We may here clarify that in case any dispute arises between defendant Nos.1-5 and defendant No.6 in relation to exact amount paid by defendant No.6 to defendant Nos.1-5 by way of sale consideration for execution of sale deed dated 09.02.1983, the executing Court will hold limited enquiry on this question and record its finding after giving an opportunity to the parties to prove this fact and then parties will accordingly pay the decided amount.

33. It was brought to our notice that during the pendency of this litigation, some more transactions took place in relation to suit house. Suffice it to say, such transactions are directly hit by the principle of lis pendence, as contemplated under Section 52 of the T.P. Act and, therefore, it is of no consequence so far as this litigation is concerned. In other words, these transactions are not binding on the parties to the Lis much less on the plaintiff. Such parties would be, therefore, at a liberty to now work out their inter se rights in accordance with law as a fall out of this judgment.

34. In the light of foregoing discussion and subject to modification as directed above, the appeal is accordingly finally disposed of.

35. Let the compliance of this judgment including execution of decree of the Trial Court be made by the parties within three months from the date of receipt of this judgment.

Judgment Referred.

<sup>1</sup>AIR 1954 SC 0075