

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No. 258 of 2001**

1. Trivenilal, S/o Babulal Mahra (died)
 - 1(a) Shankarlal, S/o. Trivenilal Mahar, aged about 19 years, resident of Babu Mistri's house near Ratnabandha Naka, Dhamtari, District Dhamtari (C.G.)
2. Smt. Jaya Bai, widow of Babulal Mahar (died).
 - 2(a) Smt. Sumitra Bai, S/o. Babulal Mahar, resident of near Ratnabandha Naka, Dhamtari, District Dhamtari (C.G.)

----Appellants/defendants**Versus**

1. Jagdish Singh Gill (since deceased)
 - 1(a) Smt. Mahend Kour, aged about 46 years, W/o Jagdish Singh Gill, R/o Lal Bagicha ward, District Dhamtari Chhattisgarh
 - 1(b) Majinder Kour, wife of Sangha, daughter of late Jagdish Singh Gill, R/o Lal Bagicha ward, District Dhamari (C.G.)
 - 1(c) Smt. Sukvinder Kaur Wd/o Balvinder Singh Gill, aged about 29 years,
 - 1(d) Gurpreet Singh, S/o Late Balvinder Singh Gill, aged about 12 years,
 - 1(e) Kumari Arsajeet Kaur, D/o Late Balvinder Singh Gill, aged 1 year.

All resident of Lal Bageecha ward, Dhamtari, District Dhamtari (C.G.)
2. State Govt. of Chhattisgarh, through the Collector, Dhamtari, District Dhamtari (C.G.)

---- Respondents

For Appellants : Shri Vishnu Kosta & Shri Shobhit Kosta, Advocate.
 For Respondent No.1 : Shri Prafull N. Bharat & Shri Akash Pandey, Advocate.
 For Respondent No. 2 : Shri Arun Sao, Deputy Advocate General.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

25/09/2018

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

“1. Whether the Courts below have erred in granting the discretionary relief of specific performance of the contract even without considering the readiness and willingness of the plaintiff as required mandatorily under Section 16(c) of the Specific Relief Act, 1963 ?

2. Whether the discretionary relief of specific performance of the contract could be granted in view of the terms and conditions stipulated in the alleged agreement to sale dated 12/03/1982 (Ex.P-2) ?”

(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 – Jagdish Singh Gill filed a suit for specific performance of contract stating *inter alia* that he entered into an agreement to sell with the original defendants namely Trivenilal & Smt. Jayabai prior to 8-10 days from 12.03.1982 (Ex.P-2) for a cash consideration of Rs. @ Rs. 4,000/- for the suit land admeasuring area 1000 sq. ft. and defendant No. 2 obtained Rs.1,500/- as an advance and promised to execute the sale deed till 30.06.1982 by obtaining balance amount of Rs.2,500/- and delivered peaceful possession thereof to him. But the defendants

refused to execute the sale deed and in view of that defendants filed a litigation before the Sub Divisional Officer, which terminated in favour of plaintiff by order dated 22.04.1983 and when the sale deed was not executed as promised, plaintiff sent a notice to defendants, despite that, defendants did not execute the sale deed in favour of the plaintiff resulting into filing of suit for specific performance of contract on 12.03.1985.

(2.2) Both the defendants filed their separate written statements before the trial Court. Defendant No.1 has admitted the plaint averments stating that defendant No. 2 obtained Rs. 1500/- from the plaintiff as advance *whereas* defendant No. 2 denied the execution of agreement to sell in favour of plaintiff and averred that it is fictitious and forged documents and she has lodged report in the police station to this effect vide Ex.D-1 stating that she had never executed any agreement to sell in favour of the plaintiff at her free consent and, therefore, the plaintiff is not entitled for decree of specific performance of contract. The plea taken by the plaintiff with regard to readiness and willingness was simply denied in paragraph 8 of her written statement and no specific plea with regard to hardship and unfair advantage under Section 20(2) was taken by any of the defendants before the trial Court.

(3) The trial Court, after appreciating the oral and documentary evidence available on record, decreed the plaintiff's suit holding that defendants entered into agreement to sell with the plaintiff on 12.3.1982 and obtained Rs.1,500/- as an advance and at the time of agreement to sell, defendants delivered possession of the suit land to the plaintiff.

(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 and the delay in filing the suit was also negatived.

(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. Koshta, 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 decree 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 plaintiff did not raise these issues either before the trial Court or before the appellate Court and, as such, no alternative plea was taken by the defendants and, therefore, no issue was framed in this regard and no evidence was led by the parties and, therefore, 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.

Answer to substantial question of law No. 1

(9) The substantial question of law is based on 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.

(10) 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.

(11) 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).

(12) It is the case of the plaintiff/respondent No.1 that he has paid Rs.1,500/- in cash to defendant No. 2 on the date of agreement to sell i.e. 12.3.1982 and remaining amount of Rs. 2,500/- was to be paid on the date of registration of the sale deed i.e. up to 30.06.1982. In paragraph 8 of the plaint, it has clearly been stated that plaintiff is ready and willing to deposit the balance consideration either before the trial Court or to the defendants. In the written statement filed by defendant No.1, the fact of readiness and willingness was not disputed and simply denied the aforesaid fact in paragraph 7 of the written statement, as such, it is not case of defendants before the trial Court that the plaintiff is not ready and willing to perform his part of contract and only for that reason, the trial Court omitted to frame any issue in this regard.

(13) Before the First Appellate Court, it was argued on behalf of the appellants/defendants that there is no pleading raised on behalf of respondent No. 1/plaintiff about readiness and willingness to perform his part of contract and no issue was framed in that regard. The First Appellate Court has held that the fact of readiness and willingness by the plaintiff has duly been pleaded and proved, but since the defendants themselves have not taken any specific plea in this regard, the defendants cannot take benefit of their own wrong. In support of first substantial

1 (2010) 12 Scale 400

question of law, it has been alleged that agreement to sell was entered into between the parties, as held by both the courts below, on 12.03.1982 and the suit was filed on 12.03.1985 and, therefore, readiness and willingness cannot be inferred on the part of the plaintiff and the suit is liable to be dismissed in view of the decision rendered by the Supreme Court in the matter of **B. Vijaya Bharathi v. P. Savitri and others.**²

(14) As held hereinabove, the plaintiff did not take any such ground in his defence by filing written statement that the suit was filed on 12.03.1985 i.e. after considerable delay from the date of agreement to sell, decree could not have been passed by the courts below.

(15) It is trite law that delay as a defence, in suit for specific performance of contract, should be specifically pleaded and if that point is not taken in the court below, it will not be allowed to be raised for the first time in the second appeal, therefore, I am of the considered opinion that the defendants have failed to establish that the plaintiff was not ready and willing to perform his part of contract under Section 16(c) of the Specific Relief Act, 1963 in absence of plea in this regard by the defendants before the trial Court and thus the substantial question of law No. 1 is answered in favour of plaintiff and against the defendants.

Answer to Question No. 2

(16) At this stage, Mr. Koshta learned counsel appearing for the appellants/defendants would vehemently submit that the trial Court and the first appellate Court would not have granted decree in view of the provisions contained in Section 20(2)(a) of the Act, 1963.

(17) 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”

(18) 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.

(19) 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 the agreement to sell was a fictitious document and the respondent-plaintiff had fabricated the same in connivance with others but the trial Court and the first appellate Court have clearly held that it is an out and out agreement to sell executed by defendants in favour of the plaintiff and even defendant No.1 in the written statement, originally filed, has admitted the fact of execution of agreement to sell. 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.

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

A.G. Balkis Bee³ 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.”

(21) Similarly, in the matter of **Prakash Chandra Vs. Narayan**⁴, 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 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

3 AIR 2002 SC 2385

4 (2012) 5 SCC 403

record in its support.”

(22) Likewise, in the matter of **Narinderjit Singh Vs. North Star Estate Promoters Limited**⁵, 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.”

(23) 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 defendants 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.

(24) The Supreme Court in the matter of **Balwant Vithal Kadam Vs. Sunil Baburaoi Kadam**⁶ 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

⁵ (2012) 5 SCC 712

⁶ (2018) 2 SCC 82

the defendants.

(25) 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.

(26) A decree be drawn-up accordingly.

Sd/-

(Sanjay K. Agrawal)
Judge

D/-

