

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.29 of 1973

Against the Judgment and Decree dated 28.09.1972 passed by Ist Subordinate Judge, Muzaffapur in Title suit No.76 of 1970.

Jadubans Prasad Sahi & Ors. .

.....Defendants -appellants

Versus

Smt. Sabitri Devi

.....Plaintiffs-Respondent/s

Appearance :

For the Appellant/s :-

Mr. Janardan Pd. Singh, Sr. Advocate

Mr. Nand Kumar Singh, Advocate with him.

For the Respondents :-

Dr. Uma Shanker Prasad, Sr. Advocate

Smt. Rekha Prasad, Advocate with him.

Sri H. N. Sinha., Advocates with him.

Dated : 24th day of June, 2015

P R E S E N T

CORAM : THE HON'BLE MR. JUSTICE MUNGESHWAR SAHOO

CAV J U D G M E N T

1. The Defendants have filed this Appeal against the Judgment and Decree dated 28.09.1972 passed by the learned Ist Subordinate Judge, Muzaffapur in Title Suit No.76 of 1970 decreeing the plaintiff's respondent suit for specific performance of contract.



2. It appears that earlier this First Appeal was heard and allowed by terms of Judgment dated 31 July, 1992 by this Court. Since nobody appeared on behalf of the respondent, the respondent filed application for setting aside the ex-parte Judgment and thereafter the said Judgment dt. 31 July 1992 was set aside. Then the parties were heard.

3. The plaintiff respondent filed the suit for specific performance of agreement dated 27.04.1968 alleging that the plaintiff had sold the suit property by registered sale deed dt. 27.4.1968 for a consideration of Rs.44000/- in favour of the defendants. On the same date, separate agreement was entered into between the parties and it was agreed that if the plaintiff repay the full consideration amount of Rs.44,000/- to the defendants by 27.4.1970, the defendants shall reconvey the suit property to the plaintiff. The further pleading of the plaintiff is that in fact she was paid only Rs.35,000/- as consideration amount and Rs.9000/- was added as interest for the said period, i.e., for two years. The defendants agreed that he will not take possession of the property in question. On 10.4.1970, the plaintiff and the husband of plaintiff approached the defendants for payment of consideration money of Rs.44000/- and enquired as to on which date the sale deed will be reconveyed. The defendants asked them to come on 23.4.1970 with money so that the sale deed may be executed on

24.4.1970. The plaintiff's husband arranged the money and went to the defendant to pay on 23.4.1970 the entire money of Rs.44,000/- but the defendant evaded and finally refused on 24.4.1970 to receive the amount and reconveyed the property which compelled the plaintiff to file the suit on 25.4.1970.

4. The defendants-appellants filed contesting written statement. The main defence is that in fact Rs.44,000/- was paid to the plaintiff which is recited in the sale deed also and the defendants were put in possession of the property. The defendants came in possession through the tenants. The execution of deed of agreement dt.27.4.1968 was admitted by the defendants. According to them, time was the essence of the contract as it was an agreement of reconveyance and there was stipulation to pay Rs.44,000/- and also the cost of the sale deed in question within the date fixed in the agreement. The statement of the plaintiff regarding approach of plaintiff's husband on 10.4.1970 and tendering of Rs.44,000/- by the husband of plaintiff was denied. The further defence is that the defendants were always ready to perform their part of the contract but the plaintiff failed to perform in time. The plaintiff could not arrange the amount which would be evident from the fact that the plaintiff could not deposit the amount in Court on 25.4.1970 on the date of filing the suit and the conduct of the plaintiff shows that she had no

money. The suit was filed only to gain time for arranging the amount.

5. On the basis of the aforesaid pleadings of the parties, the learned trial Court framed the following issues :-

- (i) Is the suit as framed maintainable?
- (ii) Has the plaintiff got any cause of action or right to sue?
- (iii) Is the suit barred by law of limitation, waiver and acquiescence?
- (iv) Whether the story of tendering the money as propounded by the plaintiff is correct?
- (v) Whether the sale deed and the deed of agreement are part of the same transaction? If so, what would be the effect of the sale deed?
- (vi) Whether the story of inclusion of interest in the total consideration of the sale deed as alleged by the plaintiff is correct? If so, can it be realised?
- (vii) Is the plaintiff entitled to a decree for specific performance of contract as prayed or as directed by the Court?
- (viii) To what other reliefs, if any, is the plaintiff entitled?

6. On the basis of the evidences and materials, the trial Court



held that the suit house is in Municipal area of Muzaffarpur wherein several tenants were inducted and out of them, one is running a hotel. For marriage of the daughter, the plaintiff needed money and agreed to sell the property. Mahadmana was executed on 23.4.1968. The defendants never came in possession over the house and the plaintiff continued in possession, therefore, the plaintiff had no intention to sell the house and the house was actually hypothecated by way of security. The defendants had deducted Rs.9000/- towards interest for two years. The plaintiff had offered Rs.44,000/- on 24.4.1970 which was refused by defendant and accordingly decreed the plaintiff's suit.

7. The learned senior counsel, Mr. Janardan Prasad Singh, for the appellant submitted that since the suit was filed for specific performance of contract, the plaintiff were required to aver and prove that the plaintiffs were always ready and willing and are still ready and willing to perform their part of the contract as provided under Section 16 (3) of the Specific Relief Act but in the present case, there is neither any such pleading nor there is any evidence but the learned court below has decreed the suit filed by the plaintiff for specific performance of contract without recording any findings as to whether the plaintiffs were in fact ready and willing to perform their part of the contract. In fact the plaintiffs had no money and, therefore, the plaintiff was not able to repay the consideration amount to the



defendant within the period stipulated in the agreement and since it was a reconveyance deed and only a concession was given by the defendant, the time was the essence of the contract. On failure of repayment within the period, the right to get a decree was lost. There is no case made by the plaintiff that prior to the last date, the plaintiff ever approached the defendants for repayment. The allegation made in the plaint itself shows that the plaintiff had no money, therefore, it is amply proved that in fact the plaintiffs were not ready to perform their part of the contract of the agreement. The only pleading to the effect that money was arranged on 23.4.1970 and it was offered to the defendant cannot be relied upon and on the basis of this statement, it cannot be recorded a finding that the plaintiffs were ready and willing to perform their part of the contract. Even after the Judgment and Decree, the plaintiff was not able to deposit the amount directed by the Court below and several times, extension were sought and thereafter, ultimately the amount has been deposited, therefore, this subsequent conduct also shows that the plaintiffs were not ready and willing to perform their part of the contract. According to the learned counsel, the learned Court below, therefore, wrongly decreed the plaintiff's suit for specific performance of contract.

8. On the other hand, the learned senior counsel, Dr. Uma Shanker Prasad, for the respondent submitted that the plaintiff was in



dire need of money so she was compelled to sell the property in favour of the defendant and the time was fixed for repayment within 27.04.1970. Anyhow the amount was arranged by the husband of the plaintiff within the period stipulated in the agreement and offered the same on 23.04.1970 which was evaded and on 24.4.1970, finally refused to accept the money and execute the sale deed, therefore, the plaintiff was compelled to file the suit. In view of this pleading, there is sufficient compliance of the provision as contained in Section 16 (3) of the Specific Relief Act. According to the learned senior counsel, it is not necessary to plead the same word by word mentioned in the Section. If from the entire pleading of the plaint and the conduct of the parties, it is apparent that the intention of the plaintiff was to obtain back the property after offering the amount within the stipulated period, it can be said that the plaintiff was ready and willing to perform his part of the contract. The learned senior counsel further submitted that it is not the requirement of law that exact wordings must exist in the plaint. If sufficient facts and evidences are on record to show the readiness and willingness, the suit can be decreed. The learned senior counsel further submitted that the plaintiff has adduced sufficient materials and evidences before the Court below on the basis of which it can be said that the plaintiff had arranged the money and it is not necessary that the money be kept in hand and, it must be shown



to the defendants. The Court below has rightly on the basis of the evidences recorded the finding that the plaintiff had arranged the money and accordingly decreed the suit. So far the submission of the appellant that the amount was even not deposited in the Court below is concerned, the learned senior counsel submitted that the Court has the jurisdiction to extend the period for deposit and the plaintiffs deposited the amount after extension of the period granted by the Court. Moreover, if the plaintiff did not deposit after decree, it cannot be said that within the period stipulated in the agreement, the appellant and plaintiff had no money. The husband of the plaintiff was ill and the money which was in hand and which was offered to the defendants was spent in the treatment, therefore, time was prayed for extension and the Court below has extended the time, this subsequent event will not affect the right of the plaintiff in the main suit because after decree, this subsequent event took place. On this subsequent event after decree, the Judgment and Decree based on evidences cannot be set aside. The learned counsel relied upon the Judgment of the *Supreme Court reported in 2014 (11) SCC 605 Vishwanath Ghosh Vs. Babinda Ghosh* and submitted that readiness and willingness means that the person claiming performance has kept the contract subsisting with preparedness to fulfill his obligation. On these grounds, the learned counsel submitted that the First Appeal is

liable to be dismissed.

9. In view of the submission of the learned counsel for the parties, the points arises for consideration in this First Appeal is as to whether the plaintiff respondent is entitled to the grant of decree for Specific Performance of Contract and whether the Judgment and Decree impugned is sustainable in the eye of law or not.

10. According to the plaintiff, the property was sold by registered sale deed dated 27.04.1968 for Rs.44,000/- only. An agreement was entered into between them to the effect that if the said amount of Rs.44,000/- is repaid within 25.04.1970, the defendant shall resale the suit property to the plaintiff. The possession of the property was not given to the defendant and also the interest of Rs.9000/- for two years was added in the consideration amount of Rs.35,000/- making it Rs.44,000/-. Agreement was executed on 27.4.1968.

11. At paragraph five of the plaint, it is specifically pleaded that the plaintiff and her husband arranged the entire money for payment to the defendant by 22.4.1970 by executing sale deed on 22.4.1970 at Gopalganj Sub Registry and on 23.4.1970, husband of the plaintiff went to the defendant for tendering the same amount of Rs.44,000/- and getting the sale deed within 24.4.1970 but the defendants evaded

and on 24.4.1970, the defendants refused. On the contrary, the pleading of the defendant is that the plaintiff had no money or that there was no offer made by the plaintiff husband.

12. In support of the aforesaid pleadings, the parties have adduced evidences. The husband of the plaintiff has been examined as P.W.13. He has fully supported the case of the plaintiff pleaded in the plaint. It is not necessary to reiterate his evidence. This P.W.13 has described how he arranged money for payment to the defendant according to the terms of the agreement. According to this witness, he looks after the affairs of his wife. The marriage of his daughter was fixed to be performed on 9th May, 1968 and, therefore, the property was sold. He and one P.W.8 both had gone to the defendant on 10.4.1970 and enquired about the date when the sale deed will be executed and registered. He sold some property by sale deed for consideration of Rs.24,000/-. He borrowed Rs.3,000/- from Rasul Ansari to whom the said land was sold. On the same date, i.e., 23.4.1970, Ramavtar Singh gave him Rs.10,000/-, therefore, the plaintiff husband arranged Rs.47,000/- total till 23.04.1970. He along with Sharda Babu, Harendra Prasad, Mukhiya and other persons went to village of the defendant and offered the money.

13. P.W.3 has been examined in support of the fact that he

purchased some other land from the plaintiff husband for Rs.24,000/- and paid the consideration amount. The endorsement of the Registrar in the sale deed is there which has been marked as Exhibit '3'. He also said that he paid Rs.3,000/- by means of a Cheque. The counterfoil has been deposited in the suit.

14. P.W. 7 has stated that the husband of the plaintiff has met Rani, i.e., Fua and requested to pay Rs.35,000/- for release of Alka hotel, the property in question. However, Rani had Rs.10,000/- only which she paid, so on 23rd April, this witness paid Rs.10,000/- to the plaintiff husband. P.W.8 has supported that along with others, he had gone with money to pay the amount. These evidences of the plaintiffs regarding arrangement of money and offering of same is supported by the evidence of P.W.9.

15. On the contrary, the defendants have adduced the negative evidence to the fact that the plaintiff had no money and the money was never offered. It is settled principle of law that positive facts alleged is required to be proved by a person alleging the fact and negative needs no proof. In view of the above evidences, it appears that the plaintiffs have produced the evidences to the effect that they arranged the money within the period prescribed in the agreement and the amount was offered to the defendants within the time.



16. So far the submission of the learned counsel for the appellants that there is no averment in terms of Section 16 (3) of the Specific Relief Act and, therefore, the plaintiff suit for specific performance is to be dismissed is concerned, the learned counsel relied upon the decision of this Court in **A.I.R. 2011 Patna 89 Smt. Sundiri Devi Vs. Deonarayan Prasad**. So far this decision is concerned, it appears that in that case it was found that except mathematical pleading and evidence that the plaintiff vendee was always ready and willing to perform her part of the contract, there was no cogent and reliable evidence. In other words, in that case also it was held that on the basis of mathematical pleading, only the suit for specific performance cannot be granted. The basic principle behind Section 16 (C) is that any person seeking decree of the Specific Performance of Contract himself manifest that his conduct has been unblemished throughout entitling him to the specific relief. The Court is to grant relief on the basis of the conduct of the person seeking relief. The averment of readiness and willingness in the plaint should not be mathematical formulae which should not be in specific words only. Therefore, this decision is not helpful to the appellant.

17. The learned counsel next relied upon **AIR 2011 SC 382 Raj Kishore Vs. Prem Singh** and submitted that the pre-requisite for holding mortgage by conditional sale is that the sale and payment of



mortgage money as condition for transfer of property must be embodied in the sale deed itself. So far this decision is concerned, it may be mentioned here that no doubt, it was the case decided by the trial Court but it is not required to be decided here in view of the fact that the suit for specific performance of contract has been filed by the plaintiff. In such circumstances, it is not necessary to deal with this matter in this First Appeal.

18. The learned counsel next relied upon *A.I.R. 1983 Bombay 60 Hindu Rao Anna Sahib Patil Vs. Yaswant Laxman Yadav* and submitted that the period fixed in the decree for deposit of the consideration amount cannot be extended under Section 148 C.P.C. So far this decision is concerned, also it is not applicable in the present case. Section 28 of the Specific Relief Act confers jurisdiction to this court to extend the period and moreover the appellant never availed the benefit of Section 28, therefore, this question is also not required to be gone into in this present First Appeal.

19. The learned counsel next relied upon the decision of this Court in the case of **Fulan Miyan Vs. Gogendra Ram AIR 2006 Patna 183** and submitted that the plaintiff has to ever as well as to prove that he has performed or has always been ready and willing to



perform essential terms of contract. According to the learned counsel, there is no averment in this present case at our hand. From perusal of this decision also, I find that in that case also, this Court held that mere insertion of averments in plaint is not sufficient to decree the suit for specific performance of contract.

20. In view of the above settled proposition of law, the present case has to be decided in the present facts and circumstances of the case.

21. Section 16 (C) of the Specific Relief Act provides that the plaintiff must plead and prove that he has always been ready and willing to perform his part of the essential terms of the contract.

The continuous readiness and willingness at all stages from the date of the agreement till the date of the hearing of the suit need to be proved. The substance of the matter and surrounding circumstances and the conduct of the plaintiff must be taken into consideration in adjudging readiness and willingness to perform the plaintiff's part of the contract.

22. For proving the readiness and willingness, it is not necessary that entire amount of consideration should be kept ready by the plaintiff.



23. So far non-pleading in terms of Section 16 (C) of the Specific Relief Act is concerned, the Hon'ble Supreme Court in the decision relied upon by the respondent in the case of **Vishwanath Ghosh (Supra)** has held that **'the readiness and willingness of person seeking performance means that the person claiming performance has kept the contract subsisting with preparedness to fulfill his obligation and except the performance when the time for performance arrives. In a suit for specific performance of contract, the plaintiff must be able to show that he is ready and willing to carry on those obligations which are in fact part of the consideration for the undertaking of the defendant. For compliance with Section 16 (C) of the Specific Relief Act, 1963, it is not necessary for the plaintiff to aver in the same words used in the Section, i.e., ready and willing to perform the contract. Absence of the specific words in the plaint would not result in dismissal of the suit, if sufficient facts and evidence are brought on record to satisfy the Court about the readiness and willingness to perform his part of the contract.**

24. In the present case at out hand, we have discussed the evidences elaborately. Within the time fixed in the agreement, the amount was arranged by the plaintiff. How the amount was arranged have been clearly and elaborately mentioned by the plaintiff in the



plaint as well as in the evidence. There is no reason as to why the evidence of the witness be discarded. The tenants P.W.3, 4, 5, 6, have been examined in support of the possession of the property by the plaintiff. These witnesses have stated that they are tenant in the suit premises and continuously paying rents to the plaintiff. The rent receipts produced has been marked Ext.'7' series. Ext.'10' is the agreement in question. P.W.'18' the plaintiff herself has also supported her case.

25. The plaintiff in support of arrangement of money has filed ext.'1', the Mahadnama, entered into between the plaintiff's husband and P.W.2. P.W.2 has stated that he has paid Rs.24,000/- consideration amount and advanced a loan of Rs.3,000/- Ext. 4 is the cheque book which shows that amount of Rs.3,000/- was paid by P.W. 2 to P.W.13.

26. The case before the Supreme Court in the case of ***Vishwanth Ghosh 2014 (11) SCC 605*** also I find that it was a case of reconveyance wherein also there was no pleading in terms of Section 16(C). The trial Court decreed the suit and the appellate Court affirmed the trial Court Judgment but the High Court set aside the Judgment of both the Courts below holding that the Courts below has failed to consider the point of readiness and willingness of the



plaintiff which had not been averred and / or proved. The Hon'ble Supreme Court allowed the appeal and the Judgment of the High Court was set aside and the judgment of the trial Court was restored. In other words, although there was no pleading in terms of Section 16 (C) of the Specific Relief Act, 1963, the suit was decreed by the Supreme Court finding that only the exact words are not mentioned but there is sufficient compliance of Section 16 (C) of the Specific Relief Act.

27. In view of my above discussion in the present case at out hand, I find that absence of the specific words in terms of Section 16 (C) of the Specific Relief Act would not result in dismissal of the plaintiff's suit as from the plaint, it is apparent that the plaintiff clearly stated that she had arranged the money and then offered the same within the time which indicate readiness and wiling and that the contract was kept subsisting and further the suit was filed within the time when the defendants refused to accept the money and the plaintiff have been able to show by leading cogent and sufficient reliable evidence to satisfy the Court about the readiness and willing, as such I ultimately find that the plaintiff was ready and willing to perform her part of the contract within the time mentioned in the agreement. Therefore, the plaintiff is entitled for the decree of specific performance of contract. The learned Court below has,

therefore, rightly decreed the plaintiff’s suit for specific performance of contract.

28. In the result, this First Appeal is dismissed. In the facts and circumstances of the case, there shall be no order as to cost.

(Mungeshwar Sahoo, J)

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