
(1997) 02 AHC CK 0067

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 8310 of 1980

Kailash Nath Gupta (deceased by L.R.)

APPELLANT

Vs

District Judge, Ballia and others

RESPONDENT

Date of Decision : 06-02-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17
Specific Relief Act, 1963 — Section 16

Citation : AIR 1997 All 309 : (1997) 2 AWC 787 : (1997) 2 CivCC 381 : (1998) RD 590

Hon'ble Judges : D.K. Seth, J

Bench : Single Bench

Advocate : Shyam Narayan, for the Appellant; Standing Counsel and Aditya Narain, for the Respondent

Final Decision : Dismissed

Judgement

In a suit for specific performance by way of amendment statement as is required under S. 16(c) of the Specific Relief Act and specified in-form No. 47 Appendix A to the CPC was sought to be incorporated. The amendment having been allowed by an order dated 15th October, 1979 by the 1st Additional Munsif, Ballia in suit No. 252 of 1977, Civil Revision No. 151 of 1979 and 152 of 1979 were preferred by two groups of defendants. By an order dated 5th May, 1980 the learned District Judge, Ballia dismissed both the revisions affirming in the order of the learned Munsif. It is this order which is impugned in the present writ petition. In which an ad interim stay of further proceedings was granted.

2. The plaintiff opposite party filed an application for vacating the interim order dated 29th September, 1980 passed in this case on 9th January, 1981 but the same could not be taken up for hearing so long for some reason or the other. While deciding the said application which was vehemently pressed by the plaintiff opposite party and opposed by the defendant-petitioner it appears that both the counsels have argued the case on merit. The decision on this application for

vacating the interim order would virtually decide the case itself on merit. Both the learned counsels, therefore agreed to the disposal of the revision application and, accordingly, had addressed the Court on the merit of the case.

3. By reason thereof the case was taken up for hearing on merits and the learned counsels were heard at length.

4. Factually in the plaint it was alleged that there was an agreement for sale of an immovable property dated 18th May, 1974 between the parties. Pursuant to the said agreement out of the total consideration of Rs. 1000/- a sum of Rs. 700/- was received by the defendant at the time of execution of the decree. The defendant agreed to execute the sale deed as soon as the ban on transfer of urban properties applicable in Ballia is lifted by the Government. Subsequently a further sum of Rs. 200/- was received by the defendant. Ultimately the ban was lifted on 17-2-1976. Thereupon the plaintiff had been requesting the defendant to execute the deed after accepting the balance amount as early as possible but the defendant had been avoiding the same on one pretext or the other. On 16th August, 1978 the plaintiff filed an application for amendment of the plaint. By the said application the plaintiff sought to incorporate a statement that the plaintiff was and had always been and still is ready and willing to perform his part of the contract.

5. The above amendment as allowed by both the courts below is assailed by Sri Shyam Narain learned counsel for the petitioner on three fold grounds. Firstly, that in the absence of the necessary statement as required under S. 16(c) of the said Act as specified in Form No. 47 of the Code the suit as on the date of its filing was not maintainable. By reason thereof a right has been accrued to the defendant by operation of law. The said right cannot be taken away by way of amendment. The second point that was urged by the learned counsel was that the amendment, if allowed, would, bring out a fresh cause of action which was conspicuous by its absence in the plaint as originally presented. Thirdly, he had contended that the amendment will change the nature and character of the suit.

6. Learned courts below overruled all the grounds. The revisional Court had found that some statements indicating the readiness and willingness having been present in the pleadings, the amendment was an elucidation of the statement already made and that no fresh cause of action was being introduced. Therefore, there was no question of depriving the defendant of any right accrued to him by operation of law. .

7. As observed earlier, the pleadings as originally presumed contained a statement to the effect that as soon as the ban on transfer was lifted he had been sending words to the defendant to execute the sale deed as early as possible but the defendant had been avoiding the same in one or other pretext. The said statement, though not specifically tally with the statement as specified in Form No. 47 Appendix A of the Code or the expression used in S. 16(c) but still it indicates the readiness and willingness of the plaintiff to perform his part of the

contract which was being avoided by the defendant. The filing of the suit itself indicates that he was still willing to perform his part of the contract for which he had filed the suit. The agreement was alleged to be entered into on 18th May, 1974, when there was a ban on transfer of urban property. The ban having been lifted on 17th of February, 1976 the words were being sent by the plaintiff for execution of the deed. The suit was filed on 11th August, 1977 prima facie, therefore, as is appearing on the face of the pleadings namely 16th August, 1978. the application for amendment was filed the specific performance of the alleged contract does not appear to have been barred by limitation. However, this observation on the question of limitation made herein is tentative and shall not preclude the parties to agitate the said point, if taken at the time of hearing of the suit.

8. Section 16(c) of the said Act lays down the conditions when specific performance of a contract cannot be enforced. Clause (c) provides "that 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 which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant." The said condition has been explained in the explanation appended therein to mean "(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." Form No. 47 Appendix A of the Code specifies the plaint in a suit for specific performance which contains in para 3 "the plaintiff has been and still is ready and willing specifically to perform the agreement on his part of which the defendant had notice."

Form No. 47 is a model form. It does not mean that the exact words used therein are to be incorporated in the plaint. It may be expressed in different manner. But, however, the pleading must disclose from the averments made that there is an indication of readiness and willingness. Whereas S. 16(c) of the said Act lays down that who fails to aver and prove that he was ready and willing to perform his part does not require the use of "the exact expression used in the section.

9. In a suit for specific performance the plaintiff has to aver and prove a continuous readiness and willingness to perform the contract on his part from the date of the contract to the time of hearing, *Ardcshir H. Mamma v. Flora Sassoon* AIR 1928 PC 208.

10. The requirement of law is two fold (i) that the plaintiff must aver in the plaint and (ii) that he must prove by evidence that he was always been ready and willing to perform his part of the contract. *Narendra Bahadur Singh Vs. Baijnath Singh and Another*, . The averments in the plaint would not be sufficient unless it is slated during the trial in Court. Inasmuch as, readiness at the time of filing of the suit is not enough, *Mali Bewa and Others Vs. Dhunda Samal and Another*, . Absence of averment with regard to readiness in the plaint would not be fatal if

readiness is otherwise indicated, Kamdev Nath Chawdhary v. Devendra Kumar Nath AIR 1979 Gauhati 65. The absence of such statement leads to the dismissal of the suit even though the defendant fails to take such objection, Rajendra Prasad Rai and Another Vs. Rajdeva Rai and Another, . Even in case where the defendant evaded execution of the sale deed and the plaintiff did not Commit any breach of his part even then the absence of such condition would be fatal. Sankatha Prasad Vs. Abdul Aziz Khan, . The readiness and willingness can be inferred from the prompt filing of a suit. R.C. Chandiok and Another Vs. Chuni Lal Sabharwal and Others, . The same can be inferred also from the conduct of the plaintiff. Shamji Bhai v. Jagoo Hemchand AIR 1952 Nag 220. It is not necessary to slate in so many words that the plaintiff was continuously ready and willing to perform his part of the contract. It is enough if it is clear from the recital in the plaint that he was so willing, Nannapaneni Subeyya Chawdhary v. Gariyapati Veeraya AIR 1957 And 307 at p. 313.

11. The question for amendment as in the present case is to be looked into from the above prospective, in view of the fact that after the ban was lifted the plaintiff had been sending words for execution of the sale deed but the defendant had been evading the same. Therefore, it appears that there was some indication that the plaintiff had been ready and willing to perform his part. The prompt filing of the suit also indicates that on the date of filing of the suit he was ready and willing to perform his part of the contract.

12. In the case of Mahmood Khan and Another Vs. Ayub Khan and Others, it was held that when the plaintiff fails to plead the ingredient of S. 16(c) of the Act he cannot be allowed to amend the plaint during the course of argument. In the case of Ram Singhasan Choubey and Others Vs. Sudama Prasad Sah, it was held that even though there was evidence about plaintiff readiness and willingness during the course of arguments, the plaintiff cannot be allowed to amend his plaint to incorporate such ingredients. In the case of Narendra Bahadur Singh Vs. Baijnath Singh and Another, it has been held that when the fresh suit would have become barred amendment seeking to cure the defect cannot be allowed.

13. In the revision petition three grounds have been made but nowhere it was alleged that a fresh suit was barred when the application for amendment was filed namely that limitation had set in so far as the cause of action is concerned. However, be mat as it may, since I have left the said question open I do not intend to make any observation on the same.

14. The decision in the case of Mukhtiyar Singh v. Dharampal Singh, (1981) 7 All LR 144 : 1981 All LJ 119 does not help the petitioner since the same was not a case involving amendment. In the said case till the hearing no averment with regard to readiness and willingness was made. The. ratio decided therein cannot be attracted in a case where the validity of amendment is under consideration.

15. In the case of Mahmood Khan and Another Vs. Ayub Khan and Others, a Division Bench of this Court relied on the decision in the case of Ganesh Trading

Co. Vs. Moji Ram, while dealing with the identical question. The Apex Court in Ganesh Trading Co. (supra) held "it is only if lapse of time has barred the remedy on a newly constituted cause of action that the Courts should, ordinarily, refuse prayers for amendment of pleadings." This Court following the same had held :

"The Supreme Court has made a distinction in case of amendment, where by amendment, the plaintiff seeks to bring a cause of action, which was conspicuous by its absence in the plaint. But where there is a cause of action shown in the plaint as defective, the amendment application can be allowed to rectify the mistake. But if a valuable right has accrued to the other side, on account of the efflux of time, the Court should be reluctant to allow the amendment. In the instant case, as shown above, the plaintiff by omitting to aver in the plaint that he was ready and willing to perform his part of the contract, omitted to show the cause of action, and, therefore, to allow such an amendment would be to allow the plaintiff to bring a cause of action in the suit by such amendment which should not be done in view of the observations made by the Supreme Court in the case cited above."

16. In the present case the question of limitation has not been set out and it was also not so found by both the Courts below which finding has also not been assailed on the said ground. Therefore, the ratio decided in the present case also does not help the petitioner.

17. However, the decisions in the case of Babulal v. IIIrd Additional District Judge, Mathura (1992) 19 All LR 244 and U.P. State Electricity Board v. M/S. Sersole Chemicals Ltd. (1994) 24 All LR 88 cited by the learned counsel for the respondent does not help him because of the ratio decided in the case of Mahmood Khan and Another Vs. Ayub Khan and Others, . Inasmuch as, the questions involved in the case is identical with that which was considered in the case of Mahmood Khan (supra) whereas the cases involved in the said two cases cited above by the counsel for the opposite party are altogether different.

18. In the course of arguments also learned counsel for the petitioner has not asserted that when the application for amendment was filed a fresh suit was barred or that limitation had set in. The facts disclosed in the pleadings apparently does not make out a case that the cause of action had become barred. The question of limitation is to be decided on the basis of the pleadings made in the plaint not on the basis of the defence raised in the written statement so long such, question is not required to be decided as an issue in the suit. Only when the question is raised as an issue then only the same has to be decided on the basis of the materials before the Court even though the question of limitation is not raised. Therefore, the said question would remain open raised. Therefore, the said question would remain open for being agitated at the time of hearing of the suit and the amendment allowed herein would be open to challenge at the time of hearing to show that the amendment was sought to be incorporated after a fresh suit became barred.

19. In that view of the matter, I am not inclined to interfere with the order impugned. The writ petition is, therefore, dismissed. Since the suit appears to have been filed in 1977 and a very long time has elapsed in between, let the records if arrived in this Court, be sent back to the Court below immediately. The Trial Court is expected to expedite the hearing of the case and decide the same as early as possible preferably within a period of one year from the date a certified copy of this order is produced before the Court below. The defendant may file his additional written statement within a period of two months from this date. The issues may be settled within a period of one month after the filing of the additional written statement. Both the learned counsels have assured that the parties shall take appropriate steps to make the case ready and shall not take adjournment unless it is exceptionally unavoidable. There will be no order as to costs.

20. Let a certified copy of this order may be given to the learned counsel for the petitioner on payment of usual charges within seven days.

21. Petition dismissed.