

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.190 of 1983

(Against the judgment and decree dated 23.12.1982 passed by 3rd Additional Subordinate Judge, Darbhanga in title suit No.74 of 1975/43 of 1981).

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Dr.Arun Kr.Singh & Anr.

.... Defendants-Appellants

Versus

Smt. Radha Devi

.... Plaintiff-Respondent

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Appearance :

For the Appellant/s : Mr. Surendra Kumar Singh, Sr. Advocate
Mr. Dilip Kumar Sinha, Advocate
Mr. Pravin Prakash, Advocate.
For the Respondent/s : Mr. Keshav Srivastava, Sr. Advocate
Mr. Bhubneshwar Prasad, Advocate.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. JUDGMENT

Date: 15-04-2015

1. The defendants have filed this First Appeal against the judgment and decree dated 23.12.1982 passed by the learned 3rd Additional Subordinate Judge, Darbhanga in title suit No.74 of 1975/43 of 1981 whereby the court below decreed the plaintiff-respondent's suit for specific performance of contract.

2. The aforesaid suit was filed for specific performance of contract for reconveying the suit property to the plaintiff on receipt of Rs.27,000. According to the plaintiff, she had three storied building i.e. the suit property. She was in need of money for starting business, therefore, she approached the defendants for loan. The defendants agreed to advance loan of Rs.37,000 on



condition that the plaintiff has to execute a registered sale deed in favour of the defendants with respect to her residential house. The defendants also agreed to execute an agreement in favour of the plaintiff to the effect that if the plaintiff will repay the entire amount within two years from the date of agreement, the defendant shall reconveyed the house. Accordingly, a registered sale deed was executed on 18.10.1962 with respect to the suit house for a consideration of Rs.37,000. The defendant also executed a registered agreement dated 02.11.1962 to the effect that the defendants shall reconvey the house in question within two years on repayment of the consideration amount. The plaintiff also executed a registered Kirayanama dated 02.11.1962 in favour of the defendants whereby the plaintiff was allowed to continue in possession as tenant on monthly rent of Rs.133. The plaintiff paid Rs.10,000 on 06.06.1967 out of Rs.37,000 and the defendants granted receipt and extended the date for receipt of the balance consideration amount uptill 31.12.1970. Thereafter, the plaintiff sent a registered notice to the defendants on 17.09.1969 requesting them to accept Rs.27,000 and reconvey the house but the defendant failed to reconvey rather he filed title suit No.227 of 1967 for eviction of the plaintiff from the house in question and for arrears of rent. In that suit, the plaintiff filed application that they are ready to pay Rs.27,000 as per agreement. The plaintiff sent

her son-in-law on 23.12.1970 to the defendants for requesting him to accept Rs.27,000 and reconvey the house but the defendants refused. Therefore, the suit was filed. The plaintiff alleged that she was all along been ready and willing to perform her part of the agreement.

3. The defendants-appellants filed contesting written statement. Besides taking various legal and ornamental pleas, the defendants mainly contended that the plaintiff was only in occupation of the suit house as tenant of the defendants as the plaintiff had already sold the suit property for Rs.37,000. The plaintiff never paid Rs.10,000 as claimed by the plaintiff. The receipt alleged to have been granted by the defendant No.1 is forged and fabricated. The stipulated period of two years given in the agreement has lapsed long ago. The defendants never received any notice said to have been sent by the plaintiff. Son-in-law of the plaintiff never came to defendant with money and requested to reconvey the house because there was no such occasion in view of the fact that two years had lapsed long ago. The plaintiff was neither ready nor willing to perform her part of the contract dated 02.11.1962.

4. On the basis of the aforesaid pleadings, the learned court below framed the following issues:

- I. Whether the plaintiff has got cause of action for the suit?
- II. Whether the suit is maintainable in its present form?
- III. Whether the receipt of Rs.10,000/- as perponded by the

plaintiff as part payment out of Rs.37,000/- on 06.06.1967 granted by defendant no.1 extending the date of payment to remaining amount to 31.12.1970 was genuine, valid and binding on the defendants?

- IV. Whether the plaintiff is entitled to a decree for specific performance of contract?
- V. To any other relief or reliefs to which the plaintiff may be entitled?

5. Thereafter, the court below recorded a finding that the time for re-conveyance was extended. The receipt of Rs.10,000 granted on 06.06.1967 is genuine, valid and binding on the defendants. The plaintiff, is, therefore, entitled to a decree for specific performance of contract.

6. The learned senior counsel, Mr. Surendra Kumar Singh appearing on behalf of the appellants submitted that the court below has wrongly decreed the plaintiff's suit for specific performance of contract without recording any finding as to whether the plaintiff was ready and willing to perform her part of the contract within the period stipulated in the agreement. The learned counsel further submitted that the readiness and willingness is the condition precedent for the grant of the relief of specific performance of contract. The plaintiff herself filed the suit alleging that she is a pauper having no property or amount, therefore, she had no money to pay the balance consideration amount. Moreover, it is admitted case



of the plaintiff that the agreement was executed on 02.11.1962 wherein the period to pay back the consideration money was fixed at two years i.e. 02.11.1964. Admittedly, during this period, no payment was made by the defendants. How after expiry of the period, the period fixed by the parties can be extended? For the first time, even if it is accepted that the plaintiff has paid Rs.10,000, it was only on 06.06.1967, which is much after expiry of the stipulated period. Moreover, in the agreement itself, it is clearly mentioned that the time is the essence of the contract. A separate agreement was executed and registered for re-conveyance. In such circumstances, when the property was sold fully, a concession was given by the appellants to the plaintiff-respondent for obtaining re-conveyance within two years after paying the full consideration amount. What prevented the plaintiff from paying the said amount within the said two years and even after two years because the amount has been paid after five years. This clearly shows that plaintiff had no money, therefore, she was not ready. So far the extension of time by the receipt dated 06.06.1967 is concerned, the learned counsel submitted that the terms and conditions of the registered agreement cannot be varied or altered by a sada document. The court below has wrongly interpreted this receipt dated 06.06.1967 without considering that it is a sada document and cannot affect the terms and conditions mentioned in the



registered document. On this ground alone, the court below should have dismissed the plaintiff's suit but without examining these matters, the court below decreed the plaintiff's suit for specific performance of contract without recording a finding that plaintiff was always ready and willing and is still ready and willing to perform her part of the contract.

7. The learned counsel further submitted that since this is an agreement between the parties to reconvey the suit property, the general proposition of law relating to the agreement to sale with respect to immovable property, is not applicable. Generally in cases of agreement to sale with respect to immovable property unless the parties made the time an essence of the contract generally the time is not considered to be the essence of the contract but here, this principle will not apply because it is not a general agreement to sale rather it is an agreement to reconvey the property wherein specifically time has been made the essence of the contract. On these grounds, the learned counsel submitted that the impugned judgment and decree be set aside and this appeal be allowed by dismissing the plaintiff's suit.

8. On 23.03.2015, after conclusion of the hearing of the appellants the learned senior counsel for respondent requested the Court for hearing him on 25.03.2015. On 25.03.2015, he submitted that he has got no instruction in this matter and, therefore, the

judgment was reserved after hearing the appellants only.

9. In view of the above facts and circumstances of the case and the submission of the learned counsel for the appellants the only point arises for consideration in this case is “whether the plaintiff-respondent is entitled for the decree for specific performance of contract as prayed for with respect to the suit property” and “whether the judgment and decree impugned is sustainable in the eye of law?”

10. From perusal of the plaint, it appears that at paragraph 3, it has been specifically pleaded by the plaintiff herself that a registered agreement dated 02.11.1962 was executed to the effect that they will reconvey the house in question to the plaintiff within two years on repayment of the consideration amount of Rs.37,000. Now, therefore, in view of this admission, it becomes clear that the time was fixed for two years for repayment. The agreement has been produced by the plaintiff which is Exhibit 4. From perusal of this Exhibit 4, it appears that it is specific pleading that time of two years is made essence of the contract. The word “Khas Bat” has been used by the parties.

11. In paragraph 5, the plaintiff specifically pleaded that she could not pay the sum of Rs.37,000 to the defendants within two years from the date of agreement and then in paragraph 6, it is



pleaded that she paid Rs.10,000 on 06.06.1967. This alleged payment is made after more than 4 ½ years from the date of agreement. There is no explanation as to why the whole amount was not paid on that day and only Rs.10,000 was paid which clearly shows that she had no money on that date which again clarifies the matter that since the date of execution and registration of the agreement dated 02.11.1962 till 06.06.1967 she had no money to the extent of Rs.37,000 so that she could have paid the same for re-conveyance.

12. The plaintiff has examined herself as P.W.10. She has stated the same thing which is pleaded in the plaint. P.W.6 has stated that he had gone to the defendant No.1 and requested to receive Rs.27,000 according to the terms of the re-conveyance agreement but defendant No.1 refused. P.W.10 and P.W.6 prove that Rs.10,000 was paid on 06.06.1967. The receipt has been proved as Exhibit 5. It appears that the court below gave much emphasis on this receipt, Exhibit 5 and recorded a finding that it is a genuine document and further held that the time for repayment was extended upto 31.12.1970 and within said period, the plaintiff has sent notice, Exhibit 1 requesting the defendant to accept Rs.27,000 and, therefore, the suit has been decreed. The court below has not at all considered the readiness and willingness of the plaintiff. As stated above, there is no pleading in the plaint that the plaintiff was ready and willing to

perform her part of the contract i.e. to pay the balance consideration amount rather the pleading is that within the period she did not pay. For the first time, part payment was made i.e. on 06.06.1967. No explanation is there as to why full payment was not made.

13. In the case of **N. P. Thirugnanam v. Dr. R. Jagan Mohan Rao and others**, reported in 1995 (5) SCC 115, the Hon'ble Supreme court has held that **the continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. This circumstance is material and relevant and is required to be considered by the Court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. 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. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available.** The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract.



14. A three Judges Bench of the Supreme Court in the case of **Ram Awadh and others. v. Achhaibar Dubey and another.**, reported in 2000 (2) Supreme Court Cases 428 held that the obligation imposed by Section 16 is upon the Court not to grant specific performance to a plaintiff who has not met the requirement of clauses (a), (b) and (c) thereof. A court may not, therefore, grant to a plaintiff who has failed to aver and to prove that he has performed or has always been ready and willing to perform his part of the agreement, the specific performance whereof he seeks. There is, therefore, no question of the plea being available to one defendant and not to another. It is open to any defendant to contend and establish that the mandatory requirement of Section 16(c) has not been complied with and it is for the court to determine whether it has or has not been complied with and, depending upon its conclusion, decree or decline to decree the suit.

15. In the case of **Gomathinayagam Pillai and others v. Palaniswami Nadar**, reported in A.I.R. 1967 SC 868 the Hon'ble Supreme Court has held that it was for the plaintiff in a suit for specific performance to establish that he was since the date of the contract, continuously ready and willing to perform his part of the contract. If he fails to do so his claim for specific performance

must fail.

16. Section 16(c) of the Specific Relief Act provides that the plaintiff must plead and prove that he had 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 those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the Court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. 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. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. Reference may be made to the decision of the Hon'ble Supreme Court in the case of **Narinderjit Singh vs. North Star Estate Promoters Limited, (2012) 5 Supreme**

Court Cases 712.

17. In view of the above settled proposition of law laid down by the Supreme Court, mere pleading is not the proof of fact. Therefore, the plaintiff is not only required to aver but also required to establish the fact by evidence which must be reliable evidence. In the present case, at our hand, from the pleading and evidence itself, the plaintiff admitted the fact that she was not possessed of the consideration amount of Rs.37,000 from the date of agreement till the alleged payment dated 06.06.1967. Now, in view of this admitted fact and position, can it be said that the plaintiff was always ready and willing to perform her part of the contract i.e. she was always ready with the amount.

18. The Supreme Court in the case of **J.P. Builders and another v. A. Ramadas Rao and another**, reported in (2011) 1 Supreme Court Cases 429 has held that the words “ready” and “willing” in the Specific Relief Act, Section 16 imply that the person was prepared to carry out the terms of the contract. The distinction between “readiness” and “willingness” is that the former refers to financial capacity and the latter to the conduct of the plaintiff wanting performance. Generally, readiness is backed by willingness. Section 16 (c) mandates “readiness and willingness” on the part of the plaintiff and it is a condition



precedent for obtaining relief of grant of specific performance. It is also held that it is settled law that even in the absence of specific plea by the opposite party, it is the mandate of the statute that the plaintiff has to comply with Section 16 (c) of the Specific Relief Act and when there is non-compliance with this statutory mandate, the Court is not bound to grant specific performance and it is also clear that readiness to perform must be established throughout the relevant points of time.

19. When the plaintiff failed to prove her readiness, in view of the above law laid down by the Supreme Court, it can very safely be held that the plaintiff was not ready to perform her part of the contract.

20. So far the extension of time by the receipt dated 06.06.1967 is concerned, it may be mentioned here that it is a sada document whereas the agreement dated 02.11.1962 is a registered agreement, Exhibit 4. It is well settled principles of law that the terms and conditions of a registered document can only be varied or altered by another registered document only. Since the receipt dated 06.06.1967 is a sada document, by that document, the terms and conditions i.e. fixing the period of two years for repayment could not have been extended. The court below has wrongly therefore, held that by this receipt, the period was extended. Now, therefore, the suit filed



for specific performance of contract dated 02.11.1962 itself is barred by law of limitation as the suit has been filed in the year 1975. Here, in the present case, in the agreement, the parties prescribed the time for repayment, therefore, in view of the decision of the Supreme Court in the case of **K.S. Vidyadnam and others v. Vairavan, A.I.R. 1997 Supreme Court 1751**, here it is not merely a delay of few days but the consideration amount was offered in the year 1970, if the plaintiff's case is relied upon, the plaintiff pleaded that she sent to offer Rs.27,000 in the year 1970 and the period fixed in the agreement expired on 02.11.1964. The delay here is more than six years, therefore, in view of the above facts and circumstances of the case, the right to repurchase which was given to the plaintiff by way of concession was lost for not complying the terms and conditions embodied in the agreement punctually.

21. The Supreme Court in the case of **K. Simrathmull v. Nanjalingiah Gowder, A.I.R. 1963 Supreme Court 1182** has held that covenant of re-conveyance is in the nature of a concession or privilege granted by the defendant on certain conditions and if the conditions are not fulfilled, the court has no power to afford relief against the forfeiture arising as a result of breach of such a condition.

22. It is admitted case that the plaintiff filed the suit as pauper alleging that she had no amount to pay the required court fee.



In the said pauper application or in the plaint, nowhere it is stated by the plaintiff that she had only Rs.27,000 which is kept by her for repayment. Her specific case in the pauper application that she has no property at all and is not capable of paying the court fee. Therefore, on the date of institution of the suit also, she had no money to pay. Can it be said that merely because in the legal notice, she stated that she is ready to pay the amount, she had the necessary fund. Can it be relied that she sent a person to offer the amount just two days prior to institution of the suit to the defendant requesting to receive the balance consideration amount. It is settled principles of law that the readiness and willingness must not be pleaded in its letter and spirit as required by the Act but it must be reflected from the conduct of the plaintiff also.

23. In view of my above discussion, I find that the court below without considering all these settled principles of law wrongly held that by the sada document i.e. the receipt dated 06.06.1967, the period of two years was extended. The finding of the court below on this point is, therefore, reversed and I find that the plaintiff failed to prove that she was always ready and is still ready to perform her part of the contract i.e. to pay the consideration amount of even Rs.27,000. Therefore, the plaintiff is not entitled for the grant of decree for specific performance of the contract. Accordingly, the point

formulated is answered in favour of the defendants-appellants and against the plaintiff-respondent.

24. In the result, this First Appeal is allowed. The impugned judgment and decree are set aside and the plaintiff-respondent's suit is dismissed.

(Mungeshwar Sahoo, J)

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