

(1996) 07 BOM CK 0008
In the Bombay High Court
Case No : S.A. No. 269 of 1982

Bhikaram Nathuji Vanjari and Another	APPELLANT
Vs	
Saraswatibai Molilal Zarkariya	RESPONDENT

Date of Decision : 16-07-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2
Specific Relief Act, 1963 — Section 16(c)

Citation : (1997) 3 CivCC 369

Hon'ble Judges : S.B. Mhase, J

Bench : Single Bench

Advocate : V. Bhangde, for the Appellant; S.A. Jaiswal, for the Respondent

Judgement

S.B. Mhase, J.—This appeal is directed against the judgment and decree passed by District Judge, Nagpur in Regular Civil Appeal No. 210/80, confirming the judgment and decree in Reg. Civil Suit No. 433/73 dated 20.2.1978 on the file of 4th Jt. Civil Judge, Jr. Dn. Nagpur. The present appeal is by the original defendants. The respondent is original plaintiff.

2. The respondent filed a suit for enforcement of specific performance of contract dated 6.4.1971, wherein it was agreed by the defendants to sell house constructed on plot No. 91, K.h.Nos.9/2 and 14/3, Ward Nc.8 situated in Vishwakarma Nagar within the limits of Nagpur Improvement Trust and Corporation. The agreed price was fixed at Rs. 4,000/- and out of the said amount of consideration, an amount of Rs. 4,000/- was paid before the said agreement was registered in the office of Sub-Registrar, Nagpur. It was further agreed between appellants and respondent that the ale-deed was to be executed on or before 5.4.1972 and Rebalance amount of Rs. 2,000/- was to be paid at that lime. However, respondent stated that the appellants avoided the performance of contract and, therefore, respondent issued notice on 25.2.1973 to the appellants. It is further case of respondent that on the scheduled date he had been to the office of Sub Registrar and waited there throughout the day.

Appellants did not turn up for executing the sale-deed and, therefore, respondent obtained endorsement on an affidavit from the Sub Registrar in order to establish his presence on that date. According to respondent, appellants ultimately avoided to execute the sale-deed as per the agreement and, therefore, the suit was filed for seeking specific performance of agreement. The suit was contested on numerous grounds and with a contention that the transaction was a money lending transaction and that the appellants were in need of money for the marriage of their son Janardan and, therefore, Rs. 400/- and Rs. 3,000/- were advanced and the document was only by way of security for the said amount. According to the appellants, the price was inadequate and the market price of the suit property was Rs. 25,000/- to 30,000/-.

3. Both the Lower Courts affirmed that the transaction between appellants and respondent dated 6.4.1971 was not of money lending but it was transaction of agreement to sell the suit property and both the Lower Courts have granted specific performance of contract decreeing the suit in favour of the respondent

4. In this second appeal, the substantial question of law which is raised and which arises for decision of this Court is as to whether plaintiffs suit is maintainable in the absence of pleadings and averments as required by Section 16(c) of Specific Relief Act; and whether respondents have proved the readiness and willingness to perform his part of the contract as required u/s 16 of the Specific Relief Act.

5. Section 16(c) of the Specific Relief Act is reproduced as under for the sake of convenience.

S. 16. Specific performance of contract cannot be enforced in favour of a person:

(a)

(b)

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

6. This provision came to be incorporated in the Specific Relief Act, 1963, However, the same was not the, provision in the Specific Relief Act of 1877. However, even though the earlier Act, there was no requirement like that of Section 16(c) to be followed by the party seeking specific performance, still it has been observed by the Privy Council in the matter of AIR 1928 208 (Privy Council) that "where the injured party sued at law for 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." In the absence of the provisions like that of Section 16(c), it was required by the Privy Council that the person seeking performance of contract has to aver and prove the continuous readiness and willingness to perform his part of the contract. By the said Privy Council Judgment, it was clear that this was the law in England and that the requirement of Indian and English law in this matter were the same. The Law Commission, therefore, recommended that the new Specific Relief Act should specifically include this requirement to be fulfilled by the plaintiff suing for specific performance and therefore, the provisions of Section 16(c) were incorporated in the Specific Relief Act, 1963. *Raj Rani Bhasin and Others Vs. S. Kartar Singh Mehta*, relevant para 9. Not only this but the ratio laid down by the 1928 Privy Council referred to above was followed by the Supreme Court in the matter of *Prem Raj Vs. D.L.F. Housing and Construction Pvt. Ltd. and Another*, . This High Court has also considered the provisions of Section 16(c) in the matter of *Bhaurao v. Mahadeo*, AIR 1979 Bom. 209 and while considering the said provision, reliance was placed on AIR 1928 208 (Privy Council) and *Prem Raj Vs. D.L.F. Housing and Construction Pvt. Ltd. and Another*, referred to above and it has been observed 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 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 bring with it the inevitable dismissal of the suit. It is pertinent to note that in the facts and circumstances of the case, it was considered in AIR 1979 Bom.209 that there was no averment whatsoever in the plaint to the effect that plaintiffs were ready and willing to perform their part of contract at-least till the date of suit and consequently suit came to be dismissed.

7. Shri Bhangde, learned counsel for the appellant apart from pointing out the above referred judgments, has also pointed out the judgment in the matter of *Ouseph Varghese Vs. Joseph Aley and Others*, . It has been observed in para 9 of the said judgment that "the plaintiff did not plead either in the plaint or at any subsequent stage that he was ready and willing to perform the agreement pleaded in the written statement of defendant. A suit for specific performance has to conform to the requirements prescribed in Forms 47 and 48 of the 1st Schedule in the Civil Procedure Code. In a suit for specific performance it is incumbent on the plaintiff not only to set out agreement on the basis of which he sues in all its details, he must go further and plead that he has applied to the defendant specifically to perform the agreement pleaded by him but the defendant has not done so. He must further plead that he has been and is still ready and willing to specifically perform his part of agreement. Neither in the plaint nor at any subsequent stage of the suit the plaintiff has taken those steps. As observed by this Court in *Prem Raj v. D.L.F.H. and C. Ltd.*, that it is well

settled that in suit for specific performance the plaintiff, who alleges that he is ready and willing to perform his part of the contract and in the absence of such an allegation, suit is not maintainable." It was also pointed out that in the matter of Vrindavanibai Sambhaji Mane Vs. Ramachandra Vithal Ganeshkar and others, , the Apex Court had the occasion to consider the provisions of Section 16(c) and it has been observed in para 5 of the aid judgment that "it is settled law that remedy for specific performance is an equitable remedy and is in the discretion of the Court, which discretion requires to be exercised according to settled principles of law and not arbitrarily as adumbrated u/s 20 of the Specific Relief Act. 1963 u/s 20, the Court is not bound to grant the relief just because there was a valid agreement of sale. Section 16(c) of Specific Relief Act envisages that plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance "S material and relevant and is required to be considered by the Court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail." In the matter of Abdul Khader Rowther Vs. P.K. Sara Bai and Others, , it has been laid down that the plaintiff-appellant brought a suit for specific performance of a covenant for recoveyance. His plaint did not contain the requisite allegation that he is ready and willing to perform his part of the contract in terms of Forms 47 and 48 which was necessary to obtain a decree for specific performance. The Court observed that the equitable remedy recognised by Specific Relief Act could not be had on the basis of such pleadings and evidence and ultimately refused to grant specific performance

8. All these judgments are very emphatic and consistent that the compliance of Section 16(c) by a person or plaintiff seeking specific performance of contract or agreement is a must and failure on the part of the plaintiff to make such averment and further to prove them is fatal to the plaintiffs claim of specific performance. The question, therefore, which arises for consideration is that Section 16(c) requires initially the averment and then at the trial proof of such an averment. All the judgments which are referred to above, make a reference to readiness and willingness to perform the essential terms of contract, which are to be performed by a person seeking performance of agreement.

9. What is important from the above referred judgments that the plaintiff has to take precaution not only at the lime of leading evidence at the stage of trial but law has cast additional duty on the plaintiff to be cautious at the time of drafting of the plaint itself because law requires that the plaint shall contain statement as required by Section 16(c) of the Specific Relief Act. Therefore, the combined reading of Section 16(c) read with the Forms provided under Order VI, Rule 3 bearing Nos.47 and 48 is that the plaint must contain averment of statement as required by Section 16(c) of Specific Relief Act as has been observed by the

Supreme Court in above referred judgments. It is further clarified that Order VI, Rule 2, CPC requires that every pleading shall contain only statements in concise form of material facts, on which party pleading relies for his claim or defence as the case may be but not the evidence by which they are to be proved. Thus rule requires that the material facts from which cause of action arises are required to be stated concisely in the plaint. On the basis of this, it was tried to submit by Mr. Jaiswal that if the plaint contains material facts showing that the plaintiff was ready and willing to perform his part of the contract and thereby further proceeds to prove those facts, according to him, it is the compliance of Section 16(c) for the purpose of decreeing the suit. With respect. I am not in agreement with this submission" of Mr. Jaiswal. I am of the opinion that the law requires in a suit for specific performance of contract or agreement that the plaint must contain concise statements of material facts as required in respect of other normal suits but in addition to that law has cast additional duty on the plaintiff to aver further his readiness and willingness to perform his part of contract as required by Section 16(c), when the suit is for specific performance of agreement. I feel that Section 16(c) is an additional mandatory rule of pleading to be read with Order VI. Rule 2 for the purpose of making a complete cause of action in a suit for specific performance of agreement. It is also an additional rule of evidence to be followed while leading evidence in such suit

10. Therefore, it becomes necessary, in the light of above observations and law that as to whether the present plaint which has been filed by respondent satisfies requirements of Section 16(c) of Specific Relief Act. The relevant portion of the plaint, which is required to be considered is in para 2 and which runs as under:

It was agreed between the parties that the sale-deed will be execute don or before 5 4 1072. The balance amount of Rs. 2,000/- was to be paid at the time of registration of sale-deed. The plaintiff was always willing to complete his part of the contract. The plaintiff sent registered notice to defendant to execute the sale-deed but they avoided to complete their part of the contract for no reasons whatsoever. The plaintiff, therefore, served a notice dated 25.2.1973 calling upon the defendant to remain present on 13.3.1973 at 11.00 a.m. in the office of Sub-Registrar in Mahal Corporation, Nagpur to execute the sale-deed and to receive the amount. The defendants received notice "out did not remain present in the office of Sub Registrar to execute the sale-deed. The defendants are thus not willing to perform their part of the contract. Hence this suit.

The underlined (in italics) portion in the above: quotation i.e. that the plaintiff was always willing to complete his part of the contract, is an averment, according to Mr. Jaiswal. which satisfies the requirement of Section 16(c). On proper analysis, it will be found from the said sentence that the said sentence: is in past tense and, therefore, shows willingness to complete his part of contract in the past. That does not show the present willingness of the plaintiff to perform his part of the contract on the date of institution of the suit. Not only that, there is a conspicuous absence of the word "readiness" and even the word "readiness" is

assumed to be there, which will lead to past readiness and not the present readiness. It will be also evident that the averments are not in consonance with the Forms 47 and 48 provided under Order VI, Rule 3, Civil Procedure Code. Apart from this, there is no specific averment in the plaint as stated by the Supreme Court discharging obligation showing readiness and willingness to performing that part of the contract, which the plaintiff is bound to perform under the agreement. Therefore, even, though para 2 of the plaint may contain material statement, showing his past willingness to perform his part of contract, there is nothing in this part, which will lead to infer the present willingness to perform the agreement or contract of which performance is being asked for. I have no hesitation to infer that para 2 or any part of the said plaint filed by the plaintiff does not contain an averment as required by Section 16(c) and, therefore, the suit filed by the plaintiff/respondent suffers from defect of noncompliance of Section 16(c), which in terms was mandatory to be observed by the plaintiff and, therefore, on this ground alone, suit filed by the plaintiff is liable to be dismissed. I may make a reference that both the Courts below have made a casual reference to the grounds, even though raised by the appellants that the suit suffers from draw-back of Section 16(c). The reasons, given by both the lower Courts that the respondents have averred and proved the readiness and willingness as required by Section 16(c) are not just and legal and are hereby set aside. Therefore, there is no other alternative but to dismiss the suit filed by the plaintiff.

11. Apart from the above discussion, even if the case of plaintiff/respondent is scrutinised for the purpose as to whether respondent has proved readiness and willingness to perform his part of the contract, it will be evident that the respondent herself has not entered into the witness box and the respondent's husband has deposed on her behalf. Apart from proving the agreement of sale (Exh.44), he has stated that he has issued notice on 25.2.1973 to appellants/plaintiffs, which is at Exh.45 and the acknowledgments of the said notice are at Exhs.46 and 47. Second notice was also issued on 6.3.1973 which is at Exh.48 and the acknowledgements of said notice are at Exhs.49 and 50. He further stated that on 30.3.1973, he had gone to the office of Sub-Registrar alongwith his wife to get the sale-deed executed. However, defendant/appellant did not turn up. Thereafter, he submitted application before the Sub Registrar and obtained endorsement on the same, which is at Exh.54. Apart from that, I do not find any statement made in examination-in-chief that the plaintiff or her husband was ready and willing to perform her or his part of the contract since the date of agreement till the filing of the suit and thereafter till the date of statement being receded in the Court. Thus I find that not only there is failure to aver in the plaint the readiness and willingness to perform his part of the contract but there is further failure to prove the said fact by leading appropriate evidence. Therefore, I find that there is a total non-compliance of Section 16(c) of Specific Relief Act. As such, I proceed to set aside the judgment and decrees passed by both the lower Courts in favour of the respondent. Not only that I find

that suit filed by the plaintiff is defective because of non-compliance of Section 16(c) which is a mandatory provision and, therefore, I proceed to dismiss the suit.

12. However, under the above referral circumstances, as the specific performance of the contract is being refused in favour of the plaintiff/respondent it becomes necessary to see as to whether alternatively, plaintiff/respondent is entitled to claim damages or compensation. In this respect, provisions contained in Section 21 of Specific Relief Act will have to be adverted to. In the plaint in prayer clause (F) plaintiff/respondent has claimed only return of Rs. 4,000/- along with interest in case specific performance of contract is not granted. Apart from this. Section 21 allows granting of compensation, in case of breach by the defendants i.e. appellants in the present case. Even though subsection (4) makes it a provision that the compensation is to be assessed on the basis of principle laid down in Section 73 of Indian Contract Act, 1872, still further sub-section (5) envisages that no compensation shall be awarded under this section, unless plaintiff has claimed such compensation in the plaint. The proviso allows amendment to be made by the plaintiff at any stage. The plaint, which is before me does not make out any case for grant of compensation in case of refusal of specific performance but it only mentions that in case specific performance is not granted, amount of earnest money may be refunded along with interest. No amendment was intended to be carried out as provided in sub-section (5) proviso to Section 21 by the respondent and therefore, in view of the provisions contained in sub-section (5), it is not possible to consider the claim of compensation on the basis of Section 73 of the Indian Contract Act. Apart from that. there is no evidence on record to assess the compensation to be payable to the respondent. However, in view of the fact that the suit of the plaintiff is being dismissed and in view of the fact that the claim made by the appellants that the transaction was of loan, which was not accepted by both the lower Courts, I feel that in the facts and circumstances of the case, it will be appropriate to direct the respondent to return the amount of Rs. 4,000/- which was paid by the appellants by way of earnest money. No doubt since 1972 i.e. since the date of agreement, appellant has used and enjoyed the said amount. As per the say of the appellants, she was liable to pay interest on the said amount. Therefore, what would be appropriate interest to be awarded is a question before me. I feel, looking to the circumstances of the case, interest at the rate of 6% per annum from the date of institution of the suit till realisation would be reasonable. Hence I pass the following order:

The suit filed by the plaintiff/respondent seeking specific performance of agreement dated 9.4.1971 in respect of plot No. 9, K.h.Nos.9/2 and 14/3 in Ward No. 8, situated at Vishwakarma Nagar within the limits of Nagpur Improvement Trust and Nagpur Corporation owned and possessed by the appellants stands hereby dismissed. The decree of specific performance passed by both the lower Courts is hereby quashed and set aside. However, the appellant/defendant is directed to return the amount of Rs. 4,000/- along with

interest at the rate of 6% per annum to the respondent/plaintiff from the date of institution of the suit till realisation of the said amount. However, in the facts and circumstances of the case, there shall be no order as to costs.