

(2012) 07 PAT CK 0085
In the Patna High Court
Case No : First Appeal No. 58 of 1992

Bhagwatia Devi and Others	Vs	APPELLANT
Arjun Prasad Thathera, Ashok Kumar Tathera, Krishna Prasad Thathera, Ram Pati Devi		RESPONDENT

Date of Decision : 26-07-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22, Order 41 Rule 33
Specific Relief Act, 1963 — Section 16(c)

Citation : (2013) 2 PLJR 134

Hon'ble Judges : V. Nath, J

Bench : Single Bench

Advocate : S.S. Nayer Hussain, Mr. Md. Kamil Akhtar and Mr. Abbas Haider, for the Appellant; Manoj Kumar Ambastha, for the Respondent

Final Decision : Allowed

Judgement

V. Nath, J.—The defendant has filed this appeal against the judgment and decree dated 29.02.1992 passed in T.S.No.26/86/50/91 by Sub Judge III, Nawada by which the decree for specific performance of contract has been passed in favour of the plaintiffs. The necessitous facts as uncurtained in this appeal are that the defendant is the owner of the suit property described in Schedule A of the plaint. According to the plaintiff he agreed to sell the same with the plaintiff No. 1 for total consideration of Rs. 1,50,001/- (Rs. One lac fifty thousand one) and also executed the agreement for sale on 25.11.1985 according to which the sale deeds were to be executed within a period of one month with the liberty to the plaintiff No. 1 to get the sale deeds also in the name of his family members. It is the case of the plaintiffs that an amount of Rs. 1501/- (one thousand five hundred one) had been paid to the defendant by way of advance at the time of the execution of agreement for sale and it was further agreed that in the remaining consideration money, the amount of four mortgage deeds coming to total Rs. 31, 000/-, executed by the defendant in favour of the plaintiffs, would be adjusted. The plaintiffs thus have claimed that after adjusting the advance

amount of Rs. 1501/- and the mortgage amount of Rs. 31, 000/- (total Rs. 32,501/-), the remaining consideration money of Rs. 1, 17,500/- only remained to be paid to the defendant by the plaintiffs for the execution of the sale deeds for the suit properties according to the agreement. The plaintiffs have stated in several paragraphs of the plaint that they have been ever ready and willing to pay the remaining amount of Rs. 1,17,500/- to the defendant but the defendant malafidely did not receive the said amount and has failed to perform his part of the contract by executing the sale deeds in favour of the plaintiffs.

2. The defendant in his written statement has completely denied the agreement for sale of the suit properties with the plaintiffs and also denied the execution of the deed of the agreement for sale dated 25.11.1985. The defendant has also denied to have received Rs. 1501/- by way of advance from the plaintiffs, and further denied the execution of the three mortgage deeds of the year 1980 by him as described in Schedule B of the plaint but accepted the execution of only one mortgage deed dated 04.12.1982 in favour of the plaintiffs for Rs. 6,000/-. It is the case of the defendant that as he was in need of money so he mortgaged the suit house with the plaintiffs for a sum of Rs. 6,000/- and put the plaintiff No. 1 in possession over the same but he never executed any other mortgage deeds nor had executed the agreement for sale as propounded by the plaintiffs.

3. In view of the rival pleadings of the parties, the following issues were framed in the suit.

- (i) Whether the suit as framed is maintainable?
- (ii) Whether the plaintiffs have got any cause of action for the suit?
- (iii) Whether the Baibayana deed dated 25.11.1985 was executed by the defendant Motilal in favour of the plaintiff No. 1 or not?
- (iv) Whether a sum of Rs. 1501/- was paid to the defendant as Baibayana?
- (v) Whether three mortgage deeds dated 26.11.1980 and one mortgage deed dated 04.12.1982 were executed by the defendant in favour of the plaintiffs?
- (vi) Whether there was an agreement to adjust the Rehan money from the consideration money for sale?
- (vii) Whether the plaintiffs are entitled to get the relief as claimed?
- (viii) To what other relief or reliefs the plaintiffs are entitled to get?

4. Out of the aforesaid issues, the issue nos. 3 and 4 relating to the validity of the Baibayana deed (agreement for sale) dated 25.11.85 and payment of advance of Rs. 1501/- have been decided in favour of the plaintiffs. The issue No. 5 relating to the execution of three mortgage deeds dated 26.11.80 has also been decided in favour of the plaintiff and it has been held that the three mortgage deeds have been executed by the defendant in favour of the plaintiffs. However, the issue No. 6 relating to the adjustment of the mortgage money in

the consideration amount of the sale has been decided against the plaintiffs and it has been held that there was no agreement between the plaintiffs and defendant to adjust the mortgage money in the consideration amount and consequently it has been held that the plaintiffs are liable to pay the consideration amount of Rs. 1,48,500/- to the defendant at the time of registration of the sale deeds after adjusting only the earnest money of Rs. 1501/-. While deciding the issue No. 7 regarding the entitlement of the plaintiff to get the reliefs as claimed, the learned court below also discussed the evidence relating to the readiness and willingness of the plaintiffs to perform their part of the contract, and has come to the finding that the plaintiffs have been ever ready and willing to perform their part of the contract. On the basis of these findings, the learned court below has decreed the suit directing the defendant to execute four sale deeds in favour of the plaintiffs(one sale deed for each of the plaintiff) within three months and further directed the plaintiffs to pay Rs. 1,48,500/- to the defendant at the time of execution of the sale deeds.

5. The assail of Mr. Abbas Haider, the Learned Counsel appearing on behalf of the defendant appellant to the impugned judgment is mainly based upon Section 16(c) of the Specific Relief Act. The Learned Counsel has submitted that the relief for specific performance of contract is a discretionary relief and it is not necessary in all cases where the agreement for sale is established by the plaintiff to grant a decree for specific performance of contract. It has been urged that besides proving the legality and validity of the agreement for sale, the plaintiff, in order to succeed in a suit for specific performance of contract, will have to establish his continuous readiness and willingness to perform his part of the contract. The Learned Counsel has placed the discussion by the learned court below in the judgment under appeal on the aspect of readiness and willingness of the plaintiffs, and emphasized that the learned court below has approached this issue in a casual manner and has failed to appreciate the essence of the provision of Section 16(c) of the Specific Relief Act. Elaborating his submission, the Learned Counsel has canvassed that even after accepting but not conceding the validity and legality of the agreement for sale, it is explicit from the plaintiffs' case that the total consideration amount is Rs. 1,50,001/- out of which Rs. 1501/- has been paid as advance and the adjustment of Rs. 31,000/- of the mortgage money has been agreed, and as such the plaintiffs have although maintained that they have been ready and willing to pay Rs. 1,17,500/- only but the learned court below has accepted the adjustment of the earnest money of Rs. 1501/- alone and has disbelieved the case of adjustment of the mortgage money in the consideration amount. This finding has become final as the plaintiffs have not preferred any cross objection in that regard and as such there is nothing on the record to establish that the plaintiffs have been ready and willing to pay the entire remaining consideration money amounting to Rs. 1,48,500/-. On this basis the Learned Counsel has emphatically submitted that the relief for specific performance of contract, as sought by the plaintiffs, could not be granted in view of the bar envisaged in the proviso of Section 16(C) of the

Specific Relief Act.

6. Md. Farookh Ahmad, the Learned Counsel appearing on behalf of the plaintiffs-respondents, in reply, has submitted that the plaintiffs have paid the court fee on the total amount of consideration money i.e. Rs. 1,50,001/- and this fact alone is indicative of their readiness and willingness to perform their part of the contract. It has been further contended that in view of the finding that the mortgage deeds as mentioned in Schedule B were valid and legal documents, the learned court below has committed no illegality in directing the plaintiffs to pay the remaining consideration amount after adjustment of only the earnest money leaving aside the mortgage money. The Learned Counsel has canvassed that the provision of Section 16(c) of the Specific Relief Act should not be interpreted narrowly and in conservative manner, and once the agreement for sale has been established and payment of advance money has also been established by the plaintiffs, the decree for specific performance becomes the inevitable consequence in the interest of justice. Much emphasis has again been laid by the Learned Counsel on the payment of the ad valorem court fee on the total consideration money by the plaintiff in order to establish that the said fact sufficiently demonstrates the readiness and willingness of the plaintiffs to perform their part of the contract and the reliance has been placed on the decision of the apex court in the case of P. D'Souza Vs. Shondriilo Naidu, in support of the proposition that there can be no strait jacket formula for determining the readiness and willingness of the plaintiff.

7. In view of the rival contention of the parties, the issues arising for determination in this appeal are as to whether the plaintiffs' relief for specific performance of contract will be barred by the provision of Section 16(c) Specific Relief Act and whether the learned court below has rightly decided the point of readiness and willingness of the plaintiff in view of the pleading and evidence on the record.

8. The provision contained in Section 16(c) of the Specific Relief Act is in the nature of personal bar to the relief of specific performance of contract to a person who has failed to aver and prove his continuous readiness and willingness to perform his part of the contract. The said provision reads as follows:

S.16. Personal bars to relief-Specific performance of a contract cannot be enforced in favour of a person

(a) x x x

(b) x x x

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential term of the contract which are to be preformed by him, other than the term the performance of which has been prevented or waived by the defendant.

The aforesaid provision has come up for consideration in several decisions of the

Hon"ble Supreme Court and it has been consistently laid down that in order to succeed in getting the relief for specific performance of contract, it is essential for the plaintiff to not only aver his readiness and willingness to perform his part of the contract but also to establish the said fact by appropriate evidence. In a recent decision in the case of J.P. Builders and Another Vs. A. Ramadas Rao and Another, , their lordships have observed as follows:-

...Section 16(c) of the Specific Relief Act, 1963 mandates "readiness and willingness" on the part of the plaintiff and it is a condition precedent for obtaining relief for grant of specific performance...

It has been further observed:

..It is settled law that even in the absence of specific plea by the opposite party, it is mandate of the statute that the plaintiff has to comply with Section 16(c) of the Specific Relief Act and when there is non-compliance with this statutory mandate, the Court is not bound to grant specific performance and is left with no other alternative but to dismiss the suit...

9. The plaintiffs' case is that the total amount of consideration money for sale of the suit property has been agreed to be Rs. 1,50,001/- out of which Rs. 1501/- have been paid to the defendant by way of advance. Further, in paragraph 6 of the plaint, it has been specifically pleaded that the agreement was to adjust the mortgage amount of Rs. 31,000/- and advance amount of Rs. 1501/- in the consideration money and thus the remaining consideration money was Rs. 1,17,500/-. In the subsequent paragraphs the plaintiffs have stated that when they became ready with the remaining consideration amount of Rs. 1,17,500/-, they requested the defendant to receive the said amount and execute the sale deeds as agreed. It has also been stated that the notice was also sent to the defendant through advocate, calling upon him to receive the remaining consideration money of Rs. 1,17,500/- and execute the sale deeds. It would be relevant to quote paragraph No. 12 of the plaint which reads as follows:

Para. 12. That the plaintiffs have been ready and are always willing to pay the remaining amount of consideration money i.e. 1,17,500/- and are ready and willing to perform their part of the contract.

10. The plaintiff No. 1 has been examined as P.W. 16 in the suit and he has accepted that the amount of mortgage money was to be adjusted in the total consideration money of Rs. 1,50,001/-. He has further stated that the necessary amount was arranged within 10 days after the execution of the agreement for sale. He has also stated that after the refusal by the defendant, he got the legal notice sent to him for execution of the sale deed.

11. Ext.4 & 4/A are copies of the legal notice sent at the instance of the plaintiff No. 1 to the defendant. In Ext.4, it has been clearly stated that only Rs. 1,17,500/- was to be paid by the plaintiffs to the defendant for execution of the sale deed and the defendant was called upon to accept the aforesaid amount and

execute the sale deed. The Ext.B/1 is the reply notice given on behalf of the plaintiff by his advocate to the defendant. In this reply notice also it has been reiterated by the plaintiffs that they were ready to pay the remaining money of Rs. 1,17,500/- for execution and registration of the sale deeds as per the agreement.

12. Learned court below, after considering the terms of the Bai Bayana (Ext.19), has come to the finding that the plaintiffs were liable to pay the balance consideration money of Rs. 1,48,500/- as per the agreed terms. The learned court below has disbelieved the case of the plaintiff that the mortgage money was to be adjusted in the consideration money and found them liable for payment of Rs. 1,48,500/- after the adjustment of only the advance money of Rs. 1501/-. In view of this finding, it is plain and patent that the part of the contract which the plaintiff has been required to perform was to offer and pay Rs. 1,48,500/- which was the actual balance consideration amount. The pleading of the plaintiffs and their evidence only disclose that the plaintiffs have been ready and willing to pay only 1,17,500/- to the defendant and have never been ready and willing to pay the amount of Rs. 1,48,500/- which was the balance consideration amount.

13. The terms "readiness" and "willingness" in Section 16(c) of the Specific Relief Act have been purposely used by the legislature and refer to the physical and mental preparedness of the plaintiff to perform his part of the contract. In other words, if in a suit for specific performance of contract for sale, the plaintiff is required under the agreement, to pay an amount, he must aver and establish that the required amount is ready with him and he bonafidely intends to pay the same to the defendant. It has also been held in the J.P. Builder's case (Supra) that "the word "readiness" refers to financial capacity and "willingness" to the conduct of the plaintiff wanting performance and generally readiness is backed by willingness".

14. On the studied scrutiny of the pleading and evidence of the plaintiffs, it is clear that the plaintiffs have nowhere averred and expressed their readiness and willingness to pay the balance consideration money of Rs. 1,48,500/- rather they have come before the Court with specific case that only Rs. 1,17,500/- is the remaining amount of consideration which they have been continuously ready and willing to pay to the defendant. The question that emanates here is whether on the basis of this case, the plaintiffs are entitled to a decree for specific performance of contract as prayed particularly in view of the finding that the plaintiffs in fact were required to pay Rs. 1,48,500/?.

15. No cross objection has been filed by the plaintiffs challenging the finding of the learned court below that the adjustment of the amount of the mortgage dues in the consideration amount was not the agreed terms between the parties and the plaintiffs are required to pay Rs. 1,48,500/- which is the part of the contract to be performed by them. The Learned Counsel for the appellant has submitted that this finding has now attained finality and cannot be reopened in absence of

the cross-objection. However, the Learned Counsel for the respondents has submitted that in view of the provision of Order 41 Rule 22 C.P.C., the respondents are entitled to assail this finding even without preferring a cross-objection.

16. The principles underlying the provision of Order 41 Rule 22 is no longer res integra. In the case of Banarsi and Others Vs. Ram Phal, , their lordships have considered this provision and laid down that in a case where the challenge to a finding by the court below, if succeeds, would result in the modification/variation of the decree, the respondent cannot be permitted to do this in absence of a cross-objection by him. It would be condign here to notice their lordships' observation:

...A respondent may defend himself without filing any cross-objection to the extent to which decree is in his favour; however, if he proposes to attack any part of the decree he must take cross-objection...

17. In the present case, if the plaintiff-respondents are permitted to assail the finding regarding the adjustment of mortgage money in the consideration amount and thereby establish their liability to pay only Rs. 1,17,500/-, it would certainly involve modification/variation in the impugned decree whereby the plaintiffs have been held liable to pay Rs. 1,48,500/-. Their lordships have further also laid down that the appellate court even in exercise of its power under Order 41 Rule 33 C.P.C. also cannot allow such a challenge by the respondent.

18. It has been submitted on behalf of the respondent that the plaintiff has paid the court fee in the suit on the total consideration money of Rs. 1,50,001/- which itself establishes the readiness and willingness of the plaintiffs to pay even that much of the amount. This submission has been apparently made in desperation because the valuation of the suit or the quantum of amount paid as court fee can never be the determining factor for the purpose of Section 16(c) of the Specific Relief Act which requires pleading and proof of the readiness and willingness by the plaintiff to perform his part of the contract. The plaintiffs have pleaded readiness and willingness for payment of only Rs. 1,17,500/- and their evidence also corroborate the said fact. There is no whisper anywhere in the pleading or evidence that the plaintiffs have been ready and willing to pay the entire amount of consideration i.e. Rs. 1,50,001/- ignoring even the advance payment of Rs. 1501/- by them. The decision in P.D'Souza case(Supra) has been rendered in an entirely different set of facts and is not applicable in the present case but even in this decision, the requirement of the plaintiff to establish his readiness and willingness has been emphasized.

19. In the ultimate eventuate, the inescapable conclusion is that the plaintiffs have squarely failed to aver and prove that they have always ready and willing to perform their part of contract and thus the bar created u/s 16(c) of the Specific Relief Act, 1963 is clearly attracted. The learned court below, after finding that the plaintiffs are required to pay Rs. 1,48,500/- which is their part of contract,

has failed to consider the total absence of the pleading and evidence of the plaintiff to pay that sum. Thus, the learned court below has committed illegality in holding that the plaintiffs have always been ready and willing to perform their part of contract and the said finding is accordingly, set aside. In the result, this appeal succeeds and it is held that the plaintiffs are not entitled to the decree of specific performance of contract as prayed. The impugned judgment and decree of the court below is, accordingly, set aside. And the suit is dismissed. However, in the facts and circumstances of the case, the parties shall bear their own costs.