

(2015) 05 GAU CK 0063

In the Gauhati High Court

Case No : Regular First Appeal No. 152 of 2005

Niva Baruah and Others

APPELLANT

Vs

Mamoni Baruah and Others

RESPONDENT

Date of Decision : 19-05-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12A
Specific Relief Act, 1963 — Section 16(c), 20, 22, 22(1), 28
Transfer of Property Act, 1882 — Section 53-A

Citation : (2015) 05 GAU CK 0063

Hon'ble Judges : Nishitendu Chaudhury, J

Bench : Single Bench

Advocate : D. Mozumder and R. Sharma, for the Appellant; D.R. Gogoi, Advocates for the Respondent

Final Decision : Allowed

Judgement

Nishitendu Chaudhury, J—Decree of specific performance passed by the learned trial court in Title Suit No. 19 of 2003 by judgment dated 21.7.2005 has been challenged in this first appeal by the defendants.

2. Plaintiff Mamoni Baruah filed Title Suit No. 8 of 1996 in the Court of Assistant District Judge, Jorhat stating that a plot of land measuring 1 katha covered by Dag No. 5128 of P.P. No. 102 old 49 new of Block No. 2 in Jorhat is owned by defendants No. 1 to 5. They entered into a written agreement with the plaintiff on 28.1.1995 for sale at a total consideration of Rs. 4,00,000/- and received Rs. 2,00,000/- as advance on the date of execution of the agreement. As per terms of the agreement, the defendants were supposed to execute sale deed in favour of the plaintiff on receipt of the balance amount of money but plaintiff approached the defendants time and again, however, to no avail. Defendants appeared to be avoiding the plaintiff for performing their part of the contract and so a pleader's notice was issued to the defendants asking them to execute and register sale deed as per the agreement dated 28.1.1995 upon receipt of Rs.

2,00,000/-. Said notice was served on 23.5.1995 and 18.7.1995 but even thereafter, the defendants did not come forward to perform their part of the agreement. Under such circumstances, plaintiff instituted the suit praying for a decree of specific performance of contract and in the alternative it was prayed that in the event sale deed is found to be not executable in that event the suit be decreed with cost and interest @ 18% per month from 28.1.1995 till realization.

3. On being summoned, defendants No. 1 to 5 appeared and contested the suit by filing joint written statement. According to these defendants, the suit is premature one and vitiated for non impleading necessary party. It was further contended that the contract was not a concluding and complete one and unless the defendants No. 6 and 7 vacate the hotel situated on the suit land, no sale deed could be executed by defendants. Defendants No. 6 and 7 entered appearance by filing written statement and contended that they are not remotely associated with the contract in question and so they have been wrongly impleaded as defendants in the suit. Defendant No. 6 was only attesting witness to the agreement and he had nothing to do in regard to the performance of the contract. These defendants also prayed that suit is liable to be dismissed with cost.

4. Upon such contention of the parties, the learned trial court has framed as many as seven issues which are quoted below:

"(i) Whether there is any cause of action for the suit?

(ii) Whether the contract for sale is a contingent contract and not enforceable in law?

(iii) Whether the suit is bad for non-joinder of necessary parties?

(iv) Whether the contract for sale is a Benami transaction?

(v) Whether the contract for sale is an invalid contract?

(vi) Whether the plaintiff is entitled to any decree for specific performance of the contract?

(vii) To what relief/reliefs the parties are entitled to?"

5. In course of trial, plaintiff examined herself, her husband and four other witnesses who are duly cross-examined by defendants. Plaintiff also exhibited documents. Defendants on the other hand did not examine any witness and did not produce any documents.

6. Learned trial court after consideration of the materials available on record and after hearing the learned counsel for the parties passed the impugned judgment and decree holding, inter-alia, that the agreement is contingent one but enforceable in law and is not invalid in any way. It is held that suit is not bad for defect of parties and it is also not vitiated under Benami transaction. The trial court so found that there was cause of action for the suit and also decided issue

No. 1 in favor of the plaintiff. Coming to issue No. 6, trial court considered exhibit-1 agreement and arrived at the finding that plaintiff made payment of Rs. 2,00,000/- to the defendants No. 1 to 5 on 28.1.1995 as part of the total payment of total consideration of Rs. 4,00,000/- and the defendants No. 1 to 5 had agreed to execute the sale deed in favour of the plaintiff upon receipt of balance consideration of Rs. 2,00,000/-. Noticing para-2 of Exhibit-1, the learned trial court found that plaintiff was given symbolical possession of the suit land with structures standing thereon and the plaintiff is entitled to a decree of specific performance under Section 53-A of the Transfer of Property Act. With these findings, learned trial court decreed the suit in entirety directing defendants No. 1 to 5 to execute and register valid sale deed within a period of three months from the date of judgment upon receipt of Rs. 2,00,000/- from the plaintiff. It is this judgment which has been brought under challenge in the present appeal.

7. I have heard Mr. D Mozumdar, learned senior counsel assisted by Mr. R Sharma, learned counsel for the appellant/defendants No. 1 to 5 and Mr. DR Gogoi, learned counsel appearing for respondent/plaintiff.

8. After hearing the parties, it appears that the points for determination in this appeal would be as follows:

"(a) Whether the suit of the plaintiff is maintainable in view of the provision under Section 16(c) of the Specific Relief Act, 1963?

(b) If not whether respondent/plaintiff is entitled to relief under Section 22 of the Specific Relief Act, 1963?"

9. Mr. D Mozumdar, learned senior counsel for the appellants would argue that the plaintiff has failed to specifically aver necessary material facts in the plaint so as to arrive at a finding that plaintiff is and has been always ready and willing to perform her part of the contract. The learned counsel has read out the entire plaint and wanted to show that there is no mention whatsoever anywhere in the body of the plaint as is mandated under Section 16(c) of Specific Relief Act. According to the learned counsel after considering the plaint in entirety, no material is available to arrive at a finding that plaintiff is or has been ready and willing to perform her part of the contract. The learned counsel further argues that plaintiff not having deposited the sum of Rs. 2,00,000/- which is admittedly due to the defendants the irresistible conclusion would be that the plaintiff does not have financial capability to make the payment and so it should be held that plaintiff was never ready and willing to perform her part of the contract. The learned counsel has also placed reliance in the case of J.P. Builders and Another Vs. A. Ramadas Rao and Another, (2010) 12 JT 588 : (2011) 1 RCR(Civil) 604 : (2010) 12 SCALE 400 : (2011) 1 SCC 429 : (2010) 10 UJ 5288 and in the case of Bal Krishna and Another Vs. Bhagwan Das (Dead) and Others, AIR 2008 SC 1786 : (2008) 1 CTLJ 337 : (2008) 4 SCALE 805 : (2008) 12 SCC 145 : (2008) AIRSCW 4863 : (2008) AIRSCW 2467 : (2008) 5 Supreme 442 : (2008) 2

Supreme 752 to buttress his argument that in case a plaintiff fails to aver and establish readiness and willingness as mandated under Section 16(c) of Specific Relief Act, the suit must be dismissed and no relief can be granted to the plaintiff under Section 20 of the Specific Relief Act.

10. Per contra, Mr. DR Gogoi, learned counsel appearing for the respondent would argue that defendants never denied to have received Rs. 2,00,000/- from the plaintiff and such payment was made only for the purpose of purchasing the suit land and not for any other cause. This being the position, there is no reason as to why suit of the plaintiff should not be decreed by upholding judgment passed by the trial court. According to the learned counsel, defendants having entered into agreement with the plaintiff did not perform their part of the contract to avoid liability. Calling attention of the court to para-4 of the plaint, learned counsel claimed that defendants who did not perform their part of the contract, plaintiff had always been ready and willing to get the sale deed executed. According to him, PW-1 Income Tax Officer was examined to prove financial capability of the plaintiff and so there is not merit in the appeal and it should be consequently dismissed.

11. The admitted fact in this appeal is that defendants No. 1 to 5 are owners of the suit land and that they agreed to sell the land to the plaintiff by executing a written agreement on 28.1.1995. The admitted total consideration was Rs. 4,00,000/- out of which defendants received Rs. 2,00,000/-. The dispute arises in regard to performance of this contract only. While drawing attention of the court to para-2 of the agreement (exhibit-1), learned counsel for defendants argued that the question of sale would arise only when defendants No. 6 and 7 would vacate the suit premises and transaction of sale is complete. Learned counsel for the respondent on the other hand would argue that plaintiff cannot be trapped by technical interpretation of the Clause once it is found that defendants received money from the plaintiff agreeing to sell the suit land. This takes us to Clause -2 of the agreement which is quoted below:

"That the second party has paid to day an amount of Rupees Two Lakhs (the receipt whereof the first part hereby acknowledge) and symbolical possession is also given in favor of the second party and actual physical possession would be delivered to the second party as soon as the house is vacated before completion of the transaction by evicting the present tenants."

12. The language of the aforesaid Clause of the contract indicates that symbolical possession of the suit premises was only given to the plaintiff and it was agreed between the parties that actual possession would be delivered as soon as defendants No. 6 and 7 vacate the premises. It was indicated that such vacation by defendants No. 6 and 7 would be before completion of the transaction by evicting them. In course of cross-examination, a specific question was put to PW-5 who is the plaintiff in the case and she stated that as per the agreement between the parties, sale of the land was supposed to be made only after the hotel of defendants No. 6 and 7 standing on the suit land would be vacated. By

pointing to these pieces of evidence, the appellants wanted to establish that there was no breach from the side of the defendants in regard to performance of the contract. The contract was there for sale of the land but time had not yet come for executing the contract as defendants No. 6 and 7 were still possessing the same.

13. To ascertain as to whether suit of the plaintiff is maintainable in terms of Section 16(c) of the Specific Relief Act, I have perused the plaint in entirety. Plaintiff has not stated anywhere that she is or has been ready and willing to perform the essential terms of the contract. Although in para-4 of the plaint it is stated that defendants did not file necessary application for getting sale permission from competent authority and that plaintiff approached the defendants on several dates but nowhere a specific date has been mentioned. Agreement was executed on 28.1.1995 and the suit was instituted on 5.2.1996. Plaintiff was duty bound to state as to what had happened in the meantime and as to what action the plaintiff had taken for the purpose of getting the sale deed executed. The mandate of Section 16(c) of the Specific Relief Act is clear. It provides that specific performance of a contract cannot be decreed unless plaintiff avers and proves that he has performed his part of the contract or that he has been ready and willing to do the same. Even under the Code of Civil Procedure, Appendix-A provides essential of a plaint in a suit for specific performance of contract. In Form No. 47 and 48 to Appendix-A of the Code of Civil Procedure, it would appear that the averment as to readiness and willingness has been prescribed under the Form.

14. In the case of JP Builders(supra) Hon''ble Supreme Court observed that Section 16(c) of the Specific Relief Act mandates averment as to readiness and willingness on the part of the plaintiff and that it is a condition precedent for obtaining relief. The plaintiff is duty bound to allege and prove a continuous readiness and willingness to perform the contract on his part from the date of the contract and that the onus is on the plaintiff alone. In para-27 of this judgment, Hon''ble Supreme Court has held that when there is non-compliance with these statutory mandates, court is not bound to grant specific performance and is left with no other alternative but to dismiss the suit.

15. The readiness and willingness of the plaintiff is not only to be present at the time of institution of the suit but it should continue to exist during whole period even after passing of the judgment. This is because under Section 28 of the Specific Relief Act, if the plaintiff does not perform his part after the suit is decreed in that event the decree of specific performance of contract is liable to be rescinded. This is why under Order XX Rule 12 -A of the Code of Civil Procedure there is a requirement that decree for specific performance of contract should specify the period within which the payment should be made.

16. The Hon''ble Supreme Court held in the case of N.P. Thirugnanam (D) by L.Rs., Vs. Dr. R. Jagan Mohan Rao and others, AIR 1996 SC 116 : AIR 1995 SC 116 : (1995) 5 JT 553 : (1995) 4 SCALE 465 : (1995) 5 SCC 115 : (1995) 2 SCR

53 Supp that plaintiff must not only aver and establish readiness and willingness but plaintiff is also duty bound to show that he has financial ability to make payment of the balance consideration. Herein this case, plaintiff initially attempted to prove her financial capability by examining PW-1, Income Tax Office but subsequently abandoned the endeavor by not producing him on the adjourned date of evidence. The examination-in-chief of PW-1 was discontinued by recording that the examination was discontinued for failure on the part of the witnesses to bring balance sheets. Plaintiff thereafter did not make any attempt to produce balance sheet to prove her financial capability. Had the plaintiff been ready and willing to make payment of Rs. 2,00,000/- she could have deposited the amount with the learned trial court even during the pendency of the suit. Besides, after the suit was decreed on 21.7.2005 and the defendants were directed to execute sale deed within three months after receipt of balance consideration of Rs. 2,00,000/- plaintiff could have deposited the amount with the trial court to show her readiness and willingness. Apart from avoiding consequences of Section -28 of the Specific Relief Act, this was necessary for the plaintiff to prove her continuance as to readiness and willingness to get the sale deed executed. The totality of circumstances only lead to show that plaintiff was not ready and willing to perform her part of the contract. Once such a finding is arrived at, the court is left with no other alternative but to dismiss the suit by setting aside the judgment and decree passed by the learned trial court. Accordingly, the appeal stands allowed and the impugned judgment and decrees are hereby set aside.

17. Before parting it is to be noted that plaintiff had made prayer in the plaint for getting cost along with 18% interest on the whole amount w.e.f. 28.1.1995. This is the date of execution of the agreement and so plaintiff must have meant to get interest on the amount advanced by her to the defendants No. 1 to 5 on 28.1.1995. Apart from that in Clause -6 of Exhibit-1, the defendants No. 1 to 5 had agreed to return the advance amount to the plaintiff in case sale deed is not executed. So there is substantial compliance of Section-22(1) of the Specific Relief Act,. As pointed out above, there is no dispute as to whether receipt of Rs. 2,00,000/- by defendants No. 1 to 5 from the plaintiff on 28.1.1995. This being the position, the defendants No. 1 to 5 are liable to refund Rs. 2,00,000/- to plaintiff @ 9% per annum from the date of payment till realization. The defendants shall make the payment within a period of one month from today.

18. Accordingly, appeal stands allowed. No order as to cost.

19. Send down the records after framing of the decree.