
(1986) 08 CAL CK 0027
In the Calcutta High Court
Case No : A.F.O.D. No. 282 of 1977

Byomkesh Banerjee

APPELLANT

Vs

Nani Gopal Banik

RESPONDENT

Date of Decision : 18-08-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17
Contract Act, 1872 — Section 2, 3, 4
Specific Relief Act, 1963 — Section 16

Citation : AIR 1987 Cal 92 : 91 CWN 272

Hon'ble Judges : Sankari Prasad Das Ghosh, J; A.M. Bhattacharjee, J

Bench : Division Bench

Advocate : Kazi Mohammad Ali, for the Appellant; A.B. Majumdar and Bharati Chatterjee, for the Respondent

Final Decision : Allowed

Judgement

A.M. Bhattacharjee, J.—In this appeal against a decree for specific performance of a contract to sell land, Mr. Ali, the learned Advocate appearing for the appellant, has urged that, firstly, there was no offer from and on behalf of the defendant-appellant to sell land to the plaintiff-respondent, and that, secondly, even if there was any such offer, there was in law no acceptance thereof by and on behalf of the plaintiff-respondent and Mr. Ali has accordingly urged that the learned Judge was wrong in decreeing the suit.

2. It appears from the evidence on record that the plaintiff-respondent by his letter. Ext. 1, to the defendant-appellant offered to purchase the disputed land at Rs. 3000/- per Katha. This offer does not appear to have been accepted by the defendant who by his reply, Ext. 8, stated that he had already received higher offers at the rate of Rs. 3,250/- per Katha and the plaintiff was therefore required to inform him if he was agreeable to purchase the land at the rate of Rs. 3,300/- per katha and, if so agreeable, to send Rs. 3000/- towards advance. The plaintiff replied by Ext. 2 enclosing therewith a bank draft for Rs. 3000/- and

stating therein that he would pay the balance amount before or on the execution of the Sale Deed in his favour. Ext. 2 was dated 13-5-74 and was sent by registered post on the same date under postal receipt Ext. 5(a), but it came back with the postal endorsement "unclaimed" and "absent". Thereafter the said bank draft was again sent to the defendant by registered post on 29-6-74 along with a letter of that date, Ext. 10, written by the plaintiff's lawyer wherein it was reiterated that the said amount was being sent "as advance" as demanded by the defendant against his offer of sale of land and this letter also came back with postal endorsement "refused", vide Ext. 4(a). The plaintiff thereafter received a letter from the defendant dated 29-6-74, being Ext. 2(a), wherein it was stated that the proposal made by the defendant to the plaintiff stood cancelled and the defendant would no longer sell the land. The plaintiff thereafter served a notice through his lawyer dated 30-7-1974 and ultimately filed the suit for specific performance. The trial Court has decreed the suit and hence this appeal by the defendant.

3. Appearing for the defendant-appellant, Mr. Ali has very strongly urged that the defendant having made no offer to sell his land at any point of time, there was nothing for the plaintiff to accept which could give rise to any concluded contract to sustain the suit and warrant a decree for specific performance. Mr. Ali has contended that the letter Ext. 8 written by the defendant to the plaintiff contained no offer but was a mere invitation to make offer and that, in pursuance thereto, the plaintiff made his offer to purchase the land by his letter Ext. 2; but this offer of the plaintiff in Ext. 2 not having been accepted by the defendant at any stage, no contract ever came into existence. Mr. Ali has referred to the decision of the Supreme Court in Col. D.I. Mac Pherson Vs. M.N. Appanna and Another, to fortify his contention that Ext. 8 could not and did not contain any offer, but was only an invitation to the plaintiff to make his offer.

4. We are, however, of the view that the plaintiff initially made his offer, not by Ext. 2, but by Ext. 1, wherein he offered to the defendant to purchase his land at Rs. 3000/- per katha. But this was not accepted by the defendant as he was already getting higher offers and defendant accordingly by Ext. 8 made his offer, rather his counter-offer, to sell land at Rs. 3300/- per Katha. The categorical instruction by the defendant to the plaintiff in Ext. 8 to send Rs. 3000/- "as advance" leaves us in no doubt that what was conveyed by the defendant in Ext. 8 was a clear offer to sell the land and not a mere invitation to the plaintiff to make his offer. And even if there could be any doubt about this, the same is dispelled by the defendant's own letter Ext. 2(a) dated 29-6-1974 wherein he clearly referred to what was conveyed in Ext. 8 as a proposal or prastab on his pan and alleged that the said prastab of his stood cancelled.

5. Reliance placed by Mr. Ali on the Supreme Court decision in Col. D.I. Mac Pherson Vs. M.N. Appanna and Another, is really misplaced. In that case the defendant Macpherson on coming to know from his manager that the plaintiff had offered to purchase the bungalow at 5 or 6 thousand, wrote to his manager

that he "won't accept less than Rs. 10,000/-" and the Supreme Court held, on a consideration of the entire correspondence and the surrounding circumstances, that such statement of an amount at lower than which the plaintiff would not sell did not contain any offer to sell at that amount. As we have already stated, the clear direction in the letter Ext. 8 by the defendant to the plaintiff to send advance of Rs. 3000/- if the latter was willing to purchase at the price stated and also the fact that the defendant himself referred to this action on his part as a proposal or prastab leave no room for any doubt that what was conveyed by Ext. 8 was a clear offer or proposal.

6. And if Ext. 8 contained an offer to sell on the part of the defendant, then we have no doubt that such offer was duly accepted by the plaintiff by Ext. 2 and Ext. 10. It is to be noted that, barring Ext. 2(a) dated 29-6-1974, there is nothing on record to show that the defendant ever proceeded or purported to revoke the offer communicated by and through Ext. 8. It is settled law that the revocation of an offer, in order to be effective, must be communicated, and that too, before the offer is accepted for once the offer is accepted, it can no longer be revoked, Ext. 2 dated 13-5-1974 and even Ext. 10 dated 29-6-1974 were put in the course of postal transmission before Ext. 2(a) dated 29-6-1974, purporting to revoke the offer, could reach the plaintiff by post. It is also the categorical and unchallenged evidence of the plaintiff that he received Ext. 2(a) by post from the defendant after he sent Ext. 10 through his lawyer. The purported revocation, as sought to be conveyed through Ext. 2(a), could not therefore be effective as the offer was already accepted by the plaintiff by Ext. 2 and Ext. 10 before Ext. 2(a) could reach him.

7. Mr. Ali has urged further that even assuming that Ext. 8 contained an offer or a counter offer which could be accepted by the plaintiff by Ext. 2 or Ext. 10, these letters not having been received by the defendant, the acceptance was never communicated to the offeror and therefore there was no concluded contract. It is true that acceptance of an offer should ordinarily mean communicated acceptance. u/s 2(b) of the Contract Act, "when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted." Since the expression "signify" means "communicate" or "make known", an acceptance should be completed only when it is communicated or made known to the proposer. Since the minds of the offeror and the offeror must meet in order that an agreement may be formed, intimation of the acceptance of offer should be necessary to result in a binding agreement. Ordinarily, therefore, the offeror must receive intimation that the offeror has accepted his offer and has signified his willingness to perform his promise and if the offeror receives no such intimation, a contract may not come into existence.

8. But even though the ordinary rule is that a contract is completed only when acceptance is communicated to the offeror, an exception has been engrafted upon this rule in respect of offer and acceptance by post as provided in Section 4 of the Contract Act. Under that section, "the communication of an acceptance is

complete as against the proposer when it is put in a course of transmission to him, so as to be out of the power of the acceptor". As pointed out by the majority in the Supreme Court decision in *Bhagwandas Goverdhandas Kedia Vs. Girdharilal Parshottamdas and Co. and Others*, , "it makes a large inroad upon the concept of consensus, "a meeting of minds", which is the basis of formation of contract." One may doubt whether this law, binding an offeror to an acceptance which he did not or could not know, is at all "reasonable" or "right, just and fair"; but this exception is so firmly rooted in our law for more than a century that, as observed by the Supreme Court in *Bhagwandas* (supra), "it would be futile to enter upon an academic discussion, whether the exception is justifiable in strict theory and acceptable in principle". The two separate but concurring judgments of *Gagendragadkar, J.* (as his Lordship then was) and of *Vyas, J.* in the Bombay decision in *Baroda Oil Cakes Traders Vs. Parshottam Narayandas Bagulia and Another*, and the various decisions referred to therein would show that it has been consistently and almost uniformly held that in case of negotiations by post, the contract is complete when acceptance of the offer is put into a course of transmission to the offeror. As pointed out in *Baroda Oil Cakes Traders* (Supra, at pp. 494,497), the offeror is bound by the acceptance from the time a properly addressed letter containing the acceptance is posted, notwithstanding the fact that the letter of acceptance is lost in the post or misplaced in transmit or that its delivery is delayed or that it is returned to the acceptor undelivered. The principle that has been accepted appears to be that for the purpose of receiving the acceptance, the post office is agent of the offeror and therefore the posting of the letter of acceptance bound the offeror immediately it was posted. The decision in *Baroda Oil Cakes Traders Vs. Parshottam Narayandas Bagulia and Another*, has been approved by the Supreme Court in *Bhagwandas Goverdhandas Kedia Vs. Girdharilal Parshottamdas and Co. and Others*, and we must, therefore, hold that in this case the acceptance by the plaintiff as contained in Ext. 2 and Ext 10 bound the defendant the moment those were posted thereby resulting in a concluded agreement enforceable by specific performance. We, therefore, reject the contention of Mr. Ali that there was no concluded contract between the parties to sustain the suit for specific performance.

9. This brings us to the other point involved in this appeal, namely, whether the suit was bad for want of specific averment in the plaint to the effect that the plaintiff was at all relevant time ready and willing to perform his part of the contract, as required u/s 16(c) of the Specific Relief Act, 1963. We must, however, make it clear that this point has never been urged by Mr. Ali at any point of time nor taken in the memorandum of appeal, but it was raised by us when Mr. Majumdar was advancing his argument on behalf of the plaintiff-respondent. Mr. Majumdar has urged that if a fair reading of the plaint in the light of the evidence on record and the surrounding circumstances clearly shows that the plaintiff was so ready and willing, the suit cannot be thrown out solely on the ground that the averment was not articulated in the plaint in so many

words. Mr. Majumdar has also urged that if we are of the view that such specific averment was essential for the maintenance of the suit, the plaintiff should be given an opportunity to amend his plaint by inserting the necessary averment. An application for amendment has in fact been filed by the plaintiff-respondent and the defendant-appellant has opposed the same. For the reasons stated hereinafter, we are of the view that we should allow the amendment prayed for.

10. Section 16(c) of the Specific Relief Act, 1963 provides that "specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract.....". The expression aver and prove would indicate that the plaintiff must not only prove at the trial his readiness and willingness but must also aver the same in the plaint. The necessity of such an averment would also appear from the provisions of Explanation (ii) to Section 16 wherein it has been provided that "the plaintiff must aver..... readiness and willingness to perform the contract according to its true construction". Even under the preceding Specific Relief Act of 1877, which did not contain any such provision analogous to Section 16(c) requiring the plaintiff to plead as well as to prove his readiness and willingness at all relevant time during the contract, it was nevertheless held that the plaintiff was to plead as well as prove such readiness and willingness and was to fail if he had failed to do so. This would appear from the decisions of the Privy Council in AIR 1928 208 (Privy Council) at p. 216, and of the Supreme Court in Gomathinayagam Pillai and Others Vs. Pallaniswami Nadar, , in Prem Raj Vs. D.L.F. Housing and Construction Pvt. Ltd. and Another, , and in Ouseph Varghese Vs. Joseph Aley and Others, and the law was that a suit for specific performance without any averment in the plaint as to the plaintiff's readiness and willingness was not maintainable. But, where, as here, notwithstanding the absence of any such averment in the plaint, the trial Court has proceeded with the trial and the defendant has fully participated therein without any objection and the trial has ended in a decree and no objection has been taken by the defendant either, in the memo of appeal or in the argument before the Appellate Court as to the absence of such averment in the plaint or want of readiness and willingness on the part of the plaintiff and the Appellate Court also finds that there is satisfactory evidence as to the plaintiff's readiness and willingness, the suit, in our view, should not be thrown out solely on the ground that the plaint did not contain the averment as required u/s 16(c), but the plaintiff should be given every reasonable opportunity to make good the defect by amendment of the plaint. In Manick Lal Seal and Another Vs. K.P. Chowdhury, , such a prayer for an amendment was refused by a learned single Judge of this Court on the sole ground that the plaintiff "did not say anywhere that even at the time of hearing he was willing and ready....." In this case, the plaintiff has not only demonstrated his readiness and willingness by three repeated attempts in quick succession to send the advance amount by Bank Draft to the defendant, by sending repeated notices through his lawyer and by filing this suit at an early date, but his unchallenged categorical statement on

oath as PW-1 is that "I am always ready and willing to perform my part of the contract". It should be noted that it was not the case of the defendant at any stage either in the written statement or at the trial or even before us that the plaintiff was not so ready and willing. That being so, the amendment prayed for in this case should be allowed according to ratio in *Manick Lal Seal* (supra).

11. Mr. Ali in opposing the application for amendment has referred to a single Judge decision of the Patna High Court in *Ram Singhasan Choubey and Others Vs. Sudama Prasad Sah*, where it has been held that if the plaintiff has failed to make the necessary averment in the plaint as to his readiness and willingness as required u/s 16(c) of the Specific Relief Act, he would not be allowed to do so by way of amendment after the close of the evidence. As we have already noted, the view of this Court in *Manick Lal Seal* (supra) is, however, different, where amendment was disallowed on the sole ground that at the trial the plaintiff could not prove that he was at all material time ready and willing to perform his part of the contract. In the case at hand, the plaintiff having satisfactorily proved such readiness and willingness, the prayer for amendment to enable him to aver such readiness and willingness in the plaint should be allowed so that his suit, if otherwise good, may not fail for mere defect in pleading. "A party", as observed by the Supreme Court in *Jai Jai Ram Manohar Lal Vs. National Building Material Supply Gurgaon*, , "cannot be refused relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure" and "the Court always gives leave to amend the pleading of a party, unless it is satisfied that the party applying was acting mala fide, or that by his blunder he has caused injury to his opponent which may not be compensated for by an order of costs". It has been observed further that "however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side". This decision in *Jai Jai Ram* (supra) has been followed by the Supreme Court in the later decision in *Ganesh Trading Co. Vs. Moji Ram*, . If the materials on record clearly and sufficiently demonstrate plaintiffs readiness and willingness, the plaintiff should not be non-suited because he or his lawyer did not know how to draft a plaint and did not insert in the plaint the necessary averment as to such readiness and willingness. Since it has never been the case of the defendant either in the written statement or at the trial or before us that the plaintiff was not ready and willing to perform his part of the contract, the defendant's only case being that there was no offer on his part or, at any rate, no acceptance on the part of the plaintiff, there would be no "injustice" to him if the plaintiff is now allowed to amend his plaint to insert the requisite averment as to his readiness and willingness and no "injury" to him either which cannot be compensated for by an order of costs. We, therefore, allow the application for amendment of the plaint but direct that the plaintiff-respondent shall pay Rs. 500/- to the appellant as cost for the same.

12. It has been urged that the description of the suit-land is vague and indefinite to admit of specific performance. It has also been urged that evidence shows

that there is a tenant in respect of the structures on the suit-land but the alleged agreement being to sell the land after removing the structures, it would not be possible to decree specific performance as agreed. But since we have decided to remand the suit for re-trial we would leave these points for the determination of the trial Court.

13. In the result, we allow the appeal, set aside the judgment and decree passed by the trial Court and remand the suit back to the Court for re-trial. The trial Court shall readmit the suit under its original number, shall have the amendments recorded in the body of the plaint and allow the defendant to file additional written statement, if any, within 14 days of the receipt of the record by the trial Court and would then proceed to determine the suit in accordance with law and on the evidence already on record and also such further evidence as the parties may adduce hereinafter. Costs of the appeal to abide the result of the suit.

Sankariprasad Das Ghosh, J.

14. I agree.