(2014) 1 ALD 476

Andhra Pradesh High Court

Case No: City Civil Court Appeal No. 109 of 2010

Smt. Nirmalamma		APPELLANT
	Vs	
Syed Sami		RESPONDENT

Date of Decision: Sept. 13, 2013

Citation: (2014) 1 ALD 476

Hon'ble Judges: S.V. Bhatt, J; L. Narasimha Reddy, J

Bench: Division Bench

Advocate: Kowturu Vinaya Kumar, for the Appellant; M.V.S. Suresh Kumar, for the Respondent

Judgement

L. Narasimha Reddy, J.
The defendant in O.S. No. 528 of 2006 on the file of the III Additional Chief Judge, City Civil Court, Hyderabad filed this appeal feeling aggrieved by the decree dated 02-02-2010 passed therein. The appellant is the owner of the premises bearing No. 6-1-(sic)42 at Khairatabad. The respondent is her immediate neighbour. The respondent filed the suit, stating that the appellant agreed to sell a bit of 80 sq.yards of land, in October 2004 @ Rs. 12,000/- per sq.yard for a total sale consideration of Rs. 12 lakhs and that, advance of Rs. 1 lakh was paid on 19-10-2004 and Rs. 50,000/- on 09-01-2005. Alleging that the appellant did not come forward to receive the balance of sale consideration and to execute the sale deed, the respondent filed the suit for specific performance of agreement.

2. The appellant filed the written-statement. She raised an objection as to the maintainability of the suit. According to her, the mother of the respondent approached her with a request to sell the suit schedule property. It is also stated that written agreement was entered into for sale of the property @ Rs. 15,000/- per sq.yard, and a specific clause was incorporated in the agreement to the effect that the consideration must be paid within a period of three months and that if the entire consideration is not paid within that period, the advance amount shall stand forfeited, and that the appellant shall not be under obligation to refund the same. She stated that a sum of Rs. 1 lakh was paid as

advance and as against the balance of Rs. 11 lakhs, only a sum of Rs. 50,000/- was paid in January, 2005 and that balance was not paid, in spite of repeated demands. She alleged that the respondent and his mother have sent certain hired goondas to her house and they have not only destroyed the original agreement of sale, by making a challenge that they would take the property without making any further payment, but also have taken away a sum of Rs. 1,50,000/- from her, forcefully. Herself and her unmarried daughter are said to have been frightened and that they did not even submit a complaint to the Police Station. It was also her case that one year thereafter, an attempt was made to grab the property, and in the process, the respondent got the appellant detained in the Police Station from 5:00 p.m. to 12:00 p.m. i.e. till midnight, on 19-04-2006, by using his influence.

3. The trial Court decreed the suit, as prayed for.

4. Sri Kowturu Pawan Kumar, learned counsel for the appellant submits that the very filing of the suit was untenable, since neither any agreement of sale was referred to, nor a copy thereof was filed. He submits that even according to the averments in the plaint, the negotiations were made by the mother of the respondent, at a time when he was not even in India and no GPA was executed at all. He contends that neither PW-1 nor PW-2 were clear about the terms of contract, obviously because the agreement of sale was torn away and the equitable remedy of specific performance cannot be extended to such persons.

5. Learned counsel further submits that from a perusal of Ex. A-6, reply notice, dated 21-05-2006, it is evident that the respondent was of the view that the appellant does not have any title to the property, and on that basis, a complaint, alleging acts of cheating was filed in P.S. Safaibad, and the same was registered as Crime No. 1 of 2006. He further submits that as late as on 21-05-2006, the respondent insisted on furnishing of title deeds and other documents, obviously expressing the view that unless the title is shown to be clear, they are not prepared to proceed with the transaction. Learned counsel submits that the trial Court proceeded on untenable lines in decreeing the suit.

6. Sri M.V.S. Suresh Kumar, learned counsel for the respondent, on the other hand, submits that no written agreement was executed between the parties and all the same, the existence of agreement of sale is not disputed, once the appellant admitted that she has received a sum of Rs. 1 lakh, as advance, and a further sum of Rs. 50,000/-, under Exs. A-1 and A-2, respectively. He submits that the plea of the appellant that the respondent has sent anti social elements to her house, or that a police complaint was made are not true; and that the trial Court has taken correct view of the matter.

7. On the basis of the pleadings before it, the trial Court framed the following issues for its consideration:

1. Whether the plaintiff is ready and willing to perform his part of contract?

2. Whether the plaintiff is entitled for specific performance as prayed for?

8. On behalf of the respondent, PWs 1 and 2 were examined and Exs. A-1 to A-7 were filed. The appellant and her daughter deposed as DWs 1 and 2 and they did not file any documents.

9. The points that arise for consideration in this appeal are,

1) what is the nature of the agreement, that came into existence between the parties, and whether the claim made by the respondent accords with the agreement?

2) Is the respondent entitled for the relief of specific performance of agreement of sale or any other relief?

Point No. 1:

10. The appellant and the respondent are neighbours. The record discloses that at one point of time, the property held by the appellant was purchased from the family of the respondent. It appears that the respondent wanted to purchase, rather repurchase, an extent of 80 sq.yards from the appellant, to have proper access to his house. The manner in which the agreement was entered into, for purchase of 80 sq.yards from the appellant; was stated in paragraph 2 of the plaint, as under:

That in the month of October, 2004 the defendant has approached Plaintiff through his mother and offered to sell a portion of her house property bearing No. 6-1-742 to an extent of 80 sq.yrds, situated at Khairatabad, Hyderabad, which is more fully described in the schedule land herein after referred to as "Schedule Property" at the rate of Rs. 15,000/- per sq.yrd i.e. for a total sale consideration of Rs. 12,00,000/-.

11. The effort here is to ascertain as to whether the agreement was between the respondent, i.e., Mr. Syed Sami, on the one hand, and the appellant herein. Even according to the recital in the plaint, the negotiations took place between the mother of the respondent and the appellant. At the relevant point of time, the respondent was not in India. He did not undertake any discussion with the appellant, nor was it stated that the offer was made to him. The manner in which he is said to have accepted the offer and the subsequent events are mentioned in paragraph 3 of the plaint, as under:

...In pursuance of offer and acceptance, Plaintiff has paid a sum of Rs. 1,00,000/- (Rupees One Lakh Only) to Defendant on 19.10.2004 towards Advance and Part Sale Consideration through his mother and GPA Smt. Nazeer Sultana. The Defendant received the said amount of Rs. 1,00,000/- and acknowledged the receipt of the same by passing a Receipt dated 19.10.2004 in favour of the Plaintiff. The Receipt dated 19.10.2004 passed in favour of the Plaintiff is filed herewith as Document No. 1.

12. Had it been a case where the plaintiff, i.e. Sami executed a GPA in favour of his mother, permitting her to purchase the property on his behalf, things would have been different altogether. When he was not even in India, the question of the appellant offering to sell the property to him, much less the acceptance of the offer by him, or for that matter, payment of advance, does not arise.

13. Some important information was elicited in the cross-examination of PW-1 i.e. the mother of plaintiff. She stated,

...Plaintiff was not present in India at the time of execution of Ex. A-1 and A-2. I have filed the G.P.A. given by the plaintiff to me before this court. But I do not know whether it was marked or not. I paid 1 lakh rupees to the defendant as advance amount on behalf of plaintiff. There was no agreement of sale executed between us...

14. Nowhere in the plaint, it is mentioned that there existed any written agreement. In her written-statement, however, the appellant pleaded that there was a written-agreement and several conditions were incorporated therein. It was also pleaded that the agreement was torn into pieces by the family members of the respondent and their followers, at an altercation.

15. It is important to note that Ex. A-1 is a receipt, dated 19-10-2004, typed on a stamp paper of Rs. 100/-, evidencing receipt of Rs. 1 lakh. Ex. A-2 is another receipt, dated 09-01-2005, for a sum of Rs. 50,000/-. When receipts of this nature are issued not only on stamp paper, but also with detailed recitals in typing and is signed by three witnesses, one naturally expects the existence of a written-agreement. If the parties were so confident of each other, that they did not feel the necessity of reducing the terms of agreement into writing, one does not expect the existence of receipt in such a perfect manner. Further, it is not the case of the respondent that Ex. A-1 is an agreement. Whenever a suit for specific performance is filed in respect of an item of immovable property on the basis of an alleged oral agreement, a close scrutiny becomes necessary. The conduct of plaintiff and the nature of events that have taken between the parties become relevant.

16. It is important to mention that the filing of the suit is preceded by exchange of notices. In Ex. A-3, dated 21-06-2005, the respondent alleged that the appellant is avoiding to execute the sale deed, in spite of repeated demands. He called upon the appellant to receive the balance of consideration and execute the sale deed. It is not known as to what happened immediately after service of notice. However, the appellant got issued a notice, and not a reply, dated 27-04-2006, marked as Ex. A-5. She mentioned therein that she executed an agreement of sale in respect of 80 sq.yards of land and according to the terms of agreement, the balance of consideration i.e. Rs. 11 lakhs was to be paid within three months. She stated that in spite of demand for payment of the balance of consideration, only a sum of Rs. 50,000/- was paid by the respondent in January, 2005, promising that the balance would be paid within two months thereafter. She stated that

the respondent did not turn up to pay the balance of consideration, even in the extended time. Ex. A-5 was addressed to the mother of the respondent, by name, Nazeer Sultana, who incidentally is shown as the GPA. The relevant portion of that notice reads.

My client further represent that you and your husband have involved deputed your friends, agents, hired goondas and Rowdy elements to create nuisance and taken away amount of Rs. 1,50,000/- (Rupees One Lakh Fifty Thousand only) from my client which you was given an advance of Sale consideration on 15.4.2005 and you deputed persons are destroyed the original agreement and receipt also. So my client kept quiet because of widow lady and unmarried daughter so their ends the matter.

17. In reply to this, the mother of the respondent got issued Ex. A-6, dated 21-05-2006. As regards the plea that there existed a written agreement, it was stated:

The allegations in para 1 of the notice that your client executed an agreement of sale in respect of H. No. 6-1-742, adm 80 sq.yrds, is absolutely false, baseless, concocted and invented with ulterior motives. The transaction of Agreement of Sale is an Oral One and your client has not executed any agreement of sale in writing as alleged by your client...

18. So far as the readiness on the part of the respondent to pay the balance of consideration is concerned, the following paragraph in Ex. A-6 becomes relevant:

That since the attitude of your client in receiving the balance sale consideration was doubtful, my client caused enquiries in Sub-Registrar''s Office and was shocked and surprised to know that the above said property is standing in the name of One Mr. N.B. Bhadraiah and that your client is no way concerned with the title of the property. Thereupon my client approached your client and demanded your client to produce the title deeds of the property and the authority under which your client is entitled to sell the property to my client and her son. Instead of furnishing the copies of title deeds, your client behaved rashly with my client and asked her to do what ever he likes. That with a view to give final chance to your client, my client has issued a Leal Notice dated 1.12.2005 calling upon your client to produce the title deeds or authority under which she is entitled to sell the property. That in spite of issuance of notice, your client has not complied with the demand of my client and behaved in a rash and adamant manner. Therefore, my client was constrained to file a Private Complaint before the I Addl CMM, Hyderabad, which was subsequently registered as Crime No. 104 of 2006 of P.S. Saifabad. That your client was called to Police Station for investigation wherein your client has admitted her fault and by promising to settle the issue in a short period of time has resorted to issue the present notice with absolutely false, baseless and invented allegations.

19. A totally different version has emerged from the above paragraph. The respondent doubted the title of the appellant and not only insisted that the appellant must establish clear title to the property, but also filed a private complaint in a criminal Court, alleging

acts of cheating.

20. PW-2 is a neighbour of the respondent. His evidence is only to the effect that a sum of Rs. 1 lakh was paid as advance in October 2004 and Rs. 50,000/- thereafter, in January, 2005 and in Exs. A-1 and A-2, receipts, he figured as a witness. His evidence is not of much help on the important aspects.

21. In her deposition as DW-1, the respondent stated that an agreement of sale was executed on 19-10-2004 and a sum of Rs. 1 lakh was paid as advance, under Ex. A-1, and thereafter, a further sum of Rs. 50,000/- was paid under Ex. A-2. In the cross-examination, she admitted the execution of Exs. A-1 and A-2. It was not suggested to her that no agreement of sale was executed in relation to the transaction. DW-2 is the daughter of the appellant. Her evidence is not of much help, since she stated that she was not present when the transaction has taken place.

22. It may be true that an agreement of sale need not be in writing, and there can be oral agreement also. That would be possible if only the persons who are parties to the agreement speak about the terms thereof and substantiate the same with other cogent evidence. Admittedly, PW-1 is not the party to the agreement. The so-called agreement, if at all, is the one, between the respondent, Syed Sami and the appellant. Sami did not enter the witness box. Though PW-1 is the person, who paid the advance, she is said to have done it for and on behalf of her son, the respondent. If there existed a written agreement, even the authorized person of a party to it can pursue the remedies. Though the appellant also admitted the existence of agreement, she stated that, it was in writing.

23. Once the appellant pleaded that the written-agreement was torn by the persons sent by the respondent, heavy burden rested upon him to prove the contents of the agreement are otherwise. The respondent miserably failed in this front. What become enforceable in a suit for specific performance of an agreement of sale are the conditions stipulated therein. No agreement has been placed before the Court, nor the contents thereof have been spoken to by the person claiming rights under it. The result is that there was no basis for the trial Court, to grant the relief. The point No. 1 is accordingly answered in favour of the appellant and against the respondent.

Point No. 2:

24. The answer to point No. 1 would have its own impact on this point. Still it needs to be considered independently. For this purpose, it may even be presumed that there existed an agreement of sale, which accords with the requirement of law. All the same, mere existence of an agreement is not all. The remedy being equitable in nature, the Court must be satisfied about the bona fides on the part of the plaintiff. The readiness and willingness on the part of the plaintiff is another aspect.

25. In Ex. A-3 the respondent pleaded as though he was ready with the balance of consideration and the default was on the part of the appellant. However, if one reads Ex.

A-6, a totally different picture becomes evident. The respondent verified the records of the Registrar, and on finding that the property was noted in the name of one, Mr. N.B. Bhadraiah, not only he called upon the appellant, to satisfy him about the existence of title to the property, but also filed a complaint alleging acts of cheating. The portion of Ex. A-6 which was extracted in the preceding paragraphs, discloses that the respondent was not prepared to pay the balance of consideration, till the cloud on the title of the appellant over the property was cleared. Making an attempt to prosecute a party to an agreement, alleging acts of cheating, would certainly be a factor to be taken into account, in a suit for specific performance. When the respondent in such a suit has a serious doubt about the title of the appellant, vis-ï¿½-vis the property, and has gone to the extent of instituting proceedings for prosecution of the appellant, it is just unthinkable that a decree for specific performance can be granted. Therefore, we find that the respondent did not make out a case for the relief of specific performance.

26. Notwithstanding the defects pointed out above, the fact that a sum of Rs. 1,50,000/- was received by the appellant towards advance is not in dispute. The version of the appellant was that, she needed the money for her treatment, and though the balance was agreed to be paid by PW-1 within two months, she did not pay the same. The respondent can be granted the alternative relief of refund of the advance. Point No. 2 is answered accordingly.

27. The appeal is accordingly allowed and the judgment and decree passed by the trial Court are set aside. However, the suit shall stand decreed for refund of the advance of Rs. 1,50,000/- (Rupees one lakh fifty thousand only) with interest @ 9% per annum from the date of filing of the suit.

28. The miscellaneous petitions filed in this appeal shall also stand disposed of. There shall be no order as to costs.