
(2019) 07 MP CK 0122
In the Madhya Pradesh High Court
Case No : First Appeal No. 174 Of 2000

Roshan

APPELLANT

Vs

Misraj Kunwar And Others

RESPONDENT

Date of Decision : 18-07-2019

Acts Referred:

Specific Relief Act, 1963 — Section 16(ii), 16(c), 16(6)
Negotiable Instruments Act, 1881 — Section 138
Code Of Criminal Procedure, 1973 — Section 200
Code Of Civil Procedure, 1908 — Order 3 Rules 1, Order 3 Rules 2, Order 1 Rule 10,
Order 6 Rule 17

Citation : (2019) 07 MP CK 0122

Hon'ble Judges : Vivek Rusia, J

Bench : Single Bench

Advocate : A.K. Sethi, Harish Joshi, S.C. Shrivastava

Final Decision : Dismissed

Judgement

1. This appeal has been filed by the plaintiff being aggrieved by dismissal of the suit filed for the relief of specific performance of contract dated 13.10.89 vide order judgment dated 10.02.2000 passed by District Judge, Indore in Civil Suit No.110-A/1999.

Brief Facts of the case

2. The defendant nos.1 to 4 are owner of house No.75 (New number 87) Shitlamata Bazar, (Shekhawat Market) Indore. In the ground floor shop was in possession of the tenant viz Firm Mahendra Kumar Rajkamal and later on, sold to defendant nos.5 to 6 vide registered sale deed dated 10.02.1992 and possession was handed over. Plaintiff no.2 entered into an agreement dated 13.10.1989 with the defendant nos.1 to 4 for the sale of shop (private No.16) situated in ground floor of house No.75 (New number 87) Shitlamata Bazar, (Shekhawat Market) Indore (here in after referred as 'suit shop') in Rs.95,000/-. As per the agreement dated 13.10.89, an amount of Rs.30,000/- was paid. Later on vide

agreement dated 05.02.1992, plaintiff no.2 has agreed to sale above suit shop to the plaintiff no.1 in Rs.21,151/- . Thereafter, plaintiff no.1 came to know that defendant nos.1 to 4 are intending to sale the suit shop and denied the execution of sale deed with him. According to the plaintiffs, the defendants have extended the period of payment for two years vide agreement dated 25.02.1990, but sold the suit shop on 10.02.1992 to the defendant nos.6 and 7 (during pendency of the suit changed as Defendant nos.5 and 6 and hereinafter referred to as "defendant nos.5 and 6) which gave the cause of action for filing the suit for specific performance of contract and cancellation of the sale deed.

3. Plaintiff no.2 was initially impleaded as defendant no.5, in the suit thereafter, vide order dated 14.08.1996, he was transposed as plaintiff no.2. After receipt of summons, only defendant no.5 to 6 have contested the suit by submitting that they are bonafide purchaser of the shop by virtue of registered sale deed dated 10.02.1992 and they had no knowledge about any agreement to sale between the plaintiff and defendant nos.1 to 4.

4. On the basis of pleadings, the learned trial Court framed 8 issues for adjudication.

5. The plaintiff no.2 examined himself as PW-1 and got exhibited agreement to sale dated 13.10.1989 as Ex.P/1, notice published in news paper dated 01.02.1992 as Ex.P/2, legal notice dated 04.06.1991 as Ex.P/3, acknowledgments as Ex.P/4 to P/7, postal receipts as Ex.P/8 and certified copy of the sale deed dated 10.02.1992 as Ex.P/9.

6. In rebuttal, the defendant nos.5 and 6 have got examined Rajes as DW/1 and got exhibited photocopy of agreement to sale (undated) executed between plaintiff no.1 and plaintiff no.2.

7. After appreciating the evidence came on record vide judgment and decree dated 10.02.2000, the learned District Judge has dismissed the suit with a cost in favour of defendant nos.5 and 6.

8. Being aggrieved by the above judgment and decree the plaintiff has filed the this first appeal before this court.

9. I have heard Mr. A K Sethi Sr. Advocate for appellant and Mr. S.C. Shrivastava, learned counsel for the respondent nos.5 and 6 and peruse the records .

Appreciation and conclusions

10. According to the plaintiffs, plaintiff no.2 entered into an agreement with the defendant nos.1 to 4 for sale of shop no.16 situated in ground floor of House No.75 (New No.87) Shitalamata Bazar, Indore in total sale consideration of Rs.1,00,000/- and Rs.10,000/- was paid at the time of agreement to sale and remaining Rs.90,000/-was agreed to pay as far as possible within a period of four months. The measurement of the shop is mentioned in the Exb.P-1 is 7.6x10.6 sqft. with 9 ft. height. As per the boundaries mentioned in the para

no.1 of the agreement there is shop-14 in the East side and on the West side there is a shop no.16 is situated . There is over writing in the agreement which is not counter signed either by the plaintiff no.2 or defendant nos.1 to 4. In the plaint also, the plaintiffs have pleaded that agreement for the sale of private shop no.16 was executed hence they they are seeking decree of execution of the sale deed for shop no.16. The period of payment in the aforesaid agreement was extended to further two years on 25.02.1999. Plaintiff no.2 and defendant nos.1 to 4 have extended the period of agreement for two years from 25.02.1999.

11. The plaintiff got issued a public notice on 01.02.1992 that they have an agreement for sale of shop no.16 Ex.P/12, thereafter, they issued a legal notice in which also it is mentioned that the agreement in respect of private shop no.16 has been executed and call upon defendant nos.1 to 4 to execute the sale deed.

12. But vide sale deed dated 10.02.1992 Ex.P/9, shop no.15 was sold to the defendant nos.5 and 6. In the sale deed, the boundaries are mentioned that shop no.14 is situated in the East side (Rajesh Saree Centre) and in the West side shop no.16 (Navdulhan) of shop no 15.

13. Rajesh Porawal, PW-1, in his evidence has stated that he entered into an agreement for shop no.16 ad-measuring 9x10 sqft. In cross-examination hw further admitted that that the corrections made in the Ex.P/1 were not counter signed by the parties to the agreement. In cross-examination, he further admitted that shop no.15 belongs to defendant nos.5 and 6 which they purchased from defendant nos.1 and 4. DW/1 has also deposed that he purchased shop no.15 and it was never shop no.16 and the size of his shop is 10x9 sqft. Therefore, it is clear that the evidence that of the plaintiffs filed the suit for specific performance of contract in which shop no.16 was agreed to sold . Defendant nos.5 and 6 purchased the shop no.15 from defendant nos.1 to 4. They have wrongly been impleaded in the suit by challenging their sale deed dated 10.02.1992 and they are bonafide purchaser of the shop no.15. The plaintiffs are not entitled to claim any relief against them.

14. Initially, the plaint was filed by Roshan @ Sudharshan (Minor) aged about 17 years under the guardianship of his mother Shraddha Devi by impleading his elder brother Rajesh Porwal as defendant no.2. Alleged agreement to sale dated 13.10.1989 was executed between Rajesh and defendant no.1 to 4 for which general notice to the public was got published in news paper in which name of the plaintiffs are not mentioned. Legal notice was given by the counsel on the instructions given by Rajesh Porwal. Thereafter, on 05.02.1992,(Exb.D-1) Rajesh has agreed to sale shop no.16 to plaintiff no.1 Roshan in Rs.90,000/- and agreed to execute the sale deed in one year. At that time, plaintiff no.1 was minor. The date of agreement is not mentioned in the Exb.D-1. Rajesh was not owner of the suit shop who could entered into an agreement with plaintiff no.1 but on the basis of this agreement , he filed the suit for specific performance of contract. Plaintiff no.2 who was defendant no.5 at the time of filing of the suit filed an application under Order 1 Rule 10 of the CPC seeking his transposition as plaintiff

no.2 and vide order dated 14.08.1996, the application was allowed and he became the plaintiff no.2.

15. That Rajesh Porwal entered into the witness box as PW/1 on 28.10.1999. Plaintiff No.1 did not enter into the witness box to prove the readiness and willingness. Plaintiff no.1 filed an application under Order 6 Rule 17 of the CPC seeking amendment in the plaint to the effect that the plaintiff was continuous ready and willing to execute an agreement and the said application was allowed on 15.03.1995. Therefore, at the time of filing of the suit, there was no pleading in the plaint on 01.12.1992 in respect of continuous readiness and willingness on the part of the plaintiff no.1 . later on by way of amendment, the pleading was made only in respect of plaintiff no.1 and admittedly, there was no agreement to sale with plaintiff no.1. He said to have entered into the agreement with his brother Rajesh Porwal on 15.02.1992, therefore, there cannot be any pleading in respect of continuous readiness and willingness on part of plaintiff no.1 before 05.04.1992.

In case of J.Samuel Vs. Gattu Mahesh, reported in 2012 (2) SCC 300, Supreme Court has considered the pleading of readiness and willingness by way of amendment in the suit of specific performance. The Apex Court has held that in absence of pleading of readiness and willingness, the suit is liable to be dismissed and such pleading cannot be made by way of amendment. The relevant para is reproduced below:

"It is clear that in a suit for specific performance of a contract unless there is a specific averment that he has performed or has always been ready and willing to perform the essential terms of the contract, the suit filed by him is liable to be dismissed. In other words, in the absence of the above-said claim that he is always ready and willing to perform his part of the contract, the decree for specific performance cannot be granted by the Court.

10) In this legal background, we have to once again recapitulate the factual details. In the case on hand, Suit O.S.No. 9 of 2004 after prolonged trial came to an end in September, 2010. The application for amendment under Order VI Rule 17 CPC was filed on 24.09.2010 that is after the arguments were concluded on 22.09.2010 and the matter was posted for judgment on 04.10.2010. We have already mentioned that Section 16(c) of the Specific Relief Act contemplates that specific averments have to be made in the plaint that he has performed and has always been willing to perform the essential terms of the Act which have to be performed by him. This is an essential ingredient of Section 16(c) and the form prescribes for the due performance. The proviso inserted in Rule 17 clearly states that no amendment shall be allowed after the trial has commenced except when the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial.

11) As stated earlier, in the present case, the amendment application itself was filed only on 24.09.2010 after the arguments were completed and the matter

was posted for judgment on 04.10.2010. On the proper interpretation of proviso to Rule 17 of Order VI, the party has to satisfy the Court that he could not have discovered that ground which was pleaded by amendment, in spite of due diligence. No doubt, Rule 17 confers power on the court to amend the pleadings at any stage of the proceedings. However, proviso restricts that power once the trial has commenced. Unless the Court satisfies that there is a reasonable cause for allowing the amendment normally the court has to reject such request. An argument was advanced that since in the legal notice sent before filing of the suit, there is reference to readiness and willingness and the plaintiff has also led in evidence, nothing precluded the court from entertaining the said application with which we are unable to accept in the light of Section 16(c) of the Specific Relief Act.

(emphasised supplied)

16. In case of Premraj Vs. DLF Housing, reported in AIR 1968 SC 1355, the Apex Court has held that in absence of allegation that plaintiff is ready and willing to perform his part of a contract, the suit is not maintainable.

In case of Sukhbir Singh Vs. Brijpal Singh reported in 1997(2)SCC 200, the Apex Court has held that what requires to be considered is whether the essential facts constituting the ingredient in Section 16(6) of the Act were pleaded and that found mentioned in the Form No.47 and

48 prescribed in Appendix AA of the CPC.

17. That Rajesh became plaintiff no.2 on 22.10.1999 and thereafter, he did not file any application in respect of the fact regarding continuous readiness and willingness on his part. Therefore, in absence of the pleadings in respect of continuous readiness and willingness for plaintiff no.2. He is not entitled for decree of specific performance of contract.

18. The Apex court in case of Man Kaur Vs. Hartar Singh Sangha, reported in (2010) 10 SCC 512, has held under:

12. Section 16(c) of the Specific Relief Act, 1963 ("the Act", for short) bars the specific performance of a contract in favour of a plaintiff "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 of the performance of which has been prevented or waived by the defendant".

Explanation (ii) to Section 16 provides that for purposes of clause (c) of Section 16, "the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction."

Thus, in a suit for specific performance, the plaintiff should not only plead and prove the terms of the agreement, but should also plead and prove his readiness and willingness to perform his obligations under the contract in terms of the

contract. (See N.P. Thirugnanam v. Dr. R. Jagan Mohan Rao; Pushparani S. Sundaram v. Pauline Manomani James and Manjunath Anandappa v. Tammanasa.)

13. In the first case, this Court held: (N.P. Thirugnanam case1, SCC p. 118, para 5)

"5. ... The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the re-lief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the de-fendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract."

14. In Vidhyadhar v. Manikrao this Court reiterated the following well-recognised legal position: (SCC pp. 583-84, para 17)

"17. Where a party to the suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct...."

15. We may next refer to two decisions of this Court which considered the evidentiary value of the depositions of the attorney-holders. This Court in Janki Vashdeo Bhojwani v. Indusind Bank Ltd. held as follows: (SCC pp. 222-24, paras 13, 17-18 & 21)

"13. Order 3 Rules 1 and 2 CPC empower the holder of power of attorney to 'act' on behalf of the principal. In our view the word 'acts' employed in Order 3 Rules 1 and 2 CPC confines only to in respect of 'acts' done by the power-of-attorney holder in exercise of power granted by the instrument. The term 'acts' would not include deposing in place and instead of the principal. In other words, if the power-of-attorney holder has rendered some 'acts' in pursuance of power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter of which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.

* * *

17. ... In Shambhu Dutt Shastri v. State of Rajasthan it was held that a general power-of-attorney holder can appear, plead and act on behalf of the party but he can-not become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in the witness box on behalf of himself. To appear in a witness box is altogether a different act. A general power- of-attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff.

18. The aforesaid judgment was quoted with approval in Ram Prasad v. Hari Narain⁷. It was held that the word 'acts' used in Rule 2 of Order 3 CPC does not in-clude the act of power-of-attorney holder to appear as a witness on behalf of a party. Power-of-attorney holder of a party can appear only as a witness in his personal capacity and whatever knowledge he has about the case he can state on oath but he cannot ap-pear as a witness on behalf of the party in the capacity of that party. If the plaintiff is unable to appear in the court, a commission for recording his evidence may be issued under the relevant provisions of CPC.

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21. We hold that the view taken by the Rajasthan High Court in Shambhu Dutt Shastri followed and reiterated in Ram Prasad is the correct view."

(emphasis supplied)

16. In Shankar Finance & Investments v. State of A.P. this Court explained in what circumstances, the evidence of an at-torney-holder would be relevant, while dealing with a com-plaint under Section 138 of the Negotiable Instruments Act, 1881 signed by the attorney-holder of the payee. This Court held: (SCC pp. 542-43, paras 15-16)

"15. ... A power-of -attorney holder of the complainant who does not have personal knowledge, cannot be ex-amed. But where the attorney-holder of the com-plainant is in charge of the business of the complainant payee and the attorney-holder alone is personally aware of the transactions, and the complaint is signed by the attorney-holder on behalf of the complainant payee, there is no reason why the attorney-holder can-not be examined as the complainant. ...

16. In regard to business transactions of companies, partnerships or proprietary concerns, many a time the authorised agent or attorney-holder may be the only person having personal knowledge of the particular transaction; and if the authorised agent or attor-ney-holder has signed the complaint, it will be absurd to say that he should not be examined under Section 200 of the Code, and only the Secretary of the company or the partner of the firm or the proprietor of a concern, who did not have personal knowledge of the transaction, should be examined."

17. To succeed in a suit for specific performance, the plaintiff has to prove: (a) that a valid agreement of sale was entered into by the defendant in his favour and the terms thereof; (b) that the defendant committed breach of the contract;

and (c) that he was always ready and willing to perform his part of the obligations in terms of the contract. If a plaintiff has to prove that he was always ready and willing to perform his part of the contract, that is, to perform his obligations in terms of the contract, necessarily he should step into the witness box and give evidence that he has all along been ready and willing to perform his part of the contract and sub-ject himself to cross-examination on that issue. A plain-tiff cannot obviously examine in his place, his attorney-holder who did not have personal knowledge either of the transaction or of his readiness and willingness. Readiness and willingness refer to the state of mind and conduct of the purchaser, as also his capacity and preparedness on the other. One without the other is not sufficient. Therefore a third party who has no personal knowledge cannot give evidence about such readiness and willingness, even if he is an attorney-holder of the person concerned.

18. We may now summaries for convenience, the posi-tion as to who should give evidence in regard to mat-ters involving personal knowledge:

(a) An attorney-holder who has signed the plaint and instituted the suit, but has no personal knowl-edge of the transaction can only give formal evi-dence about the validity of the power of attorney and the filing of the suit.

(b) If the attorney-holder has done any act or han-dled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney-holder alone has per-sonal knowledge of such acts and transactions and not the principal, the attorney-holder shall be examined, if those acts and transactions have to be proved.

(c) The attorney-holder cannot depose or give evi-dence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transac-tion has been handled by an attorney-holder, nec-essarily the attorney-holder alone can give evi-dence in regard to the transaction. This frequently happens in case of principals carrying on busi-ness through authorised managers/attorney-hold-ers or persons residing abroad managing their af-fairs through their attorney-holders.

(e) Where the entire transaction has been con-ducted through a particular attorney-holder, the principal has to examine that attorney-holder to prove the transaction, and not a different or sub-sequent attorney-holder.

(f) Where different attorney-holders had dealt with the matter at different stages of the transac-tion, if evidence has to be led as to what tran-spired at those different stages, all the attor-ney-holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a

proceeding, to establish or prove something with reference to his "state of mind" or "conduct", normally the person concerned alone has to give evidence and not an attorney-holder. A landlord who seeks eviction of his tenant, on the ground of his "bona fide" need and a purchaser seeking specific performance who has to show his "readiness and willingness" fall under this category. There is however a recognised exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or "readiness and willingness". Examples of such attorney-holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad.

19. In case of NP Thirugnanam Vs. R. Jagan Mohan Rao, reported in 1995 (5) SCC 115 the Apex Court has held as under:

"Section 16(c) of the Act envisages that plaintiff must plead and prove that he had 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 those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit alongwith other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of contract. "

20. In case of J.P. Builders & Anr. Vs. Ramdas Rao & Anr, reported in (2011) 1 SCC 429, this Court has held as under:

"22. The words "ready" and "willing" imply that the person was prepared to carry out the terms of the contract. The distinction between "readiness" and "willingness" is that the former refers to financial capacity and the latter to the conduct of the plaintiff wanting performance. Generally, readiness is backed by willingness.

25. Section 16(c) of the Specific Relief Act, 1963 mandates "readiness and willingness" on the part of the plaintiff and it is a condition precedent for obtaining relief of grant of specific performance. It is also clear that in a suit for specific performance, the plaintiff must allege and prove a continuous "readiness and willingness" to perform the contract on his part from the date of the contract. The onus is on the plaintiff.

26. It has been rightly considered by this Court in R.C. Chandiok V. Chuni Lal Sabharwal that "readiness and willingness" cannot be treated as a straight jacket formula. This has to be determined from the entirety of the facts and circumstances relevant to the intention and conduct of the party concerned."

21. Therefore, in view of the aforesaid, plaintiffs are not entitled for decree of specific performance of contract against defendant nos.1 to 4 also . Hence, the appeal stands dismissed. judgment dated 10.02.2000 passed by District Judge, Indore in Civil Suit No.110-A/1999 is hereby upheld.

No order as to cost.