

(2013) 11 BOM CK 0139
In the Bombay High Court
Case No : Second Appeal No. 464 of 2012

Shaligram

APPELLANT

Vs

Ramesh

RESPONDENT

Date of Decision : 28-11-2013

Acts Referred:

Citation : (2014) 3 ALLMR 235 : (2014) 3 MhLj 704

Hon'ble Judges : S.B. Shukre, J

Bench : Single Bench

Judgement

Sunil Balkrishna Shukre, J.—This appeal is preferred against the judgment and decree commonly passed in Regular Civil Appeal No. 124 of 2009 and Regular Civil Appeal No. 125 of 2009 by Ad-hoc District Judge-3, Washim on 11.4.2012 thereby dismissing the appeal and confirming the judgment and decree passed in Regular Civil Suit No. 28 of 2000 on 2nd September, 2009 by Civil Judge, Junior Division, Mangrulpir. The appellant is the original defendant and the respondent is the original plaintiff. The respondent had filed a suit for specific performance of contract in respect of land Gat No. 73, area 3.25 hectare, situated at Chikhalgad, Tq. Mangrulpir, District Washim (in short "suit land") and in the alternative for refund of consideration amount of Rs. 80,000/-. The respondent had contended that on 27th May, 1998, the appellant being in need of money for solemnizing marriage of his daughter, agreed to sell the suit land to him for a consideration of Rs. 80,000/-. He submitted that the appellant was in possession of the suit land since the year 1975 and it was allotted to him in the category of "ex-servicemen". He further submitted that on 27.5.1998 itself, he paid the entire consideration amount to the appellant and in lieu thereof the possession of the suit land was given to him by the appellant. The terms of this agreement were also reduced into writing. It was mentioned that the permission of revenue authorities was required for transfer of the suit land to the respondent and, therefore, it was agreed that necessary permission would be obtained in one near from the date of execution of the agreement. The respondent further submitted that permission was not obtained by the appellant and later on it was

learnt by him that the land which was categorized as Class-II occupancy at the time of agreement to sell, was converted into Class-I occupancy land, did not require any permission from the Collector for transfer of the suit land as per the provisions of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961, in view of said conversion. The respondent further submitted that he issued notices on 27.12.1999 and 14.1.2000 to the appellant calling upon him to execute the sale-deed, but to no effect. Therefore, respondent filed a civil suit for specific performance of contract against the appellant in which he also claimed alternate relief of refund of earnest money, in case, the suit was not decreed in his favour.

2. The appellant contested the suit by filing his written statement. He admitted that the suit land was granted in the category of "ex-servicemen" and he also admitted that in the year 1998 he was to perform marriage of his daughter. He submitted that for the purpose of marriage of his daughter he was in need of money of Rs. 10,000/- and, therefore, he approached the respondent with a request to lend him an amount of Rs. 10,000/-. He submitted that respondent did oblige him, but obtained from him a signed blank paper and also possession of the suit land, as a security for repayment of loan. Thus, the possession of the suit land was delivered to the respondent on 27th May, 1998. He further submitted that he repaid the loan amount on 15th November, 1998 and at that time when he demanded possession of the suit land back from the respondent, the respondent avoided to deliver possession. According to him, the agreement dated 27th May, 1998 was sham and bogus. He also submitted that without permission of the Collector, the suit land could not be transferred and, therefore, the whole transaction was void, ab initio. Some other grounds were also taken by him for challenging the suit transaction. On all these grounds, he urged that suit deserved to be dismissed with costs. He also filed a counter-claim for recovery of possession of suit land.

3. The trial Court found that the respondent had duly proved the execution of the agreement dated 27.5.1998 for sale of the suit land by appellant to the respondent for a consideration of Rs. 80,000/- and that the appellant had received the entire amount of Rs. 80,000/- in lieu of which he had delivered possession of the suit land to the respondent and the respondent having performed his part of the contract, was entitled to a decree of specific performance of contract conditionally. The appellant's counter-claim for possession of the suit land, however, was rejected. Accordingly, the trial Court by its judgment and decree dated 2nd September, 2009 decreed the suit and dismissed the counterclaim for possession. The trial Court directed the appellant to apply for necessary permission for transfer of the suit land and gave liberty to the respondent to apply for such a permission, if the appellant failed to apply for it within the time stipulated by the Court. Two separate appeals were filed against the said judgment and decree of the trial Court. Regular Civil Appeal No. 124 of 2009 was against the dismissal of counter-claim of the appellant and Regular Civil Appeal No. 125 of 2009 was against decree for specific performance

of contract. The appellate Court confirmed the findings of facts recorded by the trial Court and dismissed both the appeals, thereby confirming the decree of the trial Court.

4. This appeal came to be admitted by this Court on 1st October, 2012 upon the following substantial question of law:

Whether the Courts below have committed an error in passing a decree for specific performance of contract in the absence of their (sic-there) being a pleading of the readiness and willingness to perform the part of the contract by the respondent/plaintiff.

5. I have heard Mr. S.A. Marathe, learned counsel for the appellant and Mr. A.P. Tathod, learned counsel for the respondent. With their assistance, I have gone through the memo of appeal and record of the trial Court.

6. The substantial question of law relates to necessity of making any specific averment by the respondent in the plaint, as regards performance by him his part of the contract or his readiness and willingness to perform remaining part of the contract. Learned counsel for the appellant has submitted that in view of mandatory nature of the provision contained in Section 16(c) of the Specific Relief Act, 1963 (in short, "the Act") such an averment was necessary and since it was not made in a specific manner by the appellant, the suit ought to have failed and it should not have been decreed by the trial Court and confirmed by the appellate Court. Learned counsel for the respondent submits that although this is the mandatory requirement of law, this very requirement of law can be seen from the overall pleadings in the plaint to have been fulfilled in the instant matter and, therefore, there would be no reason for this Court to interfere with the decrees passed by both the Courts below.

7. Section 16(c) of the Act is reproduced as under:

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

(a).....

(b).....

(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.

8. It is clear that the provision is very specific. It lays down a rule limiting enforcement of specific performance of contract in two situations. Firstly, it states that specific performance of contract cannot be enforced in favour of a person who fails to aver and prove that he has performed his part of the contract as regards essential terms thereof. Secondly, it also prohibits enforcement of the specific performance in a situation where the plaintiff fails to aver and prove that he has been always ready and willing to perform the essential terms of the contract which are to be performed by him. This provision also makes it clear that these averments must be made according to true construction of the contract. It has been held to be mandatory in nature. In the absence of any pleadings made on these lines and proved by the plaintiff, no specific performance of contract can be awarded. This is the law well-settled now.

9. Now, it would have to be seen whether or not the averments made by the respondent were according to true construction of the contract. For its determination, it would be useful to refer to the essential terms of the agreement of sale, which has been duly proved by the respondent vide Exhibit-62. A close perusal of this agreement discloses three essential terms, namely: i) payment of consideration of Rs. 80,000/-, ii) delivery of possession of the suit land, and iii) obtaining of permission for sale of the suit land from the Government.

10. The first term, obviously, was to be performed by the respondent, he being the purchaser. For fulfillment of other two terms, it would naturally fall upon the appellant to perform them, he being the owner in possession of the suit land. This agreement itself indicated that the only essential term which was required to be fulfilled by the respondent was performed by him by making payment of full consideration amount. It further indicated that second term, which was to be performed by appellant, was also performed by him then and there as it mentioned that possession was delivered. So, what remained to be performed post agreement of sale was obtaining of permission from the Government and that was to be done by the appellant.

11. The pleadings in the plaint show that respondent had pleaded that on the day of execution of the agreement to sell i.e. 27th May, 1998 itself, he had made payment of the said consideration amount in its entirety. This pleading has and for that matter the pleadings required to be made as per Section 16(c) have to be interpreted in the light of explanation (ii) to Section 16(c). Explanation (ii) lays down that the averment must be made according to true construction of the contract. According to Websters Comprehensive Dictionary Deluxe Encyclopedic Edition (First Indian Reprint 2001) the word "true" has been assigned the meaning as faithful to fact or reality; not false or erroneous. In concise Oxford English Dictionary, Twelfth Edition (Indian), "true" is defined to mean, "in accordance with fact or reality. It is clear that the expression "true construction" used in the explanation (ii) to Section 16(c) means construction or interpretation which is faithful to facts and realities emerging from the contract. It is the

construction which is not based upon facts or circumstances extraneous to the contract. Such construction must be made by reading the essential terms of the contract all together and not in piecemeal manner, in accordance with their ordinary and natural meaning. One of the facts and realities of essential terms of the agreement (Exhibit 62) was that there was just one obligation on the part of respondent to fulfill and that was of payment of full amount of consideration. Therefore, when respondent pleaded he paid full amount of consideration, in effect, he conveyed that he had performed his part of the contract. It would then follow that the requirement of first part of Section 16(c) was complied with and necessity of fulfilling second part requirement of Section 16(c) relating to averment of readiness and willingness to perform those essential terms which were to be performed by respondent did not arise, as nothing had remained to be performed by the respondent. Whatever was required to be performed was for the appellant only. It was also not appellant's case that something had remained to be performed by the respondent. His defence was that there was no agreement of sale and he had signed one blank stamp paper and had delivered possession to secure loan and interest thereon. Both the Courts below have concurrently held that requirements of Section 16(c) as regards averments have been fulfilled by the respondent and rightly so.

12. Learned counsel for the appellant submits that pleadings of respondent do not show use of the words that he had performed his part of the contract which he was required to perform under its terms. True it is. These specific words are missing from the plaint. But that has not made any difference in the instant case. Pleadings, sometimes, are poor in words or use different words. But as long as they convey that which must be conveyed under the law, they cannot be flayed and flogged as being sapped of legal requirements. The law relating to pleadings is clear. It is the substance of the pleadings and not the form that must be seen by the Courts, for, it is the substance only which matters and which is capable of conveying to the other side what is intended and meant by a party. Wordings or phraseology of the pleadings might not be as desired or might be employed with all hues and colours of the language. It is the beauty of any language whether English or Indian that it is capable of conveying same meaning in many different forms and words. The requirement of Section 16(c) of the Specific Relief Act, 1963 is that by averments made, it should be conveyed to the defendant that the plaintiff has performed essential terms of the contract or has always been ready and willing to perform his part of contract. This meaning can possibly be expressed in different words and forms. Such meaning can also be ascertained from the expressions and words used even in poorly or inartistically drafted pleadings by looking into their substance. It all depends upon what words and expressions have been employed in pleadings and there cannot be any one fits all solution for determining which words or expressions in their can-notions and substance conform to requirements of Section 16(c) and which do not. It is for the Court to determine so in the facts and circumstances of each case before it.

13. In the instant case, the respondent pleaded that he had paid an amount of

Rs. 80,000/- to the respondent on the very day of execution of agreement to sell and that the agreement to sell could not be executed on 27.5.1998 because the appellant was to obtain permission for sell of the suit land from the Government. This can be seen from pleadings appearing in paragraph 2 of the plaint and they are reproduced as under:-

The plaintiff on the very day paid Rs. 80,000/- to the defendant and the same fact is mentioned in the Isarpawati. As the land Gat No. 73 old Survey No. 16/1 was granted to him by the Government. The defendant agreed to apply for permission for the transaction from Government and therefore, the sale-deed was not executed on that date.

14. Substance of these pleadings, in the light of essential terms of the contract. If I may repeat, is that respondent did his part of the contract and expected the appellant to perform his part of the contract so that sale-deed could be executed. This was also understood well by the appellant, as the evidence on record shows, causing him no prejudice in his defence.

15. The trial Court in fact elaborately dealt with this aspect of the case by following the law laid down by the Hon"ble Apex Court in the cases of Kidar Lall Seal and Another Vs. Hari Lall Seal, and Madan Gopal Kanodia Vs. Mamraj Maniram and Others, when it held that the pleadings could not be interpreted in a pedantic and meticulous manner so as to defeat the genuine claims on trivial grounds. The trial Court followed the law laid down in the case of Kedarlal (supra) that the Court should be slow to throw out a claim on a mere technicality of pleadings when substance of things is there and no prejudice would be caused to the other side, however, clumsily or inartistically the plaint may be worded. The trial Court also placed its reliance upon the observations by the learned Single Judge of this Court in the case of Hariba Babu Babar and Another Vs. Appasaheb Dadu Nagargoje, , that for gathering the true spirit behind a plea, it should be read as a whole and to test whether the plaintiff has performed his obligation, one has to see the pith and substance of the plea. These findings of the trial Court have also been confirmed by first appellate Court. Findings of both these Courts are consistent with settled law of pleadings and requirements of Section 16(c) of the Act seen in the light of its explanation (ii). Thus, I see no reason to take a different view in the matter. Besides, these findings are based upon the appreciation of evidence available on record. They are not the result of non-consideration of any relevant evidence or consideration of any evidence not admissible in law. They, therefore, cannot be termed as perverse and as such leave no scope for this Court to make any interference with them. The argument of learned counsel for the appellant made in this behalf, therefore, cannot be accepted.

16. Learned counsel for the appellant has forcefully argued that question of absence of specific pleadings as regards performance of part of contract by the appellant ought to have been examined by both the Courts below in the context of the defence taken by the appellant. He submitted that it was the case of the

appellant that the sale transaction was nominal, having been entered into between the parties only as a security for repayment of loan of Rs. 10,000/- and that the respondent had filed a case before the Assistant Registrar, Co-operative Societies seeking a declaration that the real transaction of the agreement to sell was of security of loan. He submits that with this defence, it became obvious that the appellant was avoiding to perform his part of contract and, therefore, it was necessary for the respondent to have further pleaded that the appellant had failed to perform his part of contract. Learned counsel for the respondent submits that there is no such requirement u/s 16(c) of the Act.

17. Perusal of Section 16(c) of the Act will amply show that it does not lay down any rule that the plaintiff should also make an averment in words that there is a failure on the part of the defendant to perform essential terms of the contract. Such a pleading can be gathered from the facts and circumstances of the case and when it cannot be, there would be no cause of action to file the suit. In the present suit general pleadings of the respondent and conduct of the appellant did show that appellant was not ready and willing to perform his part of the contract. Besides, the appellant also did not prove that there was no cause of action to file the suit. Therefore, I find no merit in the said argument of learned counsel for the appellant.

18. Learned counsel for the appellant has also referred to me cases of Raj Kishore (Dead) By L.Rs. Vs. Prem Singh and Others, and Bal Krishna and Another Vs. Bhagwan Das (Dead) and Others, to strengthen his argument that in a suit for specific performance, averment as to readiness and willingness is mandatory. In fact, I have already held that this is the settled principle of law and it is mandatory in nature. But, here the question involved is not so much about the absence of necessary averment, but is about the form of averment which is already present in the plaint. In the said case of Raj Kishore, as per the terms of the agreement, plaintiff was required to repay an amount Rs. 6,000/- borrowed by him from the defendant to get the land in question transferred back to him. It was in this background of the agreement that it was found that the averment as regards readiness and willingness to perform part of the contract was necessary on the part of the plaintiff therein, as something had remained to be done. In the aforesaid case of Bal Krishna also, some part of the contract had remained to be performed by the plaintiff. Therefore, in that case, it became necessary for the plaintiff to make a specific averment in the plaint as regards readiness and willingness to perform the contract. These facts clearly distinguish themselves from the facts of the instant case, wherein nothing had remained to be performed by the respondent. Therefore, in my respectful submissions, both these cases would not help the appellant in any manner.

19. In the circumstances, I find that the respondent had sufficiently pleaded in the plaint that he had performed his part of contract and the Courts below cannot be said to have committed an error in passing a decree for specific performance of contract in the absence of pleading of readiness and willingness

to perform the part of the contract by the respondent/plaintiff. The substantial question of law is answered accordingly. There is no substance in the appeal and it must fail. In view of above, appeal stands dismissed with costs.