

ANDHRA PRADESH HIGH COURT

Makineni Nagayya

Vs.

Makineni Bapamma

A.A.A.O. No. 49 of 1954

(K. Subba Rao, C.J. and Ranganadham Chetty, J.)

23.03.1954. 26.11.1957

JUDGMENT

Ranganadham Chetty, J.

1. This Civil Miscellaneous Second appeal arises in Execution Proceedings relating to a decree passed on compromise in O. S. No. 300 of 1939 on the file of the District Munsif's Court at Guntur.

2. We shall refer to the parties by the role which they had in the suit. Defendants are the Appellants.

3. The facts, which have given rise to the present appeal may be briefly stated. The immovable properties, which are the subject-matter of the present appeal, belonged to one Krishnayya. His wife, Bapamma, is the plaintiff. Krishnayya executed a deed of settlement on 12-4-1939 authorizing his wife to take, after his death, in adoption one of the sons of his brother Nagayya (1st defendant) and provided that his properties should be taken in equal shares by the widow and the adopted son, if they could not live together. Krishnayya died. Thereafter, disputes arose between his widow, the plaintiff and Krishnayya's brother, the 1st defendant. The latter alleged that the widow had, in fact, taken in adoption one of his sons Venkateswarlu (2nd defendant) and claimed for the adopted son a half of the properties. The widow Bapamma denied the adoption. A suit became inevitable and the lady filed O. Section 300 of 1939 in the Court of the District Munsif, Guntur, for a permanent injunction restraining the defendants from interfering with her possession and enjoyment of the properties.

Ultimately a compromise was effected on 5-12-1942 at the instance of friends and relations. It is the decree passed on the compromise that has been the subject-matter of much litigation culminating in the present appeal.

4. We are concerned only with two of the provisions of the Compromise Decree :

1. The plaintiff shall enjoy one-half of the property mentioned in the settlement deed (plaint Schedules I and II (b) with absolute rights of sale, gift etc., and the defendants shall not raise any objection at any time in future.
2. The plaintiff shall now take the second defendant as the adopted son of her husband and he shall have a right to and enjoy certain specified properties.

The two provisions were not expressly made interdependent and that circumstance obviously enabled Bapamma to desist from taking the boy in adoption and treat the provision in clause (1) in her favor as absolute and unconditional. She filed an Execution Petition on 19-7-1943 asking for delivery of possession of the properties decreed in her favor reserving the right to seek possession of the remaining properties in future proceedings. The petition was dismissed on the ground that she failed to fulfil the conditions of taking Venkateswarlu (2nd defendant) in adoption. An appeal was preferred by Bapamma. It was also dismissed. She was then advised to file a regular suit O. Section 5 of 1946 in the Court of the Subordinate Judge, Guntur, jointly with her uncle as the second plaintiff as he had taken a conveyance from the lady. The suit was dismissed. An appeal to the High Court also failed on the ground inter alia that the only course open to the plaintiffs was to enforce their rights under the compromise decree in execution proceedings and that no separate suit could lie, Bapamma had, perforce, to reconcile herself to the decision of the High Court, realised the futility of avoiding the adoption and finally made up her mind to take the boy. She made oral requests to the first defendant, the father of the boy and ultimately issued a notice on 15-1-1951 (Ex. A-1) stating unequivocally that she was ready and willing to take the boy in adoption. She even fixed a Muhurtham on 19-2-1951 for the purpose and indicated the place, her own house, in Abbineniguntapalem where the defendants too reside. It was now the turn of the defendants to adopt evasive tactics and the first defendant sent a reply Ex. P-7 on 12-2-1951 expressing inability to give any definite reply as talks of compromise were going on between his lawyer and others. Nevertheless, Bapamma went personally to the first defendant's house on 19-2-1951 along with Tirupathayya (P. W. 2) and made a personal appeal to him to give the boy in adoption. The first defendant refused. Bapamma, soon after, filed E. P. 251 of 1951 referring to the circumstances which transpired and praying that the Court might afford the necessary facilities for her performing the obligation of taking the boy in adoption by appointing a Commissioner, if necessary, and fixing a date for the ceremony. She prayed, in addition, for the delivery of possession of the properties vouchsafed under the compromise decree. This was on 27-2-1951.

5. The defendants contested the petition entering appearance in June 1951. In the meanwhile the 2nd defendant got himself married and thereby rendered himself ineligible for adoption. Whether marriage took place in the usual course or was accelerated in the belief that the provision for adoption is a condition precedent to the enforceability of Bapamma's rights under the compromise and that her claims would be at an end if, by some means, the fulfillment of the

condition does not come about, it is needless to decide.

6. At the enquiry into the Execution Petition, oral evidence was adduced and the learned District Munsif, holding that the plaintiff Bapamma's offer to take the boy in adoption was not *bona fide* or an attempt earnest dismissed the application. The decision, however, was reversed by the learned Subordinate Judge of Guntur, with a clear finding that plaintiff, Bapamma was ready and willing and had, in fact, offered to take the boy in adoption but the first defendant had evaded or refused to give the boy. Hence this second appeal by the defendants.

7. The contention of the learned Advocate for the defendants (appellants) is this. The provision in Clause (1) of the Compromise decree enabling plaintiff Bapamma to hold and enjoy the properties in question comes into operation only on the fulfillment of the condition precedent provided in Clause (2), viz., the taking of the boy in adoption. If the condition fails in fulfillment, whatever the reason might be, the provision in favor of Bapamma correspondingly fails to take effect. The plaintiff has two alternative contentions. One is that the two provisions are independent and Bapamma's rights vouchsafed under Clause (1) can be enforced irrespective of the fulfillment of the second provision. Secondly the compromise decree is capable of the construction that it sets forth two reciprocal promises, (a) Bapamma's promise to take the boy in adoption, and (b) the defendant's promise to leave her in undisturbed possession and enjoyment of certain properties. The performance by Bapamma of the obligation resting on her was definitely prevented by the defendants though the first defendant's evasion or refusal to give the boy and making the boy ineligible for adoption by getting him married and by reason of the said prevention Bapamma should be deemed to have fulfilled her promise for the purpose of enforcing her rights under the decree. To this, the answer of the learned Advocate for the defendants is that there is no provision in the Indian Contract Act for treating a promise as fulfilled constructively under the circumstances pleaded by the plaintiff and that the only remedy open to her is, perhaps, a claim for damages if her allegation should be true and never a relief by way of specific enforcement of the first clause of the compromise.

8. On facts, we are in entire agreement with the learned Subordinate Judge of Guntur that a true and *bona fide* offer was made by Bapamma to take the boy in adoption and that she expressed her readiness and willingness to fulfill the obligation resting on her under the compromise decree. We are equally certain that the defendants prevented the performance. We see no reason to interfere with the said finding of fact.

9. As already noticed the contention of the defendants is that the taking of the boy in adoption is a condition, on the non-fulfillment of which, whatever might be the reason and whoever it might be that contributed to its failure, plaintiff's claim for the properties vanishes. In other words, a mere expression of readiness and willingness to take the boy, even assuming it is true and *bona fide*, does not suffice and it is only the actual taking of the boy in adoption as a *fait accompli*, that would operate as vesting the properties in the lady. We hold that there is no warrant for this view.

The true construction of the compromise is that it embodies two reciprocal promises. The plaintiff's promise is to take the boy in adoption and the defendant's promise is to allow her to be in peaceful possession and enjoyment. It was undoubtedly the defendant who made the discharge of plaintiff's obligation impossible. There is ample authority for the proposition that if a promisor is prevented by the promisee from fulfilling her part of the contract, she should be deemed to have performed it. Plaintiff's learned Advocate relies on *Mackay v. Dick*¹. It was a case of sale and delivery of a digging machine for a price. Certain conditions had to be fulfilled, one

¹(1881) 6 AC 251

of which was that the machine should be capable of excavating a specific quantity of clay in a fixed time on a "properly opened-up face" at the railway cutting at Carfin.

But construction of a viaduct at that place was in progress and the parties agreed that the machine, instead of being installed at Carfin cutting, should be tried at Garriongill Cutting. The conditions at the latter place were not suitable and the machine, in working through a stony layer was constantly breaking down. The machine was then, under the purchaser's instructions, removed to and fixed up at Carfin as per the terms of the contract. But here the conditions had entirely changed by that time and did not allow the use of the machine in the manner intended because a large portion of the area had been put in charge of manual labour and only a small portion allowed for the use of the machine. It had thus failed to secure full scope for work. The working of the machine, it was held, was not compatible with manual excavators at the same time. Thus the machine on such testing could not satisfy the original condition of its purchase as digging up a stated quantity of clay. The hurdles and handicaps placed by the buyer in the way of the seller satisfying him about the capacity of the machine amounted, according to the Privy Council, to a prevention of the promise made by the seller. Their Lordships held that :

"They (sellers) have been thwarted in the attempt to fulfil that condition by the neglect or refusal of the appellant to furnish the means of applying the stipulated test; and their failure being due to his fault, I am of opinion that, as in a question with him, they must be taken to have fulfilled the condition."

This principle of constructive performance of fulfilment was recognised in *Roberts v. Bury Improvement Commrs*², at pp. 329, 331, where the enforcement of a Building Contract was in question. The plaintiff, a Building Contractor, agreed to erect buildings for the defendants according to certain plans and drawing to be furnished by an Architect. There was a failure on the part of the defendants and their Architect to supply the requisite plans and give indications of the land necessary to enable the plaintiff to commence work. Plaintiff's performance was excused. The principle of law was enunciated by their Lordships thus at page 329 :

"The rule of law applies which exonerates one of two contracting parties from the performance of a contract when the performance of it is prevented and rendered impossible by the wrongful act of the other contracting party." At page 331 again they

point out :

"That the plaintiff's breach of contract is excused by reason of its having been caused by the defendant's breach of contract

Thus the contract prima facie entitling the defendants to put an end to it, the law says that they, having themselves prevented the plaintiff from making such progress, shall not take advantage of their own wrong, and put an end to the contract under the 27th clause."

10. Benjamin on Sale (eighth Edition) at page 547 refers to the opinion of the King's Bench in *Hotham v. East India Company*³, at p. 645, that :

²(1869-70) 5 CPC 310

³(1787) 1 ITR 638

"It was evident from common sense that if the performance of a condition precedent by the plaintiff had been rendered impossible by the neglect or default of the defendant, it is equal to performance."

Halsbury's Laws of England, Vol. 7, Second Edition, Page 225, while discussing the Excuses for non-performance, stresses that :

"The performance of a condition precedent is excused where the other party had prevented its performance, or has done something which puts it out of his power to perform his part of the contract, or has intimated that he does not intend to perform it."

11. In the case we are dealing with, the defendants by reason of the marriage of the boy definitely put it out of "Bapamma's power to perform her part of the contract", viz., the taking of the boy in adoption.

12. The learned Counsel for the defendants has endeavoured to distinguish the English cases dealing with sale of goods on the ground that the Indian Sale of Goods Act circumscribes the right of the seller to enforce the contract by limiting it to cases where the property in the goods has passed to the buyer. Section 55 (1) of the Indian Sale of Goods Act states thus :

"Where under a contract of sale the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may sue him for the price of the goods."

We are not concerned in the present case with a sale of goods. The principle for which the English decisions were cited by the learned Advocate for the plaintiff is that prevention by one party is tantamount, in effect, to a fulfilment of the promise by the party prevented in a case of conditional contract or a contract of reciprocal promises. There is nothing in Section 55(1) which can throw light on the real question involved in this appeal.

13. The Indian Law on the subject is identical with the English Law that prevention by one party

is constructively tantamount to fulfillment by the other. The relevant provision in the Indian Contract Act is Section 53. Its meaning and connotation, however, have to be ascertained on a reference to the other provisions of the Act. Section 53 states :

"When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract 'becomes voidable at the option of the party so prevented'; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract."

Section 2 (f) defines reciprocal promises as those 'promises which form the consideration or part of the consideration for each other'. Section 2 (i) tells us that

"an agreement which is enforceable by law at the option of one or more of the parties thereto but not at the option of the other or others, is a voidable contract."

If we substitute this definition in the place of the expression 'voidable' in Section 53, it will read, in the expanded form, thus :

"When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract 'is enforceable by law at the option of the party so prevented but not at the option of the other party (who is preventing)' and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract."

14. Thus two alternative reliefs are vouchsafed to the party prevented. One is to enforce the contract specifically and it stands and the other is to claim compensation by, of course, rescinding, annulling or abandoning the entire contract. We are not now concerned with the problems arising out of rescission because plaintiff Bapamma has not rescinded the contract and has elected to stand by it and is seeking enforcement specifically of the promise of the defendants to let her be in peaceful possession and enjoyment of the properties.

15. Apart from the principle of constructive performance embodied in Section 53, we have another (proposition enunciated in Section 38 that :

"Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract."

The facts of the case under discussion furnish plaintiff Bapamma an excuse for non-performance of her promise to take the boy in adoption. She made an offer of performance to the promisee and the offer was not accepted as Ex. B-7 would show. It means that she is not responsible for the non-performance within the meaning of the Section; nor does she thereby lose her rights under

the contract, the primary right being to enforce it specifically as per its terms ex facie. We have no hesitation in holding that the defendants prevented the plaintiff from performing her part of the contract and that the plaintiff should, therefore, be deemed to have fulfilled her promise and thus become entitled to enforce the obligation resting on the defendants.

16. Apart from all authorities, English and Indian, there is the well-known principle of equity that "no person shall take advantage of his own wrong" which the defendants have manifestly flouted in resisting the plaintiff's claim.

17. The plaintiff is entitled to delivery of possession of the properties vouchsafed to her under the Compromise Decree. The other prayer asked for, viz., the assistance of the Court in performing her obligation of taking the boy in adoption cannot obviously be granted.

18. The second appeal is dismissed with costs.

Appeal dismissed.