
(2015) 03 BOM CK 0344

In the Bombay High Court

Case No : Second Appeal No. 02 of 2001

Kashirao Sheshrao Gawande and Others

APPELLANT

Vs

Kisan Baherji Mate and Others

RESPONDENT

Date of Decision : 24-03-2015

Acts Referred:

Specific Relief Act, 1963 — Section 16, 16(c)

Citation : (2015) 03 BOM CK 0344

Hon'ble Judges : Anand Vasant Nirgude, J

Bench : Single Bench

Advocate : J.J. Chandurkar, for the Appellant; Apurva De, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Anand Vasant Nirgude, J—This appeal challenges reversing judgment of the learned Judge of the appellate Court by which the appellant/plaintiff's suit was partly decreed.

2. The facts leading to this litigation are as under:-

The learned Judge set aside the decree for specific performance but allowed the alternate prayer of refund of earnest. The appellant/plaintiff came with a following case to the Court that on 28-01-1983, defendant/respondent No. 1 Kisan agreed to sell him a piece of land for a consideration of Rs. 15,000/- and he paid Rs. 5000/- as earnest. Respondent Kisan held this land as tenant and therefore the transaction required permission from the Tenancy Court and the agreement was executed and soon thereafter an application to the Tenancy Court was moved for seeking permission. After permission was granted respondent Kisan resiled from his word and so the suit was filed on 30-03-1983. Respondent Kisan took a stand that he never intended to sell the land. It was his case that the documentation took place for security of loan amount of Rs. 1000/- which he obtained from the appellant/plaintiff. The learned Judge of the trial Court as well

as the appellate Court rejected this part of defence and held that the agreement was valid and the appellant/plaintiff had proved that he had paid Rs. 5000/- as earnest. The learned Judge of the appellate Court, however, held that the appellant/plaintiff could not prove that he was always ready and willing to perform his part of contract and therefore he was not entitled for the specific performance of contract.

3. When the appeal was admitted, the following substantial question of law can be framed as under:-

"Whether the appellant/plaintiff could prove that he was ready and willing to perform his part of contract as expected by provisions of Section 16 of the Specific Relief Act, 1963 [for short, "the said Act"]."

4. Section 16 of the said Act reads as under:-

"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 preformed, or acts in fraud of the contract, or willfully 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 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."

5. Clause (c) quoted above would be applicable to the facts of the case. The question of readiness and willingness practically did not arise when the parties were before the trial Court. As indicated above, respondent/defendant Kisan took a stand that he never intended to sell the land, so the energy of the parties mostly was spent on this question, as to whether the transaction was genuine or sham. It is at the stage of the appeal Court, the learned Judge raised this question and on the basis of evidence which was available on record came to a conclusion that the appellant/plaintiff could not prove his case of readiness and willingness.

6. There is a very peculiar feature of this case which is discussed by the learned

Judge of the appellate Court. He pointed out that when the appellant/plaintiff came to the Court initially he filed this suit only for recovery of earnest amount. At that point of time he said, that the appellant/plaintiff was not ready and willing to perform his part of contract. The learned Counsel for the appellant assailed this finding by saying that the conclusion drawn by the learned Judge of the appellate Court was perverse and not based on any evidence or any pleadings. He pointed out that though the appellant/plaintiff filed suit with different pleadings initially, subsequently he changed those pleadings by permission of the Court and what is not pleaded after the amendment should be kept out of the consideration. He further pointed out that appellant/plaintiff made clear statement on oath in his deposition that he was ready and willing to perform his part of the contract which has gone unchallenged on record. In a way his submission is quite plausible. In a case of this nature, on one hand, the appellant/plaintiff made in his deposition a bald statement that he was ready and willingness to perform his part of contract. He did not utter a single word as to why he initially filed this suit only for refund of the earnest. Unfortunately, even the respondent/defendant's cross examiner did not ask him the pertinent question to bring on record that initially the pleadings in the plaint were different etc. Nonetheless, the learned Judge of the appellate Court taking a birds eye view of the facts of the case came to a conclusion that the appellant/plaintiff would fail to prove his case squarely within the parameters of Section 16(c) of the said Act. I would also record my finding that the appellant/plaintiff would fail to prove that he was ready and willing to perform his part of contract "all the time". Section 16(c) of the said Act requires the plaintiff not only to plead but also to prove that he had performed and he had always been ready and willing to perform the terms of the contract which are performed by him. The factum of his readiness and willingness is required to be adjudged with reference to the conduct of the parties and attending circumstances. From the circumstances discussed above, I am inclined to infer that the appellant/plaintiff was not really ready and willing to perform his part of contract in interregnum. One more reason would compel me not to take any other view. The transaction is of 1983 and we are now in 2015, the respondent/defendant could retain his control on the land till today. Number of changes must have taken place after 1983 and if the suit is decreed, this position of the respondent/defendant would get changed drastically. I am not inclined to be party to such change. I would rather to dismiss the appeal and maintain the impugned judgment and decree of the appellate Court.