

(2007) 08 MP CK 0045
In the Madhya Pradesh High Court

Smt. Zubeda and Others

APPELLANT

Vs

Smt. Najma Afzal

RESPONDENT

Date of Decision : 10-08-2007

Acts Referred:

Specific Relief Act, 1963 — Section 16, 29
Stamp Act, 1899 — Section 29

Citation : (2008) 1 MPLJ 638

Hon'ble Judges : K.S. Chauhan, J;Arun Mishra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Arun Mishra, J.

This appeal has been preferred by the defendants aggrieved by judgment and decree dated 8.12.2004 passed by Second Additional District Judge, Sehore in Civil Suit No. 5-A/2003.

The plaintiff respondent filed a suit for specific performance of an agreement to sale dated 10.3.1995. The suit was filed as against Kalimurrahman (since deceased, represented by defendants appellants No. 1(a) to 1(g)) and defendant Abdul Qadeer (since deceased, represented by defendants appellants No. (a) to 3(g)). An agreement was entered into for a consideration of Rs. 3,70,000/-, plaintiff paid part of consideration of Rs. 40,000/-to Kalimurrahman at the time of agreement through her deceased husband. Kalimurrahman refused to execute the sale-deed and to transfer the suit house in the name of defendant and ultimately sold suit house to original defendant in two parts vide sale deeds dated 18.9.1996 which the plaintiff claimed to be null and void.

The defendants No. 1 and 2 in their written statement contended that agreement dated 10.3.1995 had never been executed by Kalimurrahman; same is forged and fabricated document. Abdul Qadeer was a bonafide purchaser for valuable consideration. Abdul Qadeer had already purchased a part of suit house from

Kalimurrahman vide registered sale deed (D-2) dated 7.2.1990. It was also contended that plaintiff was in occupation as tenant, earlier an agreement was entered into with late Afzal Ahmad, husband of plaintiff, sum of Rs. 40,000/- was paid in cash and Rs. 70,000/- was paid by cheque. As the cheque was dishonoured, plaintiff's husband had no arrangement of money. The sum of Rs. 40,000/- was also refunded to him. Thereafter, there was no question of executing the agreement dated 10.3.1995. The defendant No. 3 also took similar stand in the written statement.

On the basis of purchase made by Dr. Anees Ansari he had filed a suit for ejectment u/s 12(1)(a)(c)(g)(h) of M.P. Accommodation Control Act. It was not disputed that earlier the house in question was owned by late Kalimurrahman. Husband of the plaintiff namely Afzal Ahmad was a tenant in the suit premises @ Rs. 65 per month. Afzal died on 15.3.1995. Kalimurrahman has also died. Two sale deeds were executed in favour of Dr. Anees Ansari on 18.9.1996. Transfer was made in favour of Dr. Ansari by late Kalimurrahman. Temporary injunction was operating against Kalimurrahman not to alienate the property. Plaintiff Najma had also filed a regular Civil Suit 12-A/98 against Dr. Anees Ansari and others, in that also injunction was granted in favour of plaintiff. It was directed that possession of the plaintiff not to be interfered with otherwise then in due course of law. Plaintiff Najma had served a notice on Kalimurrahman for specific performance of agreement to sale. Kalimurrahman had sent a reply to the notice.

The Trial Court as per the impugned judgment and decree has decreed the suit filed by plaintiff Najma C.S. No. 5-A/03 whereas suit filed by Dr. Anees Ansari C.S. No. 4A/03 for ejectment has been dismissed. Specific performance of agreement to sell the property has been ordered. Dissatisfied with the judgment and decree passed in Civil Suit No. 5-A/2003 this appeal has been preferred by the defendants.

Shri Imtiyaz Hussain, learned Counsel appearing for appellants has submitted that plaintiff has not been able to establish readiness and willingness to purchase the property. She had arrangement of fund for purchase of property, has not been established. It is necessary upon the plaintiff to aver that she is ready to bear the stamp duty and registration charges in view of provisions of Section 29(1)(c) of Stamp Act and 55(1)(d) of T.P. Act. Decree has been granted including part of house sold to Kalimurrahman vide sale deed Ex.D-2 dated 7.2.1990. He has further submitted that plaintiff may at the most be entitled for refund of Rs. 40,000/- in case agreement Ex.P-1 is found to be proved.

Shri A.S.Jha, learned Sr. Counsel with Shri B.M.Prasad appearing on behalf of respondent has submitted that readiness and willingness has been averred and proved. Buyer had been ready and willing to perform her part of agreement. She had arrangement of necessary fund also, availability of which has been stated by the plaintiff. In spite of notice in newspapers and injunction granted by the Court, property had been sold by Kalimurrahman. The order of the Court was to the knowledge of the defendants, the defendant could not be said to be bonafide

purchaser. He has purchased the property for lesser consideration than agreed with the plaintiff.

First coming to the question whether readiness and willingness has been averred and proved. In the plaint it is averred that agreement had been entered into for a sum of Rs. 3,70,000/-, a sum of Rs. 40,000/- was paid as earnest money, remaining amount was to be paid at the time of execution of sale deed. Expenses to be incurred in the execution of sale deed were to be borne by the plaintiff. Agreement was executed on a stamp and it was notarized. In daily newspapers Dainik Bhaskar, Dainik Jagran and Dainik Afkar dated 13.10.1995, notice was published intimating the general public as to the factum of agreement. It was also mentioned that agreement was valid till 10.3.1996 and plaintiff had come to know that defendant was trying to sell the property for higher consideration to someone else. Yet another notice was sent by plaintiff through counsel on 4.11.1995, after about 20 days of publication of notice in the newspaper, in which it was mentioned that plaintiff had been ready and is willing to perform her part of agreement, to pay Rs. 3,30,000/- and to get the sale deed executed. Plaintiff went to the office of Sub-Registrar (Registration) on 30.11.1995 and waited for defendant No.1. The defendant No. 1 had promised to execute the sale deed on the said date. Thereafter, as defendant No. 1 has failed to turn up, she deposited Rs.10/-, intimated this fact to the Sub Registrar and obtained the receipt. In our opinion, the plaintiff has clearly pleaded readiness and willingness to purchase the property. It has been also clearly pleaded in the plaint that expenses to be borne by the plaintiff while getting the sale deed executed. She had published the notices in daily newspapers, thereafter, served a notice through counsel also for execution of the sale deed, as pleaded in the plaint she was present in the office of Sub Registrar (Registration), thus pleading with respect to readiness and willingness to perform her part of agreement has been made as per requirement of section 16(c) of Specific Relief Act, 1963. We are unable to accept the submission raised by Shri Imtiyaz Hussain, learned Counsel appearing for appellants that as per requirement of section 29(1)(c) of the Stamp Act and 55(1)(d) of T.P. Act, it has not been pleaded that plaintiff is ready to bear the stamp duty and registration charges. In our opinion the pleading made in the plaint is sufficient as per requirement of the aforesaid sections of Stamp Act and T.P. Act including that of Section 16(c) of Specific Relief Act. The Apex Court in Motilal Jain Vs. Smt. Ramdasi Devi and Others, has laid down that there need not be any specific phraseology or language of averment of readiness or willingness in the plaint. The averment made in the plaint as a whole must indicate readiness or willingness of the plaintiff to fulfill his part of obligation under the contract

Coming to the question of proof of readiness and willingness and availability of funds to purchase the property. The plaintiff Najma (PW-1) has stated in Para-4 of her deposition that she was willing to make payment of balance amount to Kalimurrahman, she was still ready to make the payment of remaining amount and to get the sale deed executed. She has denied in Para 13 of her deposition

that she was not having the arrangement of fund for execution of sale deed. In para-14 also she has denied the suggestion that she was not having the money to make the payment of outstanding sale consideration. Cross examination has stopped on that though the plaintiff has clearly stated in examination in chief that she had arrangement of money. Plaintiff has further stated that she published the notices in newspapers when she came to know that Kalimurrahman was trying to alienate the property to Dr. Anees Ansari. She has filed an objection also. Objection Ex.P-5 was filed in the office of Dy. Registrar (Registration), Sehore. She has further stated that son of Kalimurrahman has demanded a sum of Rs. 6 lakhs instead of agreed amount; consequently there was refusal to execute the sale deed by the defendant. Husband of plaintiff died, as such she had waited for sometime, however, it is clear from the entire statement of plaintiff that Kalimurrahman wanted to resile from the agreement and to realize the higher amount and in disregard to the injunction granted by the Court, he sold the property. Plaintiff remained present in office of Sub-Registrar on 30.11.1995 to get sale deed executed shows that she had arrangement of fund to pay balance consideration. Thus arrangement of fund and readiness and willingness has been proved by the statement and conduct evidence of plaintiff. Whatever was possible for her, she has done to get the sale deed executed.

In *Phoolchand Garg v. Gopal Das Agrawal and Ors.* 2002 (I) MPJR 32 it has been held that financial status of the person being ordinary mere assertion of the plaintiff that he was ready and willing to pay the amount, is not sufficient. In the aforesaid case mere statement that he had always been ready and willing to perform his part of contract was not taken to be sufficient. In the instant case statement has been made with respect to availability of fund also and that is found to be reliable. The said decision was affirmed in the LPA 104/2000 (*Phool Chand Garg v. Gopal Das Agrawal and Ors.*) 2001 (II) MPJR 12 in which a Division Bench of this Court has observed that entry in the account books are not sufficient to charge any person with liability. The decision in the LPA has turned on the different set of facts. In *N.P. Thirugnanam (D) by L.Rs., Vs. Dr. R. Jagan Mohan Rao and others*, the Apex Court has observed that 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. Availability of fund has to be proved on the date of execution of agreement. The plaintiff had not deposited amount of sale consideration nor has furnished bank guarantee as per directions of the Trial Court. He was never ready to fulfill his part of contract. In the aforesaid background, it was held that plaintiff was not ready and willing to perform his part of contract as found by the Trial Court. In the instant case plaintiff was not required to furnish the bank guarantee or deposite the amount of sale consideration in the Court. Thus the facts of *N.P. Thirugnanam v. R.Jagan Mohan Rao* (supra) are quite different.

Reliance has also been placed on decision rendered in *Sirmul Vs. Smt.*

Annapurna Devi, , in which a Division Bench of this Court has laid down that plaintiff is required to prove his readiness and willingness to make payment of registration charges. In the instant case, as already discussed by us, there is averment made in the plaint with respect to the readiness and willingness to bear the expenses of execution of sale deed, thus the requirement of decision has been complied with in this case.

Yet another decision in Kamalrani Rajaram Guru and Ors. v. Kumari Pinki d/o Hari Shankar Guru 2001(2) MPLJ 677 has been pressed into service, in which this Court has held that it is incumbent upon the plaintiff to prove that he has performed and had always been ready and willing to perform with the essential terms of the contract. Availability of fund should also to proved. In the instant case we find that plaintiff has made statement with respect to availability of fund and except giving a suggestion in the cross-examination that she was not having the fund, cross examiner had stopped. It was the duty of cross examiner to cross examine her further as to her financial status etc., in case statement of plaintiff was to be assailed as incorrect as held in Maroti Bansi Teli v. Radhabai AIR 1945 Nag 60; Chuni Lal Dwarka Nath Vs. Hartford Fire Insurance Co. Ltd. and Another, and Kuwarlal Amritlal v. Rekhlal Koduram AIR 1950 Nag 83. Cross examination has to be meaningful. The statement of plaintiff is found to be reliable that she was having the fund. She has issued the notices in different newspapers and also served notice through her counsel, she went to office of Sub-Registrar also for getting sale deed executed, all these things indicate that she was ready and willing to perform her part of agreement and had arrangement of necessary fund. In Sukhbir Singh and others Vs. Brij Pal Singh and others, endorsement of the office of Sub Registrar to the effect that buyer was present in his office for having sale deeds executed and registered by seller, it was held that it was explicit that buyer was ready and willing to perform his part of contract and had necessary funds to pass on consideration. The Apex Court has laid down in Paras 4 and 5 thus:

4. 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. When the respondents had pleaded and proved by the Sub-Registrar's endorsement as per paper No. 41/C that the respondents were present in the office of the Sub-Registrar for having the sale deed executed and registered by the petitioners, it would be explicit that the respondents were ready and willing to perform their part of the agreement. The facts that the petitioners did not

attend the office would prove positively that the petitioners had avoided execution of the sale deed.

Law is not in doubt and it is not a condition that the respondents should have ready cash with them. The fact that they attended the Sub-Registrar's office to have the sale deed executed and waited for the petitioners to attend the office of the Sub-Registrar is a positive fact to prove that they had necessary funds to pass on consideration and had with them the needed money with them for payment at the time of registration. It is sufficient for the respondents to establish that they had the capacity to pay the sale consideration. It is not necessary that they should always carry the money with them from the date of the suit till the date of the decree. It would, therefore, be clear that the courts below have appropriately exercised their discretion for granting the relief of specific performance to the respondents on sound principles of law.

In *Manzoor Ahmed Margray Vs. Gulam Hassan Aram and Others*, when the plaintiff was ready to purchase the property defendant did not call upon the plaintiff to get the sale deed executed. It was held that there was no unwillingness on the part of the plaintiff to perform his part of contract. In *Aniglase Yohannan v. Ramlatha and Ors.* 2005 AIR SCW 4789, it was held that when there was averment in the plaint that plaintiff was ready to get the sale deed executed after paying necessary consideration, order decreeing the suit for specific performance of the contract in favour of plaintiff was found to be proper.

In the instant case when we consider the facts, it is clear that inspite of Court's order of injunction, newspaper publication was made before lapse of agreed date in the agreement to sale, the property was sold by Kalimurrahman, as rightly found by the Trial Court that intention was to obtain higher consideration. Sale deeds (D-3 to D-22) were executed for a sum of Rs. 3 lakhs whereas market value was 6,71,000/- as apparent from sale deeds itself. Agreement with plaintiff was for 3,70,000/-. Thus it has been rightly concluded by the Trial Court that Kalimurrahman had refused to perform the agreement in his lifetime. Notice dated 4.11.1995 was given intimating that plaintiff would be present in the office of Sub Registrar (Registration) of 30.11.1995 to get the sale deed executed, notice was received by Kalimurrahman still he didn't turn up to execute the sale deed, had been rightly inferred by the Trial Court. Presence of plaintiff before Sub-Registrar (Registration) indicates that she was ready and willing and had adequate fund also.

Coming to the submission that due execution of the agreement (P-1) has not been established. We find that Salim (PW-2) has proved that Kalimurrahman had signed in portion F to F on the agreement in his presence. Consideration of Rs. 40,000/- was paid. It appears that plaintiff Najma is a parda-nasheen lady, she has clearly stated that a sum of Rs. 40,000/- was paid by her husband to Kalimurrahman. She has proved signatures on the agreement in portion A to A. After 5-6 months of the death of her husband, she asked Kalimurrahman to execute the agreement. After death of her husband she was unable to take steps

for sometime but the fact remains that time was not the essence of the contract before sale deed was executed in favour of others on 18.9.96. Plaintiff had already taken the steps for purchase of the property still the sale deed was not executed by defendant Kalimurrahman in her favour and executed the sale deeds in favour of Dr. Anees Ansari inspite of injunction granted by the Court and despite of notices (P-2, P-3 and P-4) which were published in the newspapers. She has also stated that Salim Nawab and Pyare Miyan were present at the time of execution of the agreement. She was unable to state who has purchased the stamp as her husband was alive at the time obviously her husband was aware of all these things as apparent from her statement. Consideration was also paid by her husband. She appears to be a truthful witness and there was nothing to doubt correctness of her statement.

Dr. Mohd. Anees Ansari (DW-1) has stated that he was informed by Kalimurrahman that he has not executed the agreement in question in favour of plaintiff. Suit was filed on 23.5.1995 whereas sale deed (Ex.D-3) had been executed on 18.9.1996 in favour of Abdul Qadeer and Dr. Anees Ansari on the same date. Defendant has simply stated that agreement was forged but has not adduced any evidence to prove that agreement (Ex.P-1) is outcome of forgery. No handwriting expert had been examined by the defendant to prove the agreement to be a forged document. When we consider statement of Jiya-Ul-Rahman (DW-2) he has denied the signatures of his father on the agreement (Ex.P-1), he has even denied the signatures on receipts (Ex. P-13 to P33), he has stated that these signatures are not of his father Kalimurrahman, the statement of the witness does not inspire confidence, even he has denied the signatures on the receipts which were in fact issued by Kalimurrahman, consequently it cannot be said that agreement (P-1) was a false/forged document.

It is settled law that specific performance has to be decreed once agreement has been proved. Apart from that readiness and willingness stands established.

It was also submitted by Shri Imtiyaz Hussain, learned Counsel appearing for appellant that suit has been decreed even with respect to the property sold by Kalimurrahman on 17.9.90. It is clearly stated by Shri A.S.Jha, learned Sr. counsel appearing for respondent that property earlier sold does not form part of the decree. It is clarified that property sold in the year 1990 as per sale deed executed by Kalimurrahman, does not form part of the decree passed by the Court below. In the plaint map property was given with specific precision and decree is in that regard. Plaintiff's statement has to be read in that context.

Resultantly, we find no merit in this appeal. Appeal being devoid of merit deserves to be dismissed, same is hereby dismissed. However, we leave the parties to bear their own costs as incurred of this appeal.