

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No. 470 of 1995**

1. Shiv Devi Gupta, aged about 40 years,
2. Rupendra Kumar Gupta, aged about 21 years,
3. Ku. Rekha, aged about 15 years,

Appellants No. 1 to 3 all widow/sons/daughter of late Gend Lal Gupta, resident of Nariyal Kothi, Dayalband, Bilaspur.

No. 4 Ku. Rekha, minor through next friend mother Smt. Shiv Devi Gupta.

4. Smt. Shashikala Gupta, aged about 27 years.
5. Smt. Mamta, aged about 24 years,
6. Smt. Chhaya, aged about 20 years,

Nos. 4 to 6 all are married, daughters of late Gendlal Gupta, residents of Nariyal Kothi, Dayalbag, Bilaspur (C.G.)

----Appellants/defendants

Versus

1. Dulichand Gupta (since deceased) through LRs.
 - A. Durga Devi, W/o late Dulichand Gupta, aged about 64 years, R/o – Village Khapari-kal, P.S. Pandariya, at present Karishna Nagar, Belgahana, Tah. & P.S. Kota, Distt. Bilaspur (C.G.)
 - B. Janardan Gupta, S/o late Dulichand Gupta, aged about 48 years, R/o Krishna Nagar, Belgahana, Tah. & P.S. Kota, Distt. Bilaspur (C.G.)
 - C. Sudhir Gupta, S/o late Dulichand Gupta, aged about 45 years, R/o Krishna Nagar, Belgahana, Tah. & P.S. Kota, Distt. Bilaspur (C.G.)
 - D. Shailendra Gupta, S/o Late Dulichand Gupta, aged about 35 years, R/o Krishna Nagar, Belgahana, Tah. & P.S. Kota, Distt. Bilaspur (C.G.)

.....Plaintiffs

2. State of Madhya Pradesh through the Collector, Bilaspur

(Defendant No. 2)

---- Respondents

For Appellants	: Shri M.K. Sinha, Advocate.
For LR. of Respondent No.1	: Shri P.K.C. Tiwari, Senior Advocate assisted by Shri Shashibhushan, Advocate
For Respondent No. 2	: Shri Arun Sao, Deputy Advocate General.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

03/12/2018

(1) The substantial questions of law involved, formulated and to be answered in this defendants' second appeal state as under:

“1. Whether under the circumstances of the case, the decree passed in favour of respondent No.1 is erroneous and against the provisions of Section 16 and 20 of the Specific Relief Act, 1963 ?”

(2) The imperative facts required to be noticed for adjudication of this appeal are as under:

[For the sake of convenience, parties would be referred hereinafter as per their status shown in the suit before the trial Court]

(2.1) Original plaintiff – Dulichand Gupta filed a civil suit for specific performance of the contract against the original defendant – Gendlal stating inter alia that said Gendlal entered into an oral agreement to sell on 1.12.1979 for the sale of suit land with the plaintiff for a sum of Rs.3,300/- and obtained Rs. 100/- from the plaintiff as earnest money and delivered peaceful possession to plaintiff. It was further pleaded that original defendant – Gendlal assured the plaintiff that he will execute and register the sale deed on 3.12.1979. However, he failed to perform his part of

contract. It was further alleged that on 3.12.1979 said Gendlal and plaintiff went to the office of the Sub-Registrar for registration of the sale deed but he told the plaintiff/respondent No.1 that the balance amount of consideration will be paid before the registration of the sale deed; and when the sale deed was not executed as promised, notice (Ex.P-4) was served to the defendant, which was replied by the respondent No.1/plaintiff on 16.03.1980. Since the Gendlal did not execute the sale deed as promised, the plaintiff filed a suit for specific performance of the contract.

(2.2.) Original defendant Gendlal filed his written statement and specifically denied the alleged oral agreement to sell dated 1.12.1973, receipt of Rs.100/- as earnest money and delivery of possession etc. It was further pleaded that since respondent No.1/plaintiff tried to take forceful possession of the suit land, a complaint was made to Gram Panchayat and the Gram Panchayat issued notice to the respondent No.1/plaintiff and, as such, the suit is liable to be dismissed

(3) The trial Court, after appreciating the oral and documentary evidence available on record came to the conclusion that defendant -Gendlal entered into an oral agreement to sell on 1.12.1979 for the sale of suit land with the plaintiff for a sum of Rs.3,300/- and obtained Rs. 100/- from the plaintiff as earnest money and delivered peaceful possession to the plaintiff but the defendant failed to execute the sale deed as promised, though the plaintiff was ready and willing to perform his part of contract, as such, decreed the suit for specific performance of the contract in favour of the plaintiff/respondent No.1.

(4) On first appeal being preferred by defendants, the first appellate Court has affirmed the judgment and decree of the trial Court finding no merit and even the

grounds of readiness and willingness on the part of the plaintiff was found established by the first appellate court.

(5) Questioning the judgment and decree passed by the first appellate court, this second appeal has been preferred by the appellants/defendants in which the substantial questions of law have been formulated for consideration which have been incorporated in the opening paragraph of the judgment.

(6) Mr. M.K. Sinha, learned counsel appearing for the appellants/defendants would submit that both the courts below have erred in granting the discretionary relief of specific performance of contract even without considering the plea of readiness and willingness of the plaintiff as required mandatorily under Section 16(c) of the Specific Relief Act, 1963. He further submits that in absence of written agreement to sell, relief being discretionary, could not have been granted to the plaintiff in view of the provisions contained in Section 20(2)(a) of the Act, 1963, as such, the substantial questions of law be answered in favour of defendants and the appeal be allowed.

(7) Per contra, learned counsel for respondent No. 1/plaintiff would submit that both the courts below are absolutely justified in granting decree for specific performance of contract in favour of plaintiff, as such, the second appeal deserves to be dismissed.

(8) I have heard learned counsel appearing for the parties and considered their rival submissions made hereinabove and also gone through the record with utmost circumspection.

(9) It is the respondent No.1/ plaintiff's case that in a suit for specific performance

of the contract filed by the plaintiff based on oral agreement to sell dated 3.12.1979 for a sale consideration of Rs.3,300/- was entered into with original defendant but the defendant took a plea that there was no oral agreement to sell executed by him in favour of the plaintiff. However, the trial Court after taking the letter (Ex.P-1) sent by defendant to the plaintiff on record, clearly came to the conclusion that defendant entered into oral agreement to sell with the plaintiff for a sale consideration of Rs. 3,300/- and obtained Rs.100/- as earnest money and balance amount was to be paid by the plaintiff before registration of the sale deed for which plaintiff and defendant went to the office of Sub Registrar and told that he will pay the amount before the Sub- Registrar and he is ready & willing to perform his part of contract and on these findings decreed the suit in favour of the plaintiff, which was upheld by the first appellate Court.

(10) The question of consideration whether the plaintiff was ready and willing to perform his part of contraction as required mandatorily under Section 16(c) of the Specific Relief Act, 1963.

(11) At this stage, it would be appropriate to notice the provisions contained in Section 16(c) of the Specific Relief Act, 1963, which states as under:-

“16. Personal bars to relief.- Specific performance of a contract cannot be enforced in favour of a person-

(a) xxx xxx xxx

(b) xxx xxx xxx

(c) who fails 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.

Explanation.- For the purpose of clause (c),-

- (i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;
- (ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.

(12) Under Section 16(c) of the Act it is incumbent on the party, who wants to enforce the specific performance of a contract, to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract.

(13) Section 16(c) of the Act mandates “readiness and willingness” on the part of the plaintiff and it is a condition precedent for obtaining relief of grant of specific performance. In a suit for specific performance, the plaintiff must allege and prove a continuous “readiness and willingness” to perform the contract on his part from the date of the contract. The onus is on the plaintiff. (See **J.P. Builders v. A. Ramadas Rao**¹).

(14) The plaintiff in paragraph 5 of his plaint has pleaded that he is ready is willing to perform his part of contract, for which he went to the office of Sub Registrar on 3.12.1989 but in absence of Sub – Registrar, sale deed could not be registered. The defendant – Gendlal did not take the plea that plaintiff was not ready and willing to perform his part of contract and simply taken a plea that since there is no agreement to sell executed between the plaintiff and defendant, question of readiness and willingness does not arise, as such, both the courts below, after appreciating the oral and documentary evidence available on record, have recorded a clear finding that

1 (2010) 12 Scale 400

the plaintiff was ready and willing to perform his part of contract under Section 16(c) of the Act of 1963, however, the defendant failed to perform his part of contract is a finding of fact based on material available on record, in which I do not find any illegality or perversity warranting interference in the instant second appeal.

(15) Now coming the plea raised by the defendants that the trial Court and the first appellate Court could not have granted decree in view of the provisions contained in Section 20(2)(a) of the Act, 1963

(16) Section 20 (2) (a) of the Act, 1963 states as under:-

“20. Discretion as to decreeing specific performance (1) xx xxx xxx

(2) The following are cases in which the court may properly exercise discretion not to decree specific performance :-

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or”

(17) Discretion to direct specific performance of an agreement and that too after elapse of a long period of time, undoubtedly, has to be exercised on sound, reasonable, rational and acceptable principles and the power conferred by Section 20 of the Act is a discretionary power and it vests the court with a wide discretion either to decree the suit for specific performance or decline the same.

(18) In a suit for specific performance of contract, the only and only defence set up by the defendants was the case of total denial. The defendants repeatedly averred that there was no written agreement to sell executed between the plaintiff & defendant and, as such, the plaintiff is not entitled for the decree of specific performance of the contract though it is an oral agreement to sell executed by the

defendant with the plaintiff. The defendants did not take any alternative plea based on Section 20(2)(a) of the Act, 1963 in their written statement stating that in case the Court reaches to the conclusion that there is an agreement to sell, then the decree of specific performance of contract is not grantable under Section 20(2)(a) of the Act of 1963 and, therefore, the trial Court rightly did not frame any issue in this regard and even before first appellate Court, no such ground based on Section 20(2)(a) of the Act, 1963 was taken.

(19) The Supreme Court in the matter of **A. Maria Angelena (d) and others Vs.**

A.G. Balkis Bee² has held as under :-

“4..... In any event of the matter, no hardship as now stated was pleaded in the written statement. Further, no issue was framed that plaintiff-respondent could be compensated in terms of money in lieu of the decree for specific performance. In the absence of such a plea and issue, we are not inclined to entertain the argument of the learned counsel for the appellants raised for the first time. We find that the plaintiff was always and is ready and willing to perform his part of the contract and a concurrent finding of fact to that effect has been recorded by the Court below and there is no reason to interfere with the said finding.”

(20) Similarly, in the matter of **Prakash Chandra Vs. Narayan**³, their Lordships of the Supreme Court have held as under:-

“14. We have heard the learned counsel for the parties. The learned counsel appearing on either side elaborately took us through the findings of the trial Court, the first appellate court as well as the High Court in second appeal. From the materials on record and the agreement dated 18-4-1996 and from the judgment of the trial Court and the first appellate

² AIR 2002 SC 2385

³ (2012) 5 SCC 403

court, it is evident that no issue relating to the hardship of the respondent was framed. In a case of specific performance, hardship is a good defence provided such defence is taken by the defendant and evidence in support of such defence is brought on record, while in this case no such defence was taken by the respondent and no evidence was brought on record in its support.”

(21) Likewise, in the matter of **Narinderjit Singh Vs. North Star Estate Promoters Limited**⁴, their Lordships of the Supreme Court held as under :-

“26. In the present case, the appellant had neither pleaded hardship nor produced any evidence to show that it will be inequitable to order specific performance of the agreement. Rather, the important plea taken by the appellant was that the agreement was fictitious and fabricated and his father has neither executed the same nor received the earnest money and, as mentioned above, all the courts have found this plea to be wholly untenable.”

(22) Reverting to the facts of the present case in light of the principles of law laid down by the Supreme Court in the afore-cited cases (supra), it is quite vivid that defendant did not take any such alternative plea based on Section 20(2)(a) of the Act, 1963 that the plaintiff has taken unfair advantage over the defendant and in absence of that, no issue was framed by the trial Court and even this question was also not pressed before the first appellate Court by the defendants, thus, in absence of plea and issue framed in that regard, both the courts below were justified in granting the decree of specific performance of contract in favour of the plaintiff.

(23) The Supreme Court in the matter of **Balwant Vithal Kadam Vs. Sunil**

4 (2012) 5 SCC 712

Baburaoi Kadam⁵ has held that plea relating to readiness and willingness is a finding of fact and is binding in second appeal and it cannot be interfered with in second appeal under Section 100 of the Code of Civil Procedure. Thus, the substantial question of law No.2 is also answered in favour of plaintiff and against the defendants.

(24) As a fallout and consequence of the aforesaid discussion, the second appeal, being devoid of merit, is liable to be and is hereby dismissed leaving the parties to bear their own costs.

(25) A decree be drawn-up accordingly.

Sd/-

(Sanjay K. Agrawal)
Judge

D/-

5 (2018) 2 SCC 82

