
(1992) 02 GUJ CK 0010
In the Gujarat High Court
Case No : First Appeal No. 908 of 1977

Chandrakant Shantilal Pandya and another	APPELLANT
Vs	
Savitabehn Thakorlal Shah	RESPONDENT

Date of Decision : 18-02-1992

Acts Referred:

Specific Relief Act, 1963 — Section 16, 16(c), 16(c)
Transfer of Property Act, 1882 — Section 58(c)

Citation : (1992) 02 GUJ CK 0010

Hon'ble Judges : D.G. Karia, J

Bench : Single Bench

Advocate : A.J. Patel, for the Appellant; P.B. Majumdar, for the Respondent

Final Decision : Dismissed

Judgement

D.G. Karia, J.—This First Appeal is directed against the judgment and decree dated April 14, 1977 passed by the learned Civil Judge (S.D.) Baroda, in special Civil Suit No. 260 of 1973 dismissing the suit for specific performance of contract.

2. The facts giving rise to the appeal and the aforesaid two Civil Revision Application may be summarised thus;

The plaintiffs were the owners in respect of the immovable property situated at Sultanpura, Lalbhai's Khancha, bearing Tika No. 3/7, City Survey No. 176 and Sanad No. 4478 dated February 17, 1910 in Baroda. By the registered sale deed dated September 13, 1968 the plaintiffs sold the said immovable property to the defendant Savitabehn Thakorlal Shah for Rs. 15,000/-. The plaintiff, however, continued to be in possession of the said property in capacity as the tenants thereof and the rent note dated September 13, 1968 was executed therefor. Monthly rent of Rs. 300/- was agreed to by the said rent note. The plaintiffs paid the rent at the rate of Rs. 300/- per month till June 12, 1970 and, thereafter, ceased to pay the rent and also the municipal taxes and education cess tax. The defendant, therefore, served a registered A.D. Notice on the plaintiffs on March

19,1971 demanding the arrears of rent and also terminating the tenancy in respect of the suit property, as the plaintiffs were in arrears of rent for a period of more than six months. The defendant also filed Regular Civil Suit No. 251 of 1972 against the plaintiffs to recover possession of the suit premises. Thereupon, the plaintiffs filed a Miscellaneous Civil Application No. 260 of 1973 alleging that the monthly rent of Rs. 300/- in respect of the suit property was unreasonable and excessive and as such the standard rent of the suit house should be fixed. The plaintiffs also got the interim standard rent, fixed at the rate of Rs. 25/- per month ex parte in the said proceedings of Civil Misc. Application No. 260 of 1973. An agreement was also executed between the parties on September 13, 1968 whereby the defendant had agreed to resell and reconvey the suit house on payment of Rs. 15,000 and other legal dues. The said agreement is at Ext. 36 on the record. The plaintiffs served the defendant with the notice on April 4, 1973 calling upon the defendants to pass a deed of reconveyance on accepting Rs. 15000/- and other dues. The plaintiffs contended in the said suit that the plaintiffs were ready and willing to perform their part of the contract. It is the case of plaintiffs that the defendant did not comply with the notice Ext. 37 and as such the plaintiffs filed Special Civil Suit No. 260/73 in the Court of the Civil Judge (Senior Division) at Baroda for specific performance of the contract for reconveying the suit property in their favour.

3. The defendant by her written statement at Ext. 17 admitted the agreement Ext. 36. She denied that the monthly rent of the suit premises was exorbitant or unreasonable. The defendant further contended that the plaintiffs fraudulently and behind her back obtained the interim order fixing the standard rent of 25/- per month of the suit property. The defendant also contended that pursuant to the agreement, the plaintiffs were liable to pay Rs. 15,000/- and other dues and then only the defendant was liable to reconvey the property. The defendant denied that the plaintiffs were willing to repay the said sum of Rs. 15,000/- and other legal dues. The defendant contended that she was a poor widow having no source of income except the income of the rent of the suit house. She further contended that she purchased the suit house by paying Rs, 15000/- which was the only saving of her deceased husband and it was let out to the plaintiffs on monthly rent of Rs. 300/- so that she and her children could maintain themselves. The defendant thus sought dismissal of the plaintiffs' suit with costs. The defendant, however, had alternatively contended that if the plaintiffs deposited the principal amount of Rs. 15,000/- and the amount at the monthly rate of Rs. 300/- from June 12, 1970 and all the amounts of costs in the Court, the defendant would be ready to reconvey and resell the suit property to the plaintiffs.

4. The learned Judge, having raised the necessary issue at Ext. 19 and after recording the evidence, by his aforesaid judgment and decree, dismissed the plaintiffs' suit with costs. It is this Judgment and decree that the original plaintiffs have challenged in the present appeal.

5. Civil Revision Application No. 1248/78 and Civil Revision Application No. 1310 of 1980 are filed by the respondent herein. Both these Civil Revision Applications arise out of eviction suit by the respondent against the appellants on the ground of arrears of rent and from the application by the appellant-tenants for fixation of standard rent in respect to the suit house. The eviction suit was decreed. The appellants preferred appeal Trfat was allowed, remanding the matter to the Trail Court. Standard Rent fixation application was consolidated with the suit. The Trial Court dismissed the application and fixed monthly rent of Rs. 300/-. The appellant preferred Civil Revision Application No. 3 of 1977 in the District Court, Baroda, who allowed it and remanded the matter to the Trail Court for giving opportunity to the parties to adduce and dispose of the same, in accordance with law.

6. Both the aforesaid Civil Revision Applications are ordered to be heard together with the First Appeal. Accordingly, all the three matters are heard and being disposed of by this common judgment.

At the outset, before I deal with and dispose of the rival contentions of the parties, it may be mentioned that the matter was first taken up for hearing on February 4, 1992 and on that day Mr. P.B. Majmudar, learned Advocate for the appellants, sought time to enable his clients to raise the fund and settle the matter with the respondent. Accordingly, the time was granted as prayed for and that matter was ordered to stand over to February 12, 1992. Mr. Majmudar submitted on February, 12, 1992 that the appellants-plaintiffs, despite their earnest efforts, could not raise funds and as such the matter could not be settled. The learned Advocate for the parties were, therefore, heard.

Mr. P.B. Majmudar, learned Advocate appearing for the appellants, assailed the impugned judgment and decree contending, inter alia, that the plaintiffs clearly averred in the plaint about their readiness and willingness to perform their part of the contract and, therefore, the Trail Court should have passed the decree for specific performance of contract. Mr. Majmudar invited my attention to section 16(c) of the Specific Relief Act and contended that the plaintiffs had served the notice Ext. 37 on the defendant and the suit was filed wherein it was specifically averred that plaintiffs were ready and willing to perform their part of the contract and as such the suit has been erroneously dismissed. Mr. Majmudar also relied upon several authorities in support of the submission which shall be referred to here, after.

7. The learned Trial Judge has concluded on the evidence that the plaintiffs failed to prove that they were ready and willing to perform their part of the contract. The learned Judge also held that the plaintiffs were bound to pay Rs. 300/- per month as rent or interest from June 12, 1970 over and above the principal amount of Rs. 15,000/-. The plaintiff No. 1, Chandrakant Shantilal Pandya, who is examined at Ext. 46, deposed that he was dealing in "Steel Bhangar and used to maintain the account books. However, according to the plaintiff No.1, the account books were destroyed. He has admitted that after execution of the

agreement Ext. 36, he used to maintain the account books. He has deposed that he was willing to pay the amount of Rs. 15,000/- and the other legal dues as per the agreement Ext. 36 and would pay the said sum by the time that may be fixed by the Court. In his cross-examination, he has admitted that he had taken one godown on lease and the owner thereof had filed a suit for the arrears of rent of that godown and ultimately a decree was passed against him. In the execution of the said decree, the materials lying in the godown and the account books were attached. The plaintiff No. 1 also stated that Rs. 1,200/- were due by way of rent and the settlement for Rs. 1,500/- was arrived at between him and the owner of the godown. However, the plaintiff No. 1 could not pay that amount. Plaintiff No. 1 also admitted that Rs. 5,000/- were due of the decree that was passed against him in Regular Civil Suit No. 1527 of 1972. There is no dispute about the documents which are produced by the defendant at Exts. 41 to 45. I have perused these documents which relate to the stringent financial condition of the plaintiff at the relevant time. The plaintiff No. 1 could not pay the debt and one Sushilabehn Chandulal filed Civil Suit No. 1527 of 1972 for realisation of Rs. 5,500/-. Consent decree came to be passed, where the plaintiff agreed to pay the decretal amount by way of monthly instalment of Rs. 250/-. Thereafter the plaintiff filed application No. 686 of 1972 supported by his affidavit, true copy of which is at Ext. 43, requesting the court to reduce the amount of instalment from Rs. 250/- to Rs. 35/- per month due to his weak and poor financial condition. There was compromise and the Court reduced the monthly instalment to Rs. 150/-. It is, therefore, evident from this documentary evidence, Exts. 41 to 45, that the financial condition of the plaintiff was quite stringent.

8. The plaintiff No. 1 has admitted in terms in his cross-examination that he had no provision for repayment of the principal amount of Rs. 15,000/- and other legal dues. However, he has stated that one partly, Jashhai Ranchhodbhai Patel of Vejpur was to advance a loan to him. He had to take the loan from said Jashbhai by surrendering the suit house. However, he had not entered into any agreement with Jashbhai for the same. The plaintiffs have not examined the said Jashbhai. He has also admitted that he had no correspondence to show that Jashbhai was willing to advance loan to him. It is not understood as to how the plaintiffs could raise loan by creating a mortgage of the suit house, in respect of which the plaintiffs executed the absolute sale deed in favour of the defendant.

9. On basis of the oral and documentary evidence, the learned Judge concluded that the plaintiffs cannot be said to be ready and willing to perform their part of contract stipulated in agreement Ext. 36.

10. Section 16 of the Specific Relief Act, 1963 reads as under.

16. Personal bars to relief:-

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

(a) xx xx xx xx xx

(b) xx xx xx xx xx

(c) 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 which are to be performed by him. other than terms the performance of which has been prevented or waived by the defendant.

Explanation for the purposes of the Clause (c):

(i) Where a contract involves the payment of money it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court.

(ii) The plaintiff must aver performance of or readiness and willingness to perform the contract according to its true construction.

The aforesaid provision postulates that specific performance of a contract cannot be enforced in favour of a person who fails to plead and prove that he has 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 the terms the performance of which has been prevented or waived by the defendant. The explanation contemplates that for the purpose of clause (c), if the contract involved the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in Court, except when it is so directed by the court. Therefore, what is essential pursuant to the aforesaid provision is that the plaintiff must aver in the plaint that the plaintiff is ready and willing to perform the contract of his part. He has also to prove that he is ready and willing to perform his part of the contract. The pleading and proof both are, thus, essential in order to get decree for specific performance of contract.

11. Mr. Majmuda'r submitted that the plaintiffs may not be ready to perform their part of the contract by paying the principal amount of Rs. 15,000/- and other legal dues for all the time to come and when the averment to that effect was made in the plaint it was enjoined upon the Trial Court to pass the decree for- specific performance of the contract and the plaintiffs should have been granted time for the purpose. If such a decree was passed granting the time for tendering or depositing the amount in compliance with the directions made by the court. Admittedly, the plaintiffs sought no direction for deposit of the outstanding dues. In support of this submission, Mr. Majmudar invited my attention to the case of Rajya Tulsibhai Patel v. Benar Enterprise and others 1987 (2) G.L.H. 189. It is held therein that what the law contemplates is that when a person brings an action under a contract, he must disclose to the court that he had not been guilty of breach of contract and that he has fulfilled ail the material conditions of the contract and is also ready and willing to perform the other essential conditions of the contract. What the law contemplates is that the plaintiff must disclose that he has hitherto performed his part of the contract and is ready and willing to perform the essential terms thereof which he has to perform for the enforcement of the contract. The judgment further proceeds to

hold that if the facts pleaded disclose that the plaintiff has performed his part of the contract and if the averments show that he is ready and willing to perform the other conditions of the contract, that would constitute compliance with the requirements of the forms and the statute even if the exact phraseology is missing. There cannot be any dispute with respect to the legal position. On the facts and circumstances of this case, the plaintiffs have no doubt pleaded in the plaint that they were ready and willing to perform their part of the contract. However, they have not been able to substantiate the fact of their readiness and willingness to pay the principal amount of Rs. 15,000/- and the other legal dues of the defendant. This is clear from the admission of the plaintiff. No. I in his cross-examination and from the documentary evidence at Exts. 41 to 45. There is, therefore, no substance in submission of Mr. Majmudar that since the averment of readiness and willingness to pay is made in the plaint, a decree for specific performance of contract is required to be passed. It is equally essential to prove that fact. On correct interpretation of section 16 (c) of the Specific Relief Act, only the averment in plaint is not enough and the readiness and preparedness should also be proved.

Mr. Majmudar heavily relied upon the case of Indira Kaur and Ors Vs. Sheo Lal Kapoor, , The Supreme Court, allowing the appeal of the appellant-plaintiff, held that on careful perusal of the pleadings and the evidence it was clear that the plaintiff was ready and willing to perform her part of the contract. The Supreme Court further held that the courts below had failed to apply themselves to the crucial aspect of the matter and had been carried away by the confusion created in the context of the extent of income of the plaintiff and the failure to produce the passbook. On the appreciation of the evidence on record, the Supreme Court observed that the plaintiff clearly deposed that requisite amount was deposited in the Bank, but no passbook was produced. The defendant or the Court neither inquired about the name of the Bank nor called upon the plaintiff to produce the passbook and, therefore, no adverse inference could be drawn against the plaintiffs. In view of these facts and circumstances of the case, the Supreme Court held that the plaintiff in that case was ready and willing to perform her part of the contract, in as much as the requisite amount was deposited in the Bank. The decision of the Supreme Court is on the facts and circumstances of that case, which has no relevance to the facts and circumstances of the present case. In the instant case, there is nothing to show that the plaintiffs had the requisite amount with them to perform their part of the contract by paying the same to the defendant. It is not the case of the plaintiffs here that they deposited due amount in the Bank. On the contrary, Exts. 41 to 45 show that the plaintiffs were in quite weak and poor financial condition and they had no capacity whatsoever to fulfil their part of the contract by paying back the principal amount and the other legal dues. Therefore, the facts and circumstances of the case in Indira Kaur's case (supra) has no relevance to the facts and circumstances of the present case.

Mr. Majmudar then placed reliance on the case of R.D. Dave v. Heirs of

Gangabelin 29G.LT.8,. Section 16 (c) of the Specific Relief Act came to be interpreted in that case. In a suit for specific performance, extra phraseology of the statute as to the fact that plaintiff was ready and willing to perform his part of the contract was missing though, other averments indicated of his readiness to perform the contract, the Trial Court was wrong in dismissing the suit of the plaintiffs holding it as not maintainable. The ratio of this case is also not applicable to the facts of the present case, in as much as the plaintiffs in the present case have clearly stated in the plaint that they were ready and willing to perform their part of the contract. The averments are there, but the requisite evidence or the proof about the readiness or willingness on the part of the plaintiff is not substantiated. Therefore, this authority is of no avail to the appellants.

Mr. Majmudar then placed reliance on the case of Shafiq Ahmad Vs. Smt. Sayeedan, It was held in that case the plaintiffs did not have to establish that they had with them all the time ready, the amount of the sale consideration and there being nothing to suggest that the plaintiffs were not in a position to raise the amount of Rupees Two Thousand upon the resale being made, the readiness and willingness on their part is not adversely affected. In the facts and circumstances of the present case this authority is also not applicable for the reasons that the plaintiffs have not been able to show that at any point of time, the plaintiffs were capable of fulfilling their part of the contract by paying the requisite amount to the defendant. This citation is of no help to the appellants.

12. The documentary evidence on record, namely, Exts. 41 to 45 does establish that the plaintiffs were not in a position to arrange for the requisite amount in order to enable the plaintiffs to perform their part of the contract on account of their weak and stringent financial condition.

13. On the other hand, Mr. A.J. Patel, learned Advocate appearing for the respondent, invited my attention to the case of Gomathinayagam Pillai and Others Vs. Pallaniswami Nadar, , and the case of Smt. Sandhya Rani Sarkar Vs. Smt. Sudha Rani Debi and Others, . In Gomathingayagam Pillai's case (supra), the case was with regard to the time being essence of contract. The Trial Court holding that time was not of essence of agreement and that even if it was, R's default in not performing agreement within reasonable time after date fixed in agreement evidenced that R was never ready and willing to perform his part of the agreement. In the present case, there is no such issue as regards the time being essence of the contract. Therefore, the ratio laid down in Gomathingayagam Pillai's case (supra) is not applicable to the facts and circumstances of the instant case. Mrs. Sandhya Rani Sarkar's case (supra) is with regard to the bars to the relief of specific performance of contract. In a suit for specific performance of contract for sale of immovable property it is incumbent upon the plaintiff to affirmatively establish that all throughout he or she, as the case may be, was willing to perform his or her part of the contract, and that the failure on the part of the plaintiff to perform the contract or

willingness to perform her part of the contract may in an appropriate case disentitle her to relief, one such situation being where there is inordinate delay on the part of the plaintiff to perform his or her part of the contract. There is no question of any delay in this case. Mr. Patel, learned Advocate for the respondent, however, emphasised on the fact that the plaintiffs should have affirmatively established that all throughout the plaintiffs were willing and ready to perform their part of the contract and the evidence on record shows that the plaintiff had no capacity to do so by paying Rs. 15,000/- and other legal dues to the defendant. According to Mr. Patel, the Trial Court was, therefore, right in dismissing the suit of the plaintiffs. It is true that the plaintiffs have failed to establish, their capacity to perform their part of the contract by paying the requisite amount to the defendant.

14. Clause (c) of section 16 of the Specific Relief Act expressly provides that in a suit for specific performance, the plaintiffs should plead and prove that the plaintiffs have been ready and willing to perform their part of the contract. This readiness and willingness should be in accordance with the true tenor of the agreement. Simply because the plaintiffs pleaded that they were ready and willing to perform their part of the contract would not entitle the plaintiffs to get the decree for specific relief. Section 16 (c) of the Act also contemplates that the plaintiffs are required to prove the readiness and willingness to perform his or her part of the contract. The readiness should be real and willingness should be genuine and as such it should be backed by the capacity to perform the essential terms of the contract. A person who is incapable of performing the essential term of the contract to be performed by him cannot be said to be ready and willing to perform it, however much he may say that he is ready and willing to perform it. It is well- settled that the provisions of section 16 (c) are mandatory.

15. Mr. Majmudar submitted that the capacity of the plaintiffs to pay was immaterial and that the plaintiffs would have arranged for the fund on passing the decree in their favour. This argument cannot be accepted as it is against the scheme and scope of section 16 of the Specific Relief Act. In view of the evidence on record, the plaintiffs cannot be said to be ready and willing to perform the essential term of the contract as contemplated by section 16(c). The learned Judge was, therefore, justified in dismissing the suit. If the submission of Mr. Majmudar is accepted, it would amount that when the plaintiff makes an averment in the plaint about his readiness and willingness, the decree for specific performance must follow, In that case, the other essential requirement of the proof as to readiness and willingness would be rendered redundant. On true construction of section 16(c) of the Specific Relief Act, both these requirements are essential. The evidence on the record discloses that the plaintiffs had no means to fulfill their part of the contract. The plaintiffs have failed to show any source to raise fund to meet with the requirement of performing the contract. The plaintiffs were not backed by capacity to perform their part of the contract and, therefore, the real readiness and willingness as contemplated by section 16(c) of the Specific Relief Act is missing on the part of the plaintiffs.

Mr. Patel, learned Advocate for the respondent, referred to the alternative plea of the defendant, in the written statement about the readiness of the defendant to reconvey the suit property, if the plaintiffs deposited the principal amount of Rs. 15,000/- and the amount or rent at the rate of Rs. 300/- from June 12, 1970 in the Court. He further submitted that the plaintiffs did not deposit any amount and as such the plaintiffs are not entitled for the specific performance of the contract. It is an admitted position that the property consists of ground floor and two other floors thereon. It is stated at the Bar that the property would be worth about Rupees Three Lacs. On behalf of the defendant, Mr. Patel made three proposals: (1) that the plaintiffs should pay Rs. 1,50,000/- and in that case the defendant is ready and willing to reconvey the property; (2) alternatively the plaintiffs should vacate the suit property on payment of rupees one lac by the defendant and (3) alternatively the suit property should be sold and the parties should share the sale proceeds equally. The plaintiffs were not agreeable to any of these proposals. Mr. Patel, therefore, submitted that the plaintiffs were trying to take unfair advantage by prolonging the litigation as they are continued as tenants in the property without paying any rent. From all these circumstances, it appears that the plaintiffs are lacking in bona fides and intention to get specific performance of the contract. Having regard to all these facts and circumstances of the case and on true construction of section 16(c) of the Specific Relief Act, the appeal deserves to be dismissed.

16. It was urged on behalf of the appellants that the transaction between the parties was a mortgage by conditional sale within meaning of section 58 (c) of the Transfer of Property Act and as such the appellants are entitled to get the suit property redeemed. The plaintiffs have not produced a copy of the sale deed that they executed in favour of the defendant. In absence of the document and without its perusal, it is difficult to appreciate this contention. Besides, it was not the case of the plaintiffs that the transaction was of the mortgage. Clear case for specific performance of contract was sought to be made out. Therefore, the submission being without any merit, requires to be rejected.

Mr. Majmudar lastly submitted to grant time to tender requisite amount in the Court. When the matter was first called out on February 4, 1992 the time as prayed for was granted for the purpose. The appellants could not manage to raise the funds nor could settle the matter. Fact that the appellants are not ready to accept any of the aforesaid proposals made by the respondent, does manifest lack of bonafides on the part of the plaintiffs. I, therefore, reasonably " feel that no purpose would be served by granting time The request is, therefore, rejected,

17. In Civil Revision Application Nos. 1248 of 1978 and 1310 of 1980, the lower appellant courts having allowed the suit and application before it, remanded the matter to the Trial Court with a direction to give opportunity to the parties to lead oral and documentary evidence on all the points and then dispose of the matter on the strength of the material on record in accordance with law. The learned advocates appearing in both the Civil Revision Application have not been

able to show that the findings arrived at by the lower appellate Court are erroneous in any way and hence are liable to be reversed. In that view of the matter, the impugned judgments and orders challenged in these Civil Revision Applications are required to be confirmed.

18. In The result, First Appeal No. 908 of 1977 is dismissed with costs. Both the civil Revision Application Nos. 1248 of 1978 and 1310 of 1980 are also dismissed. No costs in both the civil Revision Applications.