

(1997) 03 BOM CK 0046
In the Bombay High Court
Case No : Second Appeal No. 595 of 1987

Dattu Sakharam Khairnar @ Sutar and Another	APPELLANT
Vs	
Punja Laxman Shinde, since deceased by his heirs	RESPONDENT

Date of Decision : 05-03-1997

Acts Referred:

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

Citation : (1997) 4 BomCR 295 : (1997) 2 CivCC 431 : (1997) 3 MhLj 13

Hon'ble Judges : R.M. Lodha, J

Bench : Single Bench

Advocate : Suresh Kumbar, for the Appellant; R.S. Apte, for the Respondents
No. 1 to 6, for the Respondent

Final Decision : Dismissed

Judgement

R.M. Lodha, J.—The original plaintiffs have come up in second appeal before this Court challenging the judgment and decree passed by the Extra Jt. District Judge, Nasik on 19-12-86 whereby the said Court allowed the original defendant's appeal and set-aside the judgment and decree passed by 2nd Jt. Civil Judge, Senior Division, Nasik on 31-10-1980.

2. The original plaintiffs viz. Dattu Sakharam Khairnar and Laxman Sakharam Khairnar filed a suit for redemption of mortgage of suit lands comprising Gat No. 32 and 36 described in para-1 of the plaint against the original defendant Punja Laxman Shinde (since deceased and now represented by his legal representatives) and for possession and mesne profits of the suit land in the year 1977. It was inter alia averred by the plaintiffs that in the year 1968 they were in need of money and when they approached the defendant for advancing loan, the defendant agreed to advance loan of Rs. 9000/- provided the aforesaid property was sold by the plaintiffs by way of security and accordingly on 4-5-1968 the plaintiffs executed sale-deed relating to suit lands in favour of defendant. On that very date i.e. 4-5-68 itself an agreement was entered into between the parties

whereby the defendant agreed to reconvey the said property on payment of Rs. 9000/-. The plaintiffs' case is that after execution of the aforesaid documents the defendant took possession of the suit lands. The plaintiffs offered the amount of Rs. 9000/- back to the defendant but it was not accepted and he avoided to reconvey the suit land. On 5-10-1972 the plaintiff served a notice upon the defendant and claimed possession. However, the defendant refused to reconvey the suit land vide reply dated 17-10-92 that the said lands were sold to him. The plaint was amended and alternatively a plea was set-up that in case it is found that the document dt. 4-5-68 was a sale outright and not a mortgage then the defendant may be directed to execute the reconveyance deed in favour of plaintiff by accepting Rs. 9000/- in accordance with agreement dt. 4-5-1968. The defendant denied the claim of the original plaintiffs and set up the defence that the transaction between the parties was sale outright and not mortgage as contended by the plaintiffs and that he purchased the suit lands for a valuable consideration of Rs. 9000/- and sale deed dt. 4-5-68 was valid and binding upon the plaintiffs. Thus the defendant submitted that plaintiffs were not entitled to the decree of redemption of mortgage as claimed. To the alternative prayer made by the plaintiffs for reconveyance of the suit lands, the defendant set up the defence that plaintiffs were not entitled to such reliefs and claim was also barred by time. After framing the issues, recording the evidence and hearing the Counsel for the parties, the trial Court negatived the claim of the plaintiffs that the transaction was mortgage. However, the trial Court held that plaintiffs were entitled to reconveyance of suit lands from the defendant in accordance with the agreement dated 4-5-68 and accordingly directed the plaintiffs to deposit Rs. 9000/- in the Court within one month and defendant was directed to execute the reconveyance deed. The decree passed by the trial Court on 31-10-80 was challenged by the defendant in appeal. In the appeal the only question involved was : whether trial Court was justified in granting decree for execution of reconveyance deed on the basis of the agreement dated 4-5-1968. The challenge by the defendant to the decree granted by the trial Court was mainly on the ground that plaintiff nowhere set-up the plea that they were ready and willing to perform their part of contract nor at any point of time they offered sum of Rs. 9000/- to the defendant for execution of the conveyance deed and, therefore, the mandatory requirement of section 16 of Specific Reliefs Act was not satisfied and plaintiffs were not entitled to the said decree. The Appeal Court held that there was neither pleading nor proof by the plaintiffs that they were ready and willing to perform their part of contract under the agreement dt. 4-5-1968. The Appellate Court accordingly allowed the appeal, set-aside the judgment and decree passed by the trial Court and dismissed plaintiff's suit.

3. On the basis of the grounds No. 1, 2, 3 and 6, this second appeal was admitted and the substantial question of law that arises from the said grounds is : "whether the provisions of section 16 of Specific Reliefs Act, 1963 are attracted in the case of agreement for reconveyance of the property and if so plaintiffs have pleaded and proved their readiness and willingness to perform

their part of contract Ex. 24 dated 4-5-1968?

4. Originally in the plaint, the plaintiffs prayed for redemption of mortgage since their case was that the sale deed dt. 4-5-68 was in fact not a sale deed but mortgage by conditional sale and the pleadings in the plaint have been made keeping that aspect into consideration. Subsequently, however, the plaint was amended and an alternative plea was set up that even if the transaction was not construed between the parties as mortgage by conditional sale but any outright sale then on the basis of another agreement on that very date i.e. 4-5-68 the defendant had agreed to reconvey the said properties to the plaintiffs and, therefore, the defendant should be directed to reconvey the said lands to plaintiffs and they were prepared to deposit Rs. 9000/- towards that sale. Ex. 24 dated 4-5-68 is in the form of receipt written by defendant Punjaji Laxman Shinde. In the said receipt the original defendant stated that the disputed land comprising of Gat No. 32 and 36 situated at Village Velapur, Tq. Niphad, Dist. Nasik was purchased by him for a consideration of Rs. 9000/-. If the plaintiffs paid the price of the said lands to him without selling the said lands to anybody else he would reconvey the said lands to the plaintiffs but the said money should be paid by the plaintiffs and not by entering into any agreement for sale with anybody else.

5. Section 16 of the Specific Reliefs Act reads thus :

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

(a) who would not be entitled to recover compensation for its breach; or

(b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or

(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 Cl. (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."

6. An agreement for reconveyance is required to be construed strictly and to that extent an agreement for reconveyance of immovable property may differ from the other agreements for sale of immovable property but, there is no reason why

section 16 of Specific Reliefs Act should not be applicable to an agreement of reconveyance. As regards applicability of section 16 of the Specific Reliefs Act, an agreement for reconveyance of a immovable property does not differ from an agreement of sale of immovable property. Specific performance of a contract cannot be enforced in favour of a person if the case is covered by any of the Clauses (a), (b) and (c) of section 16. Clause (c) of section 16 bars relief of specific performance if the plaintiff fails to aver and prove that he has performed his part of the contract and has always been willing to perform the essential terms of the contract required to be performed by him. However, the pleading of readiness and willingness as contemplated under Clause (c) of section 16 cannot be construed hyper technically over looking the entirety of facts and circumstances relevant to the intention and conduct of the party concerned. The exact non-reproduction of the words of statute in the plaint is not fatal if from consideration of the entire facts and circumstances narrated in the plaint it is revealed that plaintiff not ready and willing to perform part of his contract. What is relevant is there has to be narration of facts which are sufficient to constitute the readiness and willingness on the part of plaintiff for due performance and compliance of material terms of the agreement. If on analysis of the entire facts it is found that plaintiff has been ready and willing to perform his part of contract, mere commission of the expression "readiness and willingness" would not be fatal and it cannot be said that there was no compliance of section 16. Substantially, therefore, the pleadings in the plaint must be in conformity with the requirement of section 16. The Court is called upon to look into the facts set out in the plaint by the plaintiff to find-out whether the facts and circumstances so narrated meet the requirement of readiness and willingness as contemplated u/s 16 and if the answer is in affirmative, mere omission of a particular expression of readiness and willingness as contemplated u/s 16 shall not disentitle the plaintiff from grant of relief if he is so entitled and Court in its discretion finds that decree for specific performance deserves to be passed. The grant or refusal of a decree for specific performance is always matter of discretion and the Court invariably acts on equitable principles with an eye to the substantial justice of the case.

7. The facts of the case are now required to be examined in the light of the aforesaid legal position. As already observed in the plaint originally the plaintiffs claimed relief for redemption of mortgage and, therefore, there could not have been any pleading relating to readiness and willingness. By seeking amendment in the plaint the alternative prayer for reconveyance of the agreement dated 4-5-68 was made. Even while amending the plaint and seeking the relief alternatively for reconveyance the essential facts which could have been sufficient to constitute readiness and willingness on the part of the plaintiffs were not disclosed. Even after amendment in the plaint no pleading is found that plaintiffs at any point of time offered Rs. 9000/- and asked the defendant to reconvey the property. The plaint, therefore, is absolutely lacking on this material and mandatory aspect. Not only that that plaintiffs have not averred their

readiness and willingness in specific terms but the requisite facts constituting such readiness and willingness are also wanting in the pleading. After the amendment was carried out in the plaint, plaintiff No. 1 re-entered the witness box and in his deposition also he has not testified that he ever offered a sum of Rs. 9000/- to the defendant and asked him to reconvey the property in question. On the other hand in cross examination the defendant Punjaji Laxman has clearly deposed that the plaintiffs never offered the price of the suit land in accordance with the receipt dt. 4-5-68. The plaintiffs issued the notice dt. 5-10-72 to the defendant and in that notice also the plaintiffs have not stated that they offered the amount of Rs. 9000/- to the defendant. Another notice dt. 13-5-75 sent by the plaintiffs to the defendant before filing of the suit also does not show that the plaintiffs were ready and willing to return amount of Rs. 9000/- to the defendant and that on return of the said amount they had asked for reconveyance of land in question. In the background of these facts it can safely be held that the plaintiffs-appellants have miserably failed to plead and prove their readiness and willingness to pay sum of Rs. 9000/- and get the specific performance of the agreement dt. 4-5-68 for reconveyance of the property in question.

8. The first Appellate Court, therefore, cannot be said to have erred in setting-aside the decree passed by the trial Court.

9. Second appeal accordingly has no merit and is dismissed with no order as to costs.