

**(2002) 06 AP CK 0002**

**Andhra Pradesh High Court**

**Case No:** Appeal No. 1324 of 1999 and Cross Objections and CMP No. 10098 of 2002

Syed Fazal

APPELLANT

Vs

Sajeeda Parveen

RESPONDENT

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**Date of Decision:** June 28, 2002

**Acts Referred:**

- Specific Relief Act, 1963 - Section 15, 21

**Citation:** (2002) 6 ALD 373

**Hon'ble Judges:** L. Narasimha Reddy, J

**Bench:** Single Bench

**Advocate:** T. Veerabhadrayya, in AS No. 1324 of 1999 and Mohd. Imtiaz, for P. Vinod Kumar, in CMP and for Cross Objectors in Cross Objections, for the Appellant; T. Veerabhadrayya in CMP and Cross Objections and Mohd. Imtiaz, for P. Vinod Kumar, for the Respondent

**Final Decision:** Allowed

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**Judgement**

L. Narasimha Reddy, J.

The defendant in O.S.No. 4/89 on the file of the Senior Civil Judge, Khammam, is the appellant herein.

2. The respondent/plaintiff filed the suit for specific performance of an agreement of sale dated 15-4-1985 whereunder the appellant/defendant agreed to sell an extent of 510 sq.yards, situated at Khammam (for short "the suit schedule property") @ Rs. 500/- per square yard. It was averred in the plaint that on the date of the agreement an amount of Rs. 25,000/-was paid as earnest money and that the appellant agreed to receive the balance of consideration at the time of executing the sale deed and delivering vacant possession. According to the respondent, the appellant was under obligation to produce non-encumbrance certificate and the entire transaction was to be completed within six months. It is also alleged that in addition to Rs. 25,000/- paid on 15-4-1985, the appellant has also received an amount of Rs. 25,000/-from

the husband of the respondent on different occasions. Another amount of Rs. 22,000/- is said to have been paid by the respondent on 22-10-1985 through her brother-in-law Mr. Basheer Ali, for the purpose of clearing the mortgage created by the appellant in favour of one Mr. Devaraj. It is stated that in all an amount of Rs. 73,600/- was paid by 22-10-1985. It is alleged that inspite of respondent's readiness and willingness to pay the balance of consideration, the appellant did not comply his part of the obligation and, on the other hand, started demanding additional amounts. Accordingly, she sought for a decree for specific performance. Alternative relief of damages for Rs. 2,00,000/-together with interest at 24% per annum for the breach of contract was also prayed for.

3. The appellant filed written statement stating that it is the husband of the respondent that had bargained and settled the transaction. The execution of the agreement of sale is admitted. However, so far as the payment of the amounts is concerned, the appellant disputed every item of payment pleaded in the plaint. As regards the earnest money of Rs. 25,000/-, it was the case of the appellant that an amount of Rs. 10,000/- was paid by way of cash and a cheque for Rs. 15,000/- was issued payable at Marripeda Branch of State Bank of India, Khammam District, which could not be realised on account of paucity of funds. It is stated that cash towards the same was paid at a latter date. As against the amount of Rs. 25,000/-, the appellant admitted the receipt of Rs. 8,700/-including Rs. 1,000/- through cheque. As far as payment of Rs. 22,000/- on 22-10-1985 is concerned, the appellant flatly denied the receipt of the same. It is the case of the respondent that in all he received Rs. 33,700/- only.

4. The appellant pleaded that since the inception of the transaction, the respondent and her husband were not at all ready and willing to pay the amounts and having waited sufficiently, he got issued a notice terminating the agreement. It is pleaded that the appellant never undertook to produce the non-encumbrance certificate or income tax clearance certificate, etc., and the respondent pleaded the production of the same as a condition precedent only to cover her inability to pay the balance consideration.

5. On the basis of the pleadings, the trial Court framed the following issues:-

1. Whether the plaintiff has paid Rs. 73,600/- to the defendant towards the sale consideration under the agreement of sale?
2. Whether the plaintiff has fulfilled his part of the contract?
3. Whether the plaintiff is entitled for the specific performance of contract?
4. To what relief?

The respondent/plaintiff examined herself as PW.1. Her husband deposed as PW.2 and her brother-in-law as PW.3. In addition to this, P.Ws.4, 5 and 6 were also examined. Documents Exs.A1 to A7 were marked on behalf of the respondent. The

appellant/ defendant himself was examined as DW.1 and marked documents Exs.B1 to B4. On consideration of the pleadings and the evidence before it, the trial Court rejected the relief of specific performance. However, it passed a decree against the appellant for Rs. 55,700/- with interest at 24% p.a. from 1-11-1985. Hence, the present appeal by the appellant/ defendant.

6. The respondent filed the Cross Objections insofar as the trial Court refused the relief of specific performance.

7. CMP No. 10098 of 2002 is filed by the respondent/Cross Objector under Order 41, Rule 27 CPC praying that the original receipt dated 22-10-1985 evidencing payment of Rs. 22,000/- be received.

8. Before taking up the discussion on the appeal and the Cross Objections, it is desirable that the CMP is disposed of.

CMP No. 10098/2002 :

9. One of the items of payment pleaded by the respondent was an amount of Rs. 22,000/- said to have been paid on 22-10-1985 by the brother-in-law of the respondent. It was the case of the respondent that on the request made by the appellant, the said amount was arranged so as to enable him to clear the mortgage transaction with one Mr. Devaraj. For proving the said payment, the respondent examined P.W.3, who is her brother-in-law, through whom she is said to have been paid that amount. It was pleaded that the said payment was evidenced under receipt dated 22-10-1985, which is marked as Ex.A2. Ex.A2 is only Xerox copy of the receipt. The same was taken on file subject to admissibility. This receipt is signed by the witness by name M.A. Mohiuddin. Before the trial Court, it was pleaded that the appellant could not file the original of Ex.A2 because the same was got mixed up with some other papers. P.W.6, is the Advocate Clerk, who is alleged to be responsible for misplacement of the original of Ex.A2. The CMP is filed to receive the original.

10. A reading of the depositions of P.W.2, P.W.3 and P.W.6 indicates that there are certain contradictions which remained unexplained. It is evident from the depositions that P.W.6 is said to have kept the original as well as the copies of the receipt in the same cover and it is not explained as to how the copies were available and the original was missing. It can also be gathered from the evidence that the original of Ex.A2 was available as on the date of filing of the suit, but only copies were filed. During the course of evidence, it was pleaded that all steps have been taken to locate the original of Ex.A2 and the same could not be traced. The statement made in the affidavit filed in support of the said CMP as to the circumstances under which the original was traced does not gain the confidence of this Court.

11. It is held time and again that acceptance of additional evidence under Order 41, Rule 27 is not a matter of course. Once the parties have gone on trial on the basis of certain oral and documentary evidence, to permit one of the parties to induct additional evidence would change the very contours of litigation. It is only in exceptional cases, where it is established beyond any doubt that, inspite of due diligence the party could not bring a particulate document, which has an important bearing on the matter during the trial of the Court, that the appellate Court can receive the same. Since evidence is received only when the manner and method of discovery of the same have been satisfactorily explained to the Court. In the present case, if the CMP is allowed, it would result in a situation of the receipt Ex.A2 being placed before the Court in original. Even if Ex.A2 is said to have been available before the Court in its original form, the evidence adduced by the appellant, both as to extent and content, was inadequate to prove the same. Therefore, it cannot be said that the respondent has satisfied the requirement of Order 41, Rule 27 CPC or that she had suffered any prejudice on account of the non-availability of the original of the document. Accordingly, the CMP is dismissed.

12. Now the appeal and cross objections need to be considered. It is the contention of the learned Counsel for the appellant Sri T. Veerabhadraiah that the respondent failed to establish that an amount of Rs. 22,000/- was paid to the appellant, but still the trial Court has ordered refund of the same. The 2nd contention is that the decree of the trial Court insofar as it awarded interest at the rate of 24% on the amount of Rs. 55,700/- is contrary to law and specific provisions of Section 34 of CPC.

13. Sri Mohd. Imtiaz, learned senior Counsel appearing for the respondent/Cross Objector, submits that the respondent had established and proved all the ingredients that were sufficient for decreeing the suit and the trial Court erred in refusing the decree for specific performance. As regards the payment of Rs. 22,000/-, he submits that the respondent paid the said amount through P.W.3 on 22-10-1985 and the same was evidenced under Ex.A2. As regards interest, he submits that it was in the discretion of the trial Court to award interest having regard to the facts and circumstances of the case and no exception can be taken to the same.

14. In view of the submissions of the learned Counsel, the questions that arise for consideration in the appeal and Cross Objections are as follows:--

(a) Whether the respondent herein has proved the factum of payment of Rs. 22,000/- to the appellant?

(b) Whether the award of interest at the rate of 24% from 1-11-1985 by the trial Court is proper and in accordance with law? And

(c) Whether the trial Court was justified in not decreeing the suit for specific performance?

While the first two questions arise out of the appeal, the 3rd one arises out of the Cross Objections.

15. The 3rd question, viz., whether the trial Court was justified in not decreeing the suit for specific performance, deserves to be considered first.

16. The fact that the appellant agreed to sell the suit schedule property to the respondent under Agreement of Sale dated 15-4-1985 (Ex.A1) is not in dispute. The extent of the property was 510 sq.yards and the rate agreed between the parties was Rs. 500/- per sq.yard. Thus, the total sale consideration under the said agreement of sale comes to Rs. 2,55,000/-. As against this, the respondent paid an amount of Rs. 25,000/- on the date of the agreement. The balance of consideration was required to be paid within six months. On failure of the payment of the said amount, the appellant was given liberty to cancel the agreement. Though the respondent has paid certain amounts, the fact remains that even by expiry of six months what was paid was not even 1/4th of the total consideration. The respondent pleaded that the reason for non payment of the consideration was the existence of encumbrances over the suit schedule property. In the evidence, it was elicited that there was a subsisting mortgage in respect of the suit schedule property. As long as the mortgage subsisted, the respondent cannot be accused of being unwilling to proceed with the transaction. However, the fact remains that she did not take necessary steps to assert her rights promptly. It was only when the appellant issued notice dated 25-10-1985, marked as Ex.B1, narrating the facts relating to the transaction and alleging default on the part of the respondent, that she came forward with the reply under Ex.B2, accusing the appellant of concealing certain facts relating to the encumbrances. The pleadings as well as the evidence on record discloses that both the respondent and the appellant have committed lapses and it is too difficult to hold any one squarely responsible for the situation that led to filing of the suit.

17. Further, a deeper probe into that aspect would become only academic inasmuch as during the pendency of the appeal, the appellant negotiated with some 3rd parties, received consideration from them and inducted them into possession of the suit schedule property. The property is not available in its ordinary form to be dealt with.

18. Inasmuch as the respondent has committed certain lapses, in that, she did not pay the consideration within the stipulated time nor took any prompt action to assert her rights, it cannot be said that denial of the relief of specific performance is contrary to law. At the same time, since the appellant is also guilty of concealing certain vital information, he cannot have the benefit of his own lapses. In the suit, the plaintiff prayed for the reliefs of specific performance as well as the alternative relief of payment of damages assessed at Rs. 2,00,000/- for breach of the contract.

19. Refund of earnest money is provided for u/s 22 of the Specific Relief Act along with other reliefs of partition, possession, etc. The question of refund of earnest money will be dealt with a little later.
20. Section 21 empowers the Court to award compensation in case the Court finds that the decree for specific performance ought to have been granted, but it is not proper or sufficient to satisfy the justice of the case. u/s 22 of the Specific Relief Act, where it becomes difficult for the Court to grant the relief of specific performance, it can compensate the plaintiff with other reliefs.
21. It is true that the respondent has not adduced any evidence on the question of damages. In fact there was no issue on that. However, to remit the suit once again to the trial Court for this purpose would only protract the litigation, adding to the agony of the parties. Having regard to the facts and circumstances of the case, this Court is of the view that it is not possible to grant the relief of specific performance to the respondent, but she shall be entitled for payment of damages, which is assessed at Rs. 50,000/-.
22. Coming to the 1st question viz., whether the respondent herein has proved the factum of payment of Rs. 22,000/- to the appellant, the following facts need to be taken into account:
23. Though there was some dispute as to the method of payment, it is established that the respondent paid an amount of Rs. 25,000/- as earnest money at the time of entering into the agreement of sale. The appellant admitted the receipt of another amount of Rs. 8,700/- including Rs. 1,000/- through cheque. While it is the case of the respondent that she paid another amount of Rs. 22,000/- on 22-10-1985, through Ex.A2, the appellant flatly denied the same. To prove the fact that the respondent paid an amount of Rs. 22,000/-, she got examined P.W.3, who is her brother-in-law. The receipt of the said amount is said to have been evidenced through Ex.A2. The original of Ex.A2 was not filed and only xerox copy of the same was filed. A plea was taken that the original was mixed up with other papers and inspite of their best efforts, they could not trace the same. P.W.6 was examined in support of this contention. During the pendency of the appeal, CMP No. 10098/2002 was filed for receiving the original of Ex.A2. In the preceding paragraphs, the CMP was dealt with.
24. Even if Ex.A2 is taken as the original document itself, the oral evidence adduced in support thereof does not gain the confidence of the Court. In fact the trial Court has found that the plea taken by the respondent was not at all acceptable. One important aspect is that a person by name M.A. Mohiuddin is said to have witnessed the payment. He is not examined. The versions offered by P.Ws.2 and 3, on the one hand, and P.W.6, on the other, are at variance with each other. These versions, in turn, are in conflict with the one put forward in the affidavit in the above CMP.
25. Though, the trial Court itself was not satisfied about the proof of payment of the amount of Rs. 22,000/- under Ex.A2, it has proceeded as though the respondent has

proved the payment of the same. As regards the variation of signatures of the appellant on Ex.A2, the trial Court observed as under:--

As I am not handwriting expert, I could not definitely say whether it is the signature of the defendant or not, which is found in Ex.A2."

The only reason that appears to have weighed with the trial Court is that P.W.3, even though brother of P.W.2, has no motive to give false evidence that he paid Rs. 22,000/- to the defendant. This fact weighed with it, inspite of the contradictions in the evidence of P.Ws. 2, 3 and 6.

26. P.W.3, in his chief examination, stated that he received a phone call from his brother P.W.2, instructing him to pay the amount of Rs. 22,000/- to the appellant. It was elicited through cross-examination that he received the said call on his phone No. 8224. It was further elicited in the later stage that as on 22-10-1985, P.W.3 did not have any phone at all. There are several such contradictions. Therefore, the trial Court was not justified in holding that the respondent paid an amount of Rs. 22,000/- on 22-10-1985. That finding is, therefore, set aside. Accordingly, the amount which is received by the appellant from the respondent stands reduced by Rs. 22,000/-, which comes to Rs. 33,700/-.

27. Now remains the second question. The trial Court directed refund of the amount received by the appellant with interest at the rate of 24% from 1-11-1985 till the date of realisation. This date appears to have been adopted by roughly adding six months period (stipulated for payment of the balance of consideration) to the date of agreement. This period includes (a) period prior to the filing of the suit; (b) period during the pendency of the suit; and (c) period from the date of decree till the date of realisation. Now it needs to be seen as to whether the award of interest for these three periods, that too, at 24% is sustainable in law.

28. Section 34 of the CPC deals with the power of the Court to grant interest. The section does not confer any power on the Court for grant of interest for the period prior to the filing of the suit. The matter of grant of interest for that period is to be governed by the terms of the contract between the parties. In the absence of any contract, the Court has no jurisdiction to award interest for that period. In this case, the agreement of sale, Ex.A1, does not provide for payment of interest either by the plaintiff or by the respondent under any circumstances. Therefore, there is no express contract between the parties covering this period. No implied contract is either pleaded or established by the respondent. Therefore, the award of interest for the period prior to filing of the suit cannot be sustained.

29. Section 34 empowers the trial Court to award interest for the period during which the suit was pending. The rate at which the interest can be awarded is in the discretion of the Court, which of course should be reasonable. Having regard to the fact that the amount advanced by the respondent was for the purpose of purchasing the suit schedule property and that the prices of the lands have been

increasing rapidly, the award of 24% interest on the amount for the period during which the suit was pending cannot be said to be unreasonable.

30. So far as the 3rd period i.e., the period from the date of decree till the date of realisation is concerned, Section 34 stipulates that the rate of interest shall not exceed 6% per annum. According to the proviso to Sub-section (1) of Section 34, where the liability arises out of a commercial transaction, the rate of interest may exceed 6%, subject to the maximum rate of interest at which monies are lent by the Nationalised Banks in relation to commercial transactions. Explanation (ii) appended to the proviso defines the commercial transaction to mean only those connected with industry, trade or business undertaken by the period incurring the liability. In this case, it is not pleaded, much less, established that the transaction between the respondent and the appellant was commercial in nature. The trial Court did not record any finding that what was involved was a commercial transaction. Whether or not a particular transaction is commercial is certainly a matter of specific pleading and proof. In the absence of the same, interest at 24% for the period subsequent to the decree is opposed to Section 34 of CPC. The interest for this period, in the facts and circumstances of the case, cannot exceed 6%. Therefore, the interest for this period on the decretal amount shall stand reduced to 6%.

31. In the result, the appeal is allowed to the following extent:

(i) The decretal amount directed to be refunded by the appellant shall stand reduced from Rs. 55,700/- to Rs. 33,700/-;

(ii) The amount of Rs. 33,700/- shall carry the interest at the rate of 24% p.a. from the date of filing of the suit till the date of decree and at the rate of 6% per annum from the date of decree till the date of realisation;

The cross objections are ordered to the extent indicated below:

(i) the decree of the trial Court insofar as it rejected the relief of specific performance is affirmed;

(ii) The appellant (respondent in cross objections) shall pay an amount of Rs. 50,000/- (Rs. Fifty thousand only) towards damages with interest at the rate of 15% from the date of decree till the date of realisation.

32. The decree of the trial Court is modified to the extent indicated above.

33. Each party shall bear their own costs.