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**(1997) 08 MP CK 0054**  
**In the Madhya Pradesh High Court**  
**Case No : L.P.A. No. 8 of 1990**

Sitaram Madanlal Saraogi

APPELLANT

Vs

Hemchand Bhagwandas Jain

RESPONDENT

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**Date of Decision :** 11-08-1997

**Acts Referred:**

Specific Relief Act, 1963 — Section 10, 16(1), 20

**Citation :** (1998) 1 MPLJ 561

**Hon'ble Judges :** A.K. Mathur, C.J.;Dipak Misra, J

**Bench :** Division Bench

**Advocate :** M.L. Jaiswal and P.K. Jaiswal, for the Appellant; Abhay Sapre, for the Respondent

**Final Decision :** Dismissed

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## Judgement

Dipak Misra, J.

Pregnability of the judgment passed in First Appeal No. 120/86 by a learned Single Judge of this Court allowing the appeal preferred by the defendant in a suit for specific performance of contract is called in question by the plaintiff invoking the jurisdiction under Clause 10 of the Letters Patent.

The appellant herein as plaintiff instituted Civil Suit No. 27-A/81 alleging that on 7-1-1981 the defendant negotiated for sale of suit land through Ramgopal Soni, PW-3. The negotiation was concretised and the terms and conditions were settled between the parties. It was agreed between them that the consideration for the suit land would be Rs. 40,000/- out of which Rs. 10,000/- would be paid as earnest money and the balance would be made good at the time of the registration of the Sale Deed; the cost of execution and registration would be borne by the plaintiff and it was orally agreed by the defendant that he would execute the sale deed after some time as desired by the plaintiff and deliver possession thereof. According to the plaintiff in pursuance of the said agreement he paid Rs. 10,000/- and the defendant acknowledged the same in the

agreement (Ex.P-1). After a fortnight the plaintiff asked the defendant through PW-3 to execute the Sale Deed. It was intimated by the defendant that he would execute the deed within a few days. As no positive steps were taken and the plaintiff heard a rumour that the defendant was reluctant for the execution of the Sale Deed and was wanting more money for the suit land, he sent the broker, PW-3 to persuade the defendant to fix a date for execution and registration of the sale deed when the plaintiff would pay the balance of the price as agreed. It is stated in the plaint that the broker returned with the information that the defendant refused to sell the suit land at the agreed price and demanded one Lakh. On 2-3-1981 the plaintiff sent a notice (Ex.P-3) requiring the defendant to execute the Sale Deed within seven days of the receipt of the notice, failing which he would be constrained to file the suit for specific performance. It was also intimated to the defendant that the plaintiff would be waiting on 9-3-1981 at the Sub-Registrar's Office with the requisite stamp, the price and registration expenses. The notice was delivered to the defendant on 5-3-1991, as per acknowledgment (Ex.P-2) but the defendant failed to turn up on the date fixed. Having no other way the plaintiff was constrained to file the present suit on 5-12-1991 alleging that he had always been ready and willing to perform his part of the agreement and to pay the balance of Rs. 30,000/- and bear all expenses of execution and registration of the Sale Deed but there had been no response from the defendant and, therefore, he was entitled to a decree directing the defendant to execute the sale deed and get the same registered on payment of the balance amount through Court. He also prayed for compensation @ Rs. 4,000/- per month for withholding the transfer from the date of filing of the suit till delivery of the possession.

The claim of the plaintiff was resisted by the defendant by filing a written statement wherein, he disputed to have entered into any agreement for sale of 3.78 acres of land for consideration of Rs. 40,000/-. According to him, out of 3.78 acres he had agreed to sell 0.78 acres only and as the parties could not decide which portion was to be sold, boundary was not specified in (Ex.P-1). The further case of the defendant is that he had executed the agreement with the intention to sell 0.78 acres of suit land on consideration of Rs. 40,000/- and accordingly had received Rs. 10,000/-. The plaintiff had demanded No Objection Certificate from the "nazul" and the location of the plot was to be determined after consulting the Patwari before the registration. Stating these circumstances, the defendant advanced a positive plea that the value of the total land measuring 3.78 acres on the date of agreement, was Rs. 3,50,000/- and, therefore, it was inconceivable that the defendant had agreed to sell the entire land, hence the agreement was obtained by fraud. The defendant admitted the receipt of the notice but on inquiry with regard to the extent of land as mentioned in the notice, the plaintiff reaffirmed that the agreement pertained to purchase of 0.78 acres only. All the averments in the plaint were traversed. He also denied the plaint-averment with regard to the plaintiff's going to the office of Sub-Registrar and asking him to execute the Sale Deed on acceptance of the balance price. He

expressed his willingness to sell 0.78 acres on payment of the balance amount of Rs. 30,000/-.

On pleadings of the parties, learned trial Judge framed four issues and answered all of them against the defendant. As a consequence thereof he passed decree for specific performance and possession as prayed for but dismissed the claim for damages.

Feeling aggrieved by the aforesaid judgment of the learned trial Judge the defendant preferred an appeal before this Court. Before the learned Single Judge it was urged by the defendant that the plaintiff had failed to aver and prove that he has performed or has always been ready and willing to perform the terms of the contract which are to be performed by him, and in absence of such averment and proof the plaintiff was not entitled in law to a decree for specific performance of contract. The learned Single Judge referring to the pleadings and the evidence came to hold that there has been no averment in the plaint to indicate readiness and willingness on the part of the plaintiff. A finding has also been recorded by the Learned Judge that the story of visit of the plaintiff to the office of the Sub-Registrar was unbelievable and in fact, had been contrived to cover up his inaction and to exhibit his readiness and willingness. The learned Single Judge also took note of the fact that the time taken for filing of the suit being nine months after the expiry of the notice dated 12-3-1981 negatives the claim of readiness and willingness on the part of the plaintiff. Arriving at these conclusions the learned Judge allowed the appeal.

Assailing the aforesaid judgment, Mr. M. L. Jaiswal, learned Senior Counsel for the appellant has contended that the learned Single Judge has misconstrued the pleadings of the plaintiff while arriving at the conclusions that there is no averment in the plaint that the plaintiff is ready and willing to perform his part of the contract. His further submission is that the reasonings given by the learned Single Judge that the plaintiff had not proved his financial status or capacity to pay the balance of Rs. 30,000/- and bear the expenses for purchase of stamps and registration charge is not factually correct and that apart, the concept of readiness cannot be stretched to exhibit the requisite amount in currency on all occasions. The learned counsel also has seriously criticised the emphasis laid on the time taken to despatch the notice and to file the suit. His further submission is that no issue was framed in regard to readiness and willingness before the Court below and, therefore, the finding on this score by the learned Judge is quite vulnerable.

Mr. Abhay Sapre, learned counsel for the respondent has submitted that the learned Judge has correctly scrutinised the averment in the plaint and the finding pertaining to absence of pleadings is unattackable. It is further contended by him that the evidence adduced by the plaintiff to establish his readiness and willingness has been duly scanned and the conclusion has been arrived at that the same does not meet the statutory requirement, hence no fault can be found with the impugned judgment. The learned counsel has also proposed that as

parties had entered contest and had adduced evidence with regard to readiness and willingness non-framing of an issue does not vitiate a finding recorded on that score. The last submission of Mr. Sapre is that passing of a decree for specific performance of contract in the present facts and circumstances of the case would be, in fact, inequitable as the prices have gone sky-high and it would be causing serious jeopardy to the interest of the defendant.

On a perusal of the judgment passed by the learned Single Judge we find that he has recorded his reasonings for arriving at the conclusion that there is absence of averment in the plaint to indicate readiness and willingness. The plaintiff is required to show continuous readiness and willingness on his part. This is a condition precedent for grant of relief of specific performance. The plaintiff must establish that he is ready and has always been willing to perform his part of the contract. There has to have foundation in this regard in the plaint. The plaintiff is required to conform to the requirements prescribed in Forms 47 and 48 of the first Schedule in the Code of Civil Procedure. The Apex Court in the case of Ouseph Varghese Vs. Joseph Aley and Others, has held as under:-

"A suit for specific performance has to conform to the requirements prescribed in Forms 47 and 48 of the Ist Schedule in the Civil Procedure Code. In a suit for specific performance it is incumbent on the plaintiff not only to set out agreement on the basis of which he sues in all its details, he must go further and plead that he has applied to the defendant specifically to perform the agreement pleaded by him but the defendant has not done so. He must further plead that he has been and is still ready and willing to specifically perform his part of the agreement."

In the case of Prem Raj Vs. D.L.F. Housing and Construction Pvt. Ltd. and Another, , it has been laid down that in the absence of allegations that the plaintiff is ready and willing to perform of his part of the contract the suit is not maintainable. Recently in the case of Sukhbir Singh and others Vs. Brij Pal Singh and others, , the Apex Court while considering the averments in the plaint of the suit involved in that case held as follows:-

"In paras 5, 9 and 10 of the plaint the respondents have in substance pleaded that they had been and were still willing to perform their part of the agreement and the defendants did have notice in that behalf. It is seen that averments made in the above paras are in substance as per Forms 47 and 48 prescribed in Appendix AA of the Code as amended by the High Court. What requires to be considered is whether the essential facts constituting the ingredients in section 16(1)(c) of the Act were pleaded and that found mentioned in the said forms do in substance point to those facts. The procedure is the handmaid to the substantive rights of the parties. It would, therefore, be clear from a perusal of the pleadings and the forms that the averments are consistent with the forms."

From the aforesaid it is quite clear that there has to be substantial conformation with the forms so that the plaintiff can putforth his claim for specific

performance. In paragraph 3 of Form 47 it is stipulated that the plaintiff has to plead that he has been and still is ready and willing specifically to perform agreement on his part of which the defendant has had notice. In paragraph 5 of Form 48 it is contained that the plaintiff should indicate that he is still ready and willing to pay the purchase money of the said property to the defendant. This being the requirement of law, the averments in the plaint are to be tested on the anvil of the same. Paragraphs 6, 7 and 8 are the relevant paragraphs for our purpose. We reproduce below:-

"6. That the plaintiff had always been ready and willing to pay the remaining Rs. 30,000/- to the defendant and loss all the expenses of execution and registration of sale deed at the time of execution and registration of sale deed and had communicated this fact to the defendant but he had become greedy and was rather prepared to commit breach of contract than honour it out of his avarice."

"7. That the plaintiff, therefore, sent through his larger lawyer a notice to the defendant calling upon him to execute and register the sale deed of the suit land within seven days of the receipt of the notice against the balance of Rs. 30,000/- which the plaintiff would pay at the time of execution and registration of the sale deed and which he was always ready and willing to pay. The defendant recovered received the notice but neither he sent any reply nor executed the sale deed. The plaintiff went at the Sub-Registrar's office with about Rs. 40,000/- for payment to the defendant on account of the balance of price and for covering other expenses of stamps etc. The defendant however, did not turn up."

"8. That the defendant has their refused to perform his part of the contract made on 7-1-1981 which consisted of execution of the sale deed and getting it registered and delivering of possession which while the plaintiff had performed a part of his contract by giving to the defendant an advance of Rs. 10,000/- and was even ever ready and wiling to perform the remaining part paying to the plaintiff the remaining Rs. 30,000/- at the time of registration of sale deed."

On a perusal of the aforesaid pleadings we find that the language used is relatable to the past and there is nothing to indicate the readiness and willingness in praesenti. The aforesaid averments cannot be construed that the plaintiff has expressed his readiness and willingness on the date of institution of the suit. Even applying principle of substantial compliance we are unable to persuade ourselves that the aforesaid averments are substantially in conformity with the Forms prescribed in the CPC read with section 16(1)(c) of the Specific Relief Act.

The submission of Mr. Jaiswal, learned Sr. Counsel for the appellant is that in absence of any repudiation in the written statement and in absence of an issue being framed the learned Single Judge should not have recorded a finding in favour of the defendant. On a close scrutiny of the judgment of the learned Single Judge we find that he has taken note of paragraph 7 of the written statement, wherein the defendant had denied the plaintiff's going to the Sub-

Registrar office or offering him the amount. The learned Judge has also taken note of the absence of averments in the plaint. When the plaintiff had not specifically averred the question of non-traverse does not arise. It was incumbent on the plaintiff to state the readiness and willingness as that is the mandate of the law. This being the statutory requirement, the Court has a duty to frame an issue and address itself to the same. In the case of Suraj Singh and Another Vs. Sohan Lal and Others, , it has been held that even though the defendant has not taken the defence, it is mandatory that the Court should frame an issue with reference to section 16 and decide the issue of readiness and willingness. The plaintiff has to succeed on such averments and proofs. The submission that no specific issue was proved is of no substance inasmuch as Parties were fully aware of what was required to be proved and had accordingly led evidence. It is well settled in law if the parties are conscious with regard to the requirement of proof and have proceeded accordingly and adduced evidence non-framing of an issue does not vitiate the proceedings. This view of ours gains support from the decision rendered in the case of Kunju Kesavan Vs. M.M. Philip I.C.S. and Others, .

Apart from the absence of pleadings we also notice that the learned Single Judge has also analysed the capacity of the plaintiff to raise or arrange the amount and accordingly has arrived at the conclusion that there is no iota of proof about his financial status to pay the balance sum. The story of his going to the Office of Sub-Registrar has been disbelieved. Mr. Jaiswal, learned Sr. Advocate for the appellant has seriously challenged the finding with regard to capacity of the appellants to pay the balance sum. Once we have held that there were no averments in the plaint, the evidence would not improve the situation and, therefore, the availability of funds with the plaintiff is of no consequence. What is material is the plaintiff's assertion of his visit to the Sub-Registrar's Office to perform his part of the contract. Scrutinising the evidence of Ramgopal, PW-3 and the fact that the plaintiff admitted that he had not purchased the stamp papers, the learned Single Judge has come to the categorical conclusion that his visit to the office of the Sub-Registrar is a made-up story. We do not find any infirmity in the said conclusion. Once this stand of the plaintiff is disbelieved the question of accepting the plea of readiness and willingness on the part of the plaintiff does not arise.

Mr. Jaiswal, learned Sr. Counsel has submitted that the learned Single Judge has given undue emphasis on the delay in issuance of the notice to the respondent and time consumed in filing the suit. On consideration of the plaint averments we find that on 9-3-1981 the defendant did not turn up and there had been refusal, as alleged by the plaintiff to execute the Sale deed. Though this aspect was known to the plaintiff, he filed the suit in December, 1991. The learned Single Judge has taken note of this aspect and has observed that this is also a factor to be taken into consideration for the purpose of readiness and willingness. Mr. Jaiswal, in this context has referred us to the decision rendered in the case of Madamsetty Satyanarayana Vs. G. Yellogi Rao and Others, , wherein it has been

held as follows:-

"As Article 113 of the Limitation Act prescribes a period of 3 years from the date fixed thereunder for specific performance of contract, it follows that mere delay without more extending up to the said period cannot possibly be a reason for a court to exercise its discretion against giving a relief of specific performance. Nor can the scope of the discretion, after excluding the cases mentioned in section 22 of the Specific Relief Act, be confined to waiver, abandonment or estoppel. If one of these three circumstances is established, no question of discretion arises, for either there will be no subsisting right or there will be a bar against its assertion. So, there must be some discretionary field un-occupied by the three cases, otherwise the substantive section becomes otiose. It is really difficult to define that field. Diverse situations may arise which may induce a court not to exercise the discretion in favour of the plaintiff. It may better be left undefined except to state what the section says, namely, discretion of the court is not arbitrary, but sound and reasonable guided by judicial principles and capable of correction by a Court of appeal."

In this context, we may refer to a decision of the Constitution Bench rendered in the case of Smt. Chand Rani (dead) by LRs. Vs. Smt. Kamal Rani (dead) by LRs., , wherein, the Apex Court expressed thus:-

" ....It is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract the Court may infer that it is to be performed in a reasonable time if the conditions are (evident?) (1) from the express terms of the contract; (2) from the nature of the property; and (3) from the surrounding circumstances for example, the object of making the contract."

Similar view has again been taken by the Apex Court in the case of K.S. Vidyanadam and Others Vs. Vairavan, .

From the aforesaid it is luminously clear that delay can be a factor to refuse the discretion in favour of the plaintiff and such denial is in consonance with the provisions enjoined under sections 10 and 20 of the Specific Relief Act. In the instant case, the learned Single Judge has taken 9 months delay as one of the factors to arrive at the conclusion that the plaintiff has not proved his readiness and willingness to perform his part of the contract. If the denial of decree would have been solely based on this ground the matter would have been possibly different. This finding coupled with the finding relating to absence of specific averments in the plaint and lack of proof of the plaintiff's going and doing needful in the office of the Sub-Registrar, we are of the considered opinion that the reliance on the "conduct of inaction" of the plaintiff for a period of nine months by the learned Single Judge is inexceptionable.

In view of our preceding analysis we are unable to accept any of the contentions raised by Mr. Jaiswal. As a logical corollary the appeal has to fail.

We notice that the learned Single Judge has not dealt with regard to the advance given by the plaintiff. On a perusal of the plaint we find that there is no alternative prayer for realisation of the same. The Court should have permitted to file an amendment. We are not required to enter into this technicality as in course of hearing Mr. Sapre, learned counsel for the defendant-respondent had made a submission that the defendant is ready and willing to return Rs. 10,000/- with an interest of 18% p.a. from the date of execution of the agreement. In view of this fair concession given by the learned counsel for the respondent we direct that the respondent shall return Rs. 10,000/- with interest @ 18% p.a. from 7-1-1981, the date of the agreement to the plaintiff-respondent within four months from today.

In the result, the appeal is dismissed but in the peculiar facts and circumstances of the case, the parties shall bear their respective costs throughout.