

(1978) 08 BOM CK 0015
In the Bombay High Court
Case No : A.F.A.D. No. 152 of 1967

Bhaurao Shamrao Bhalme and Others	APPELLANT
Vs	
Mahadeo Raghu Yelekar	RESPONDENT

Date of Decision : 16-08-1978

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 6
Specific Relief Act, 1877 — Section 22
Specific Relief Act, 1963 — Section 12, 12(3), 20, 20(1)

Citation : AIR 1979 Bom 208 : (1979) 81 BOMLR 323

Hon'ble Judges : Ginwala, J

Bench : Single Bench

Advocate : W.G. Deo, for the Appellant; P.N. Karekar, for the Respondent

Final Decision : Dismissed

Judgement

1. The appellants had brought a suit against the respondent for specific performance of a contract of sale of a field admeasuring 10 acres for a consideration of Rs.400/-. The suit was dismissed by the trial Court and the first appellate Court confirmed the said decree. It is against the decree of the first appellate Court that this appeal has been filed.

2. Shortly stated the case of the appellants was that on 27th May 1961 the respondent had contracted to sell the suit field to one Narayanrao for a consideration of Rs.400/- out of which he received Rs.225/- as earnest money and executed an agreement in this respect Under the terms of the agreement the sale was to be completed on Chaitra Sudha 15 Shake 1371 which corresponds to 19th April 1962, by Narayanrao paying the balance of the consideration of Rs.175/- and obtaining the sale deed by remaining present in the office of the Sub-Registrar. The appellants alleged that the respondent did not perform his part of the contract. Though Narayan was ready and willing to do so and called upon the respondent by his notice dated 25th June 1962 to complete the sale, the respondent avoided to do so and refused to execute the

sale deed. The appellants further alleged that said Narayan had, by his wills dated 19th Dec. 1956 and 22nd Sept. 1959, bequeathed all his estate to the appellants and hence they were entitled to bring the suit for specific performance against the respondent. The appellants, therefore, sought specific performance of the said agreement for sale and in the alternative for refund of the earnest money of Rs.225/-.

3. The respondent resisted the suit by raising various contentions. He denied that the appellants had acquired title to the estate of deceased Narayanrao by virtue of the alleged wills and that they were entitled to maintain the suit. He denied that he had entered into an agreement for sale or had executed any document in that respect as alleged by the appellants. He further contended that the suit field did not belong to him alone but it was the property of the joint family consisting of himself and his brothers and his eldest brother, namely Bhuja was the Karta of the family and hence he alone was not entitled to enter into any transaction with regard to the suit field in which he held only 1/4th share. Lastly he contended that he had not received the amount of Rs.225/- in cash as alleged in the agreement but Narayan had obtained certain documents from him (respondent) and his brothers for certain transactions of loan. According to the respondent, the document evidencing the agreement had been obtained from him by practising fraud and it was not intended to be acted upon.

4. After considering the evidence on record the learned trial Judge held that the respondent had agreed to sell the Suit field to Narayan for a consideration of Rs.400/- and had also accepted Rs.225/- as earnest money. However, the learned trial Judge held that there was no evidence to show that the appellants were ready and willing to perform their part of the contract and that the respondent had only 1/4th share in the suit field and he alone was not competent to sell the entire field. The learned trial Judge, therefore, held that the appellants were not entitled to specific performance of the said contract. With regard to the maintainability of the suit by the appellants the learned trial Judge held that they were entitled to do so. In view of these findings the learned trial Judge rejected the suit in so far as it related to specific performance of the agreement but decreed it with regard to refund of the earnest money of Rs.225/- with interest at 6% per annum from the date of the decree till realisation. The appellants went in appeal to the District Court. The learned District Judge was of the view that granting specific performance being a matter within the discretion of the Court, the appellants were not entitled to claim that relief in appeal in the absence of anything on record to show that the discretion had been wrongly or arbitrarily exercised. On his part the learned District Judge enumerated certain circumstances which disentitled the appellants from claiming specific performance of the agreement. He pointed out that though the agreement had taken place in 1961, no action was taken by the appellants till the suit was filed in 1965. He further pointed out that it was not stated in the evidence that Narayanrao, while alive, had showed his willingness to perform his part of the contract and the appellants, who claim to be his legatees, had come forward to

enforce the agreement after a lapse of more than 2 1/2 years. The learned District Judge also noted that in the circumstances in which the agreement had been arrived at, a doubt was cast on the genuineness of the appellants' claim for specific performance of the contract. According to the learned District Judge, the evidence on the part of the appellants showed that the agreement was not intended to be acted upon but was a device to conceal some other transaction under its cloak. In this view of the matter, the learned appellate Judge confirmed the decree passed by the learned trial Judge, and dismissed the appeal. It is against this judgment and decree that the present appeal has been filed.

5. Mr. Deo, the learned counsel for the appellants, submitted that the learned trial Judge having come to the conclusion that the respondent had agreed to sell the suit field to Narayanrao and had also accepted a sum of Rs.225/- as earnest money, he should have decreed the appellants' suit for specific performance of the agreement. Mr. Deo submitted that there was nothing on record to disentitle the appellants from having this relief. Mr. Deo submitted that the trial Court had not refused the specific performance of the contract in favour of the appellants not in its discretion but because of its finding that the appellants had not averred that they were ready and willing to perform their part of the contract and that the respondent alone was not entitled to sell the suit field which belonged to a joint family, Mr. Deo submitted that in so far as averment in the plaint is concerned, the appellants did say in para 3 of the plaint that Narayanrao was ready and willing to perform his part of the contract and, therefore, he called upon the respondent by his notice dated 25th June 1962 to perform his part of the contract. Hence, according to Mr. Deo, there was an averment in the plaint to the effect that the predecessor-in-title of the appellants was ready and willing to perform his part of the contract. Relying on the provisions of Order 6 Rule 6 of the Civil P. C. and certain observations of the erstwhile Nagpur High Court in AIR 1937 345 (Nagpur) Mr. Deo contended that it was not necessary for the appellants to contend specifically in the plaint that they were ready and willing to perform their part of the contract and that at any rate the claim of the appellants should not fail on this technical ground, as has been observed in Arjunsa's case. According to Mr. Deo, the Courts below ought to have held that the appellants were ready and willing to perform their part of the contract. With regard to the capacity of the respondent to sell the entire field, Mr. Deo, submitted that the Courts below could have directed specific performance of 1/4th share of the respondent if they held that he had that much interest only in the suit field. In the result, therefore, Mr. Deo submitted that the Courts below ought to have decreed the suit for specific performance of the agreement.

6. Mr. Karekar, the learned counsel for the respondent, submitted that in a suit for specific performance of an agreement the plaintiff has to allege and if that fact is traversed, he has to prove his continuous readiness and willingness from the date of the contract to the time of hearing to perform the contract on his part and failure to make good such an averment would result in the dismissal of the suit. For this proposition Mr. Karekar, relied on the decision of the Supreme Court

in Prem Raj Vs. D.L.F. Housing and Construction Pvt. Ltd. and Another, and of the Privy Council in Ardeshir v. Flora Sassoon (AIR 1928 PC 208). Mr. Karekar pointed out that not only that there was no averment in the plaint to the effect that the appellants were ready and willing to perform their part of the contract but there was nothing in the evidence also to give any indication to that effect or to show that the appellants had taken any steps whatsoever at least up to the date when the suit is filed in order to get the contract performed. Mr. Karekar, therefore, submitted that on this count alone the suit was liable to be dismissed. He further submitted that inasmuch as the respondent could convey only 1/4th share in the suit field, the provisions of Section 12 of the Specific Relief Act, 1963 would be attracted and specific performance of the agreement to the extent of the respondent's share in the suit field could not be directed unless and until the conditions in Sub-section (3) of Section 12 were satisfied. Shri Karekar, therefore, supported the decree passed by the lower Courts.

7. Sub-section (1) of Section 20 of the Specific Relief Act, 1963 provides that the jurisdiction, to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal. This sub-section corresponds to Section 22 of the Specific Relief Act, 1877. In Madamsetty Satyanarayana Vs. G. Yellogi Rao and Others, the Supreme Court observed that u/s 22 of the Specific Relief Act, 1877, relief of specific performance is discretionary but not arbitrary and the discretion ought to be exercised in accordance with sound and reasonable judicial principles and that the cases providing for a guide to Courts to exercise discretion one way or other are only illustrative. Their Lordships observed that it was difficult to define the field in which this discretion operates. According to them, diverse situations may arise which may induce a Court not to exercise the discretion in favour of the plaintiff and it would be better to leave this field undefined except to state what the Section says namely, that the discretion of the Court is not arbitrary, but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal. Bearing these principles in mind one has to approach at a suit for specific performance of contracts

8. In Ardeshir v. Flora Sassoon AIR 1928 PC 208, the Privy Council observed as follows:--

"Where the injured party sued at law for a breach, going as in the present case, to the root of the contract, he thereby elected to treat the contract as at an end and himself as discharged from its obligations. No further performance by him was either contemplated or had to be tendered.

In a suit for specific performance on the other hand, he treated and was required by the Court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove a continuous readiness and willingness, from the date of the contract to the time of the hearing, to

perform the contract on his part. Failure to make good that averment brought with it the inevitable dismissal of his suit."

These observations of the Privy Council were cited with approval by the Supreme Court in Prem Raj Vs. D.L.F. Housing and Construction Pvt. Ltd. and Another, . Their Lordships found that in the case before them there was no averment on the part of the plaintiff in the plaint that he was ready to perform his part of the contract and according to their Lordships, in the absence of such an averment it ought to be held that the plaintiff had no cause of action so far as the relief for specific performance was concerned. Thus in the light of the observations of the Privy Council In Ardeshir's case and those of the Supreme Court in Prem Raj's case it is clear that in a suit for specific performance of an agreement the plaintiff has not only to aver that he is ready and willing to perform his part of the contract from the date of the contract to the time of the hearing of the suit but he has also to prove the same if that averment is contravened. Failure to make such an averment and to prove it would, in the words of the Privy Council, bring with it the inevitable dismissal of the suit. It is true that in Arjuna's case AIR 1837 Nag 345, cited by Mr. Deo, the Nagpur High Court did observe that the Privy Council has said on many occasions that some latitude should be given in the case of Mofussil pleadings, and the Division Bench bearing in mind O. V. R. 6 and the actual allegations made in the claim before it was of the opinion that the claim of the plaintiff should not fail for failure to comply with the technical rules of pleading. However, it has to be noted that in Arjuna's case the Division Bench was dealing with a suit for damages for breach of contract and not with a suit for specific performance of contract wherein readiness and willingness to perform his part of the contract has to be alleged by the plaintiff. In my opinion, in view of what has been said by the Privy Council in Ardeshir's case and by the Supreme Court in Prem Raj's case, It cannot be gainsaid that such an averment has to be made by the plaintiff in a suit for specific performance of contract and not only that he has to make such an averment, but he has to substantiate it by means of evidence, if that fact is controverted.

9. Coming to the facts of the present case, It would appear that there is no averment whatsoever in the plaint to the effect that the appellants were ready and willing to perform their part of the agreement at least till the date of the suit. What has been averred in para 3 of the plaint, on which reliance is sought to be placed by Mr. Deo, is that as the respondent has failed to convey the suit field. Narayanrao, by his notice dated 25th June 1962, has intimated to the respondent that he was ready and willing to perform his part of the contract. Insofar as Narayanrao was concerned he was admittedly not alive till the time the suit was filed. The suit as has been seen above, had been instituted by the appellants claiming to be the legatees of Narayanrao and they have not alleged that they were on their part ready and willing to complete the contract. On the other hand, Shamrao, who is the father of the appellants and who deposed as a guardian of appellants Nos. 2 and 3, said that the appellants had not given any notice to the respondent about the suit transaction. Now the notice which was

alleged to be given by Narayanrao to the respondent on 25th June 1962 is not on record and it is not possible to see what Narayanrao had stated in it. It appears that the respondent had given a reply to this notice. That also has not been brought on record. In this state of affaire, therefore, it is not possible to say that there is an averment in the plaint to indicate that the appellants were ready and willing to perform their part of the contract at least till the date of the suit. The evidence adduced by the appellants is silent on this point. No doubt, Shamrao says that the appellants had called upon the respondent to execute the sale deed but this he says with reference to the notice alleged to have been given by Narayanrao on 25th June 1962. In the absence of any averment, therefore, it is not possible to hold that the appellants were entitled to the decree for a specific performance of the contract.

10. In this view of the matter, it is not necessary to consider whether the Courts below should have directed specific performance of the agreement in so far as it related to the share of the respondent in the suit field. In this connection it may be pertinent to note that Sub-section (3) of Section 12 of the Specific Relief Act, 1963 provides that where a party to a contract is unable to perform the whole or his part of it, he is not entitled to obtain a decree for specific performance if the part which must be left unperformed forms a considerable part of the whole, though admitting of compensation in money or if the part which must be left unperformed does not admit of compensation in money. However, at the suit of the other party, the Court may direct such a party in default to perform specifically so much of his part of the contract as he can perform if the party bringing the suit, that is the plaintiff, fulfills the conditions laid down in else (i) and (ii) of that Sub-section. These conditions are firstly that in the case in which the part which must be left unperformed forms a considerable part of the whole and admits of compensation in money, the plaintiff must pay the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed, while in the case in which the unperformed part does not admit of compensation in money, the plaintiff must pay consideration for the whole of the contract without any abatement. The second condition is that in either of the above two cases, the plaintiff must relinquish all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant. It would be thus evident that a party to a contract which brings the suit under the provisions of Sub-section (3) of Section 12 of the Specific Relief Act, 1963, for specific performance of part of the contract, must frame its suit in the light of that Sub-section incorporating the required averments to bring its case within its four corners. In other words, the frame of a suit for specific performance of the whole contract is distinct from that for specific performance of part of it, as different considerations arise in the two suits. Moreover the defendant must have an opportunity by pleading and if necessary by adducing evidence, to show that the plaintiff is not entitled to specific performance of part of the contract. This he can do if there is a pleading

on the part of the plaintiff bringing his case within the purview of the said Sub-section. It may be that the plaintiff can make an alternate claim for specific performance of the whole contract or only for a part of it. but if he intends to do so it must be clear from the plaint so as to give notice of it to the defendant He cannot bring the suit merely for specific performance of the whole contract and realising at the conclusion of the trial that that is not possible turn round and tell the Court that he may be granted decree for specific performance of that part only which is possible. This is what the appellants want to do in the matter and that too at the stage of second appeal. In my opinion, for the reasons stated above, the appellants could not press for the specific performance of the agreement in so far as it relates to the share of the respondent in the suit property.

11. In this view of the matter, it cannot be said that the Courts below were wrong in dismissing the suit. In the result, therefore, there is no substance in this appeal and it is dismissed with costs.

12. Appeal dismissed