
(2007) 08 AHC CK 0012
In the Allahabad High Court

Smt. Asharfi Devi and Another	Vs	APPELLANT
Smt. Jagdish Kumari alias Smt. Jagdisho and Others		RESPONDENT

Date of Decision : 22-08-2007

Acts Referred:

Specific Relief Act, 1963 — Section 16

Citation : (2007) 4 AWC 3312

Hon'ble Judges : Pankaj Mithal, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Pankaj Mithal, J.—Under challenge are the judgments and orders of the courts below dated 31.10.1979 and 6.4.1979 and the consequential decree for specific performance thereof.

2. One Diwan Singh was admittedly the sirdar having 1/5th share in the plots described at the foot of the plaint situate in village Shekhupur, Tehsil Anoopshahr, district Bulandshahr. It is alleged that the said Diwan Singh executed an agreement to sell dated 8.2.1973 in favour of Jagdish Kumari in respect of his entire aforesaid 1/5th share for a total sale consideration of Rs. 8,000 out of which It is said that he received Rs. 6,000 as advance. Diwan Singh deposited 20 times of the land revenue on 16.1.1974 and obtained a sirdari sanad in respect of his share. After obtaining the sirdari sanad he executed a registered sale deed dated 18.1.1974 transferring his share in favour of Asharfi Devi wife of Amar Singh for a sum of Rs. 4,000.

3. The plaintiff Jagdish Kumari on the above facts and circumstances filed Original Suit No. 335 of 1974 against the aforesaid Diwan Singh defendant No. 1 and arraying Asharfi Devi as defendant No. 2 for a decree of specific performance of the agreement to sell dated 8.2.1973. The suit was decreed by the trial court and the judgment and order of the trial court was also affirmed in appeal. During the pendency of the suit Diwan Singh had died and he was substituted by his

heirs and legal representatives one of whom is Amar Singh.

4. Defendant No. 2 Smt. Asharfi Devi alongwith Amar Singh who represents defendant No. 1 Diwan Singh have filed this second appeal against the plaintiff respondent No. 1 Smt. Jagdish Kumari and have claimed relief for setting aside the judgments, orders and the consequential decree of the courts below.

5. The appeal was admitted on the following substantial questions of law:

1. Whether the plaintiff respondent had not averred and proved her readiness and willingness to perform her part of the contract and sale as required by Section 16(c) of the Specific Relief Act?

2. Whether agreement was on the facts and in the circumstances of the case specifically inadmissible in law?

6. I have heard Sri Vishnu Sahai, learned Counsel for the appellants and Sri M.K. Tripathi, learned Counsel for the respondent No. 1.

7. Sri Vishnu Sahai has fairly conceded that out of two substantial questions of law framed at the time of admission only question No. 1 is the substantial question and therefore the substantial question No. 2 as formulated may be ignored. He however contended that the appeal involves one another substantial question of law inasmuch as the findings of the courts below about the due execution of the agreement are perverse. The perversity of the said findings is also a substantial question of law.

8. First of all it would be appropriate to examine about the perversity of the finding, if any with regard to the execution of the agreement to sell dated 8.2.1973. A bare perusal of the judgments of the courts below reveals that the agreement dated 8.2.1973 (paper No. 9 Ka-1) was executed by Diwan Singh who agreed to transfer his share for a sum of Rs. 8,000 on receiving a sum of Rs. 6,000 as earnest money. The agreement has been proved by the oral evidence of the plaintiff Jagdish Kumari as P.W. 1, and also by the scribe of the said agreement Shankar Lal, P.W. 2. The signatures of Diwan Singh on the said agreement has been proved by the report of handwriting and fingerprint expert. There was nothing on record to rebut of the above evidence and therefore the courts below recorded a finding that the said agreement was duly executed. No particular piece of material evidence has been placed before me to show that the aforesaid finding would have been different if the same had been considered. Therefore I fail to appreciate the submission that the finding about the due execution of the agreement as returned by the courts below is perverse.

9. Now the only substantial question of law which remains to be considered is whether in the absence of proof and the finding by the Courts that the plaintiff-respondent No. 1 was always ready and willing to perform her part of the contract, the suit for specific performance was liable to be decreed. Section 16(c) of the Specific Relief Act, 1963, (hereinafter referred to as "an Act") reads as under:

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

(a) ...

(b)...

(c) who falls 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.

10. Therefore the averment of readiness and willingness to perform his part of the contract and proof thereof are the two essential conditions stipulated by Section 16(c) of the Act for granting a decree of specific performance.

11. The legal position with regard to first condition is very clear and settled. The plaintiff seeking specific performance of the agreement has not only to aver his readiness and willingness to perform his part of the contract but such readiness and willingness must be continuous and in the absence of such averment the suit for specific performance would not be maintainable.

12. As far as the second condition stipulated by Section 16(c) of the Act is concerned, the Allahabad High Court in *Guru Nottam Das v. Mool Chandra (Deceased)* by L.Rs 1982 ALJ 1049, while considering the provisions of Section 16(c) of the Act laid down that averment of readiness and willingness to fulfil his part of the contract in plaint and proof of such readiness by evidence is the two fold requirement for the purposes of decreeing a suit for the specific performance. Thus, apart from making an averment evidence must also prove that the plaintiff was always ready and willing to perform his/her part of the agreement.

13. A similar view has been expressed by the High Court in *Suraj Singh and Another Vs. Sohan Lal and Others*, It states that the language of Section 16 of the Act makes it abundantly clear that unless the plaintiff establishes to the satisfaction of the Court that he has fulfilled the requirement of Section 16(c), the Court will not be able to grant a decree for specific performance. The fact that the parties did not press for framing an issue on the compliance or otherwise of Section 16(c) of the Act will not relieve the trial court from the necessity of framing an issue and going into the question whether the plaintiff has satisfied the twin mandatory requirement of alleging his readiness and willingness and proving the same. The requirement of Section 16(c) of the Act would stand fulfilled only by a clear finding in that regard by the Court. In *Mahmood Khan and Another Vs. Ayub Khan and Others*, , the Division Bench of this Court held that the compliance of requirement of Section 16(c) of the Act is mandatory and in the absence of necessary averment in the plaint and in the absence of the proof of the same that the plaintiff had been ready and willing to perform his part of the contract the suit for specific performance of the contract

cannot succeed.

14. In view of the above legal position the plaintiff is not only required to aver in the plaint that he is always ready and willing to perform his part of the contract but at the same time is also required to prove the same by evidence whereupon it becomes incumbent upon the Court to record a finding with regard to compliance of Section 16(c) of the Act before passing a decree for specific performance. The averment without proof and proof without a finding has no meaning. Therefore, the twin requirement of making an averment and proving the same shall be completed only if a finding to this effect is recorded by the Court, otherwise it has no value.

15. In the present case a bare perusal of the pleadings of the parties and the judgment and orders of the courts below indicates that the plaintiff in paragraph 6 of the plaint had made a very casual averment that she was always ready and willing to get the sale deed executed. The contents of paragraph 6 of the plaint are reproduced below:

eqn~nb;k cSukek djkus dks gj le; rS;kj Fkh vkSj vc rS;kj gSA

16. The aforesaid averment has been denied in the written statement. Despite the aforesaid averment and its denial none of the courts below have framed any issue with regard to compliance of Section 16(c) of the Act and no finding in this regard has been recorded by the courts below. Thus, there is no proof that the plaintiff was always ready and willing to perform her part of the contract nor there is any finding to this effect by any of the courts below.

17. Sri Tiwari, learned Counsel for the respondent placing reliance upon *Moti Lal Jain v. Smt. Ram Dasi Devi* 2001 RD 59 (SC), contended that it was the duty of the Courts to have framed the issue and the decree of specific performance granted in her favour cannot be set aside on technicality that no issue was framed in this regard.

18. I have considered the above submission of the learned Counsel in the light of the ruling cited. In the said case the Court held that the pleading of readiness and willingness can be expressed in any form but what is material is the intention. The Court must gather the intention from the true spirit of the pleadings. The Supreme Court further held that claiming of an alternative relief for refund or damages or initiation of proceedings with some delay are not sufficient grounds for denying the decree of specific performance. However, in the aforesaid judgment though an argument with regard to duty of the Court to frame an issue about readiness and willingness was also raised but it appears that the same was not considered necessary to be decided and as such no principle of law in that regard was laid down. The above ruling of the Supreme Court therefore, in no way helps the plaintiff. In the net result even though the plaintiff has made an averment about her readiness and willingness to perform her part of the contract in the plaint but has failed to comply the 2nd requirement of Section 16(c) of the Act of proving the same by adducing

evidence. Even if evidence may have been adduced, there is no finding by any of the Courts that the plaintiff has proved her readiness and willingness to perform her part of the contract. Therefore the courts below not only erred in law but committed manifest error of law in decreeing the plaintiff suit for specific performance of the agreement. The decree is therefore, in violation of provisions of Section 16(c) of the Specific Relief Act.

19. However since the execution of the agreement and the payment of Rs. 6,000 as earnest money has been proved, the defendant No. 2 Amar Singh, heir and legal representative of Diwan Singh who had executed the agreement is liable to refund the said amount to the plaintiff.

20. Normally, the plaintiff would have been entitled to reasonable interest on the earnest money paid by her. However admittedly, the plaintiff is in use and occupation of the land in dispute since the agreement. Therefore, she has been utilizing the usufruct thereof. Accordingly, she cannot be permitted to utilize the usufruct and awarded interest on the earnest money paid by her. Therefore, she is not entitled to any interest on the aforesaid amount.

21. Accordingly, the appeal succeeds and is allowed. The judgment and orders of the courts below dated 31.10.1979 and 6.4.1979 passed in Civil Appeal No. 180 of 1979 and Original Suit No. 335 of 1974 respectively and the consequential decree for specific performance thereof are set aside to the above extent. However, the plaintiffs suit is decreed for the refund of earnest money of Rs. 6,000 only as above.

22. No order is passed as to costs.