

HIGH COURT OF CHHATTISGARH, BILASPUR**FA No. 97 of 2013**

Judgment Reserved On : 27/10/2018

Judgment Delivered On : 09/04/2019

- Sheetal Ghosh S/o Late Mahadev Ghosh Aged About 54 Years R/o Flat No. 64/6, Nehru Nagar East, Bhilai Nagar, Tah. And Distt. Durg C.G.

---- Appellant**Versus**

- Ganesh Chand Jain S/o Late Fakirchand Jain Aged About 55 Years R/o G.E. Road, Opposite Jain Temple, Charoda, Tah. Patan, Distt. Durg C.G.

---- Respondent

For Appellant : Shri Siddharth Rathod, Advocate.
For Respondent : Shri Ashish Surana, Advocate.

Hon'ble Shri Prashant Kumar Mishra, Ag CJ &
Hon'ble Smt. Vimla Singh Kapoor, J

C A V JUDGMENT

The following judgment of the Court was delivered by **Prashant Kumar Mishra, Acting Chief Justice**.

1. This is the defendant's First Appeal under Section 96 of the CPC assailing the legality, validity and correctness of the judgment and decree dated 30.3.2013 passed by the 5th ADJ, Durg in Civil Suit No.18-A/2011 decreeing the plaintiff's suit for specific performance.
2. The suit property consists of land ad measuring 2400 square feet and

the house constructed thereupon bearing Khasra No.267/325 at Shikshak Nagar, Charoda, Tehsil Patan, District Durg. As per the plaint allegations, the defendant executed an agreement on 15.11.2007 for sale of the suit property to the plaintiff for Rs.9 lakhs and received advance amount of Rs.1 lakh on 17.11.2007 and executed agreement (Ex.-P/1) on the said date. It was agreed that the balance amount of Rs.4 lakhs shall be paid by 30.11.2007 and the remaining balance of Rs.4 lakhs shall be paid after the plaintiff obtains housing loan. Before execution of the sale deed, the defendant shall evict the tenant residing in the suit house. It was further stated that the plaintiff prepared an account payee demand pay order for Rs.4 lakhs on 30.11.2007 and went to the defendant's house. However, in the absence of defendant, his wife was handed over photo-stat copy of the draft informing her that her husband should collect the draft on his return and complete the documentation so that the plaintiff applies for housing loan. The defendant came to the plaintiff's house on 5.12.2007 and informed that he has forgotten to bring the documents. The plaintiff got published one public notice about the agreement but the defendant came out with a reply to the public notice repudiating the contract/agreement, whereupon the plaintiff served a counter reply to the defendant's lawyer on 14.12.2007. The defendant further informed the plaintiff that the agreement has been cancelled.

3. It was further stated that the plaintiff again requested the defendant that

he would agree to purchase the property without obtaining loan but the defendant again denied to execute the sale deed. The plaintiff was thus ready and willing to perform his part of the contract and prayed for decree for specific performance.

4. The defendant's stand, in substance, was that the plaintiff did not comply with the condition of payment of Rs.4 lakhs by 30.11.2007 and instead got published a public notice, therefore, on plaintiff's committing default, the contract was cancelled.
5. On the basis of evidence on record, the trial Court decreed the suit, which has been assailed by learned counsel for the appellant on submission that the finding in respect of readiness and willingness is neither properly pleaded nor proved. It is also argued that no relief for setting aside cancellation of agreement has been prayed, therefore, the suit for specific performance cannot be decreed. It is further urged that the plaintiff has not submitted proof of availability of funds to demonstrate his capacity to purchase the property, which is necessary in view of the recent judgment of the Supreme Court, therefore, the impugned judgment deserves to be set aside.
6. Per contra, learned counsel for the respondent would submit that the plaintiff having proved all the necessary ingredients for obtaining a decree for specific performance, the judgment and decree passed by the trial Court is unassailable, therefore, the Appeal deserves to be dismissed.

7. In para-9 of the plaint, the plaintiff would aver that he was always ready to execute his part of the contract by mentioning the word “Taiyar Wo Tatpar Tha”. Section 16 of the Specific Relief Act speaks about the pleading as to the readiness and willingness whereas meaning of the word “Taiyar Wo Tatpar Tha” is same i.e. ready, and not ready and willing. Hindi translation of the word 'ready and willing' mentioned under Section 16-C is “Taiyar Aur Rajamand” and not “Taiyar Wo Tatpar”. Thus, necessary pleading in respect of readiness and willingness is missing in the plaint.

8. In the matter of **J. Samuel and Others Vs. Gattu Mahesh and Others¹**, **J.P. Builders and Another Vs. A. Ramadas Rao and Another²**, **N.P. Thirugnanam (Dead) by LRs. Vs. Dr. R. Jagan Mohan Rao and Others³** and **P. D'Souza Vs. Shondrilo Naidu⁴**, it has been held by the Supreme Court, time and again, that pleading of readiness and willingness has to be necessarily and specifically pleaded in the absence of which the suit is liable to be dismissed and decree for specific performance cannot be granted.

9. In **J. Samuel** (Supra), the Supreme Court held thus at para-14 :-

“**14.** Before proceeding further, it is also useful to refer to [Section 16 \(c\)](#) of the Specific Relief Act which reads as under:

"16. Personal bars to relief.- Specific performance of a

1 (2012) 2 SCC 300

2 (2011) 1 SCC 429

3 (1995) 5 SCC 115

4 (2004) 6 SCC 649

contract cannot be enforced in favour of a person-

(a) – (b)

(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 purposes 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."

It is clear that in a suit for specific performance of a contract, unless there is a specific averment that he has performed or has always been ready and willing to perform the essential terms of the contract, the suit filed by him is liable to be dismissed. In other words, in the absence of the above said claim that he is always ready and willing to perform his part of the contract, the decree for specific performance cannot be granted by the Court."

10. In the case at hand, the defendant has come out with a specific pleading in para-7 of the written statement that as soon as he read the public notice got published by the plaintiff on 9.12.2007 vide Ex.-P/2, he himself got published the reply vide Ex.-P/3 that in the absence of plaintiff having performed his part of contract by paying the installment of Rs.4 lakhs out of the total balance amount of Rs.8 lakhs by 30.11.2007, the contract has been cancelled and he is no longer willing to sell the property. However, despite specific pleading, the plaintiff would not seek any relief for declaring termination of agreement of sale

as bad in law. In the absence of such prayer, mere suit for specific performance cannot be decreed, as held by the Supreme Court in the matter of **I.S. Sikandar (Dead) by LRs. Vs. K. Subramani and Others**⁵ wherein the following has been laid down at paras-37 & 38:-

“37. As could be seen from the prayer sought for in the original suit, the plaintiff has not sought for declaratory relief to declare the termination of agreement of sale as bad in law. In the absence of such prayer by the plaintiff the original suit filed by him before the trial court for grant of decree for specific performance in respect of the suit schedule property on the basis of agreement of sale and consequential relief of decree for permanent injunction is not maintainable in law.

38. Therefore, we have to hold that the relief sought for by the plaintiff for grant of decree for specific performance of execution of sale deed in respect of the suit schedule property in his favour on the basis of non-existing agreement of sale is wholly unsustainable in law. Accordingly, Point (i) (see para 32.1) is answered in favour of Defendant 5.”

11. The suit should have been dismissed also for the reason that the plaintiff has not adduced any evidence that he has sufficient funds and is capable of purchasing the property. Such proof is necessary in view of the law laid down by the Supreme Court in the matter of **Vijay Kumar Vs. Om Parkash** {Civil Appeal No.10191/2018, decided on 3.10.2018}. In the said case, the Supreme Court held at para-7 thus:-

“7. In order to obtain a decree for specific performance, the plaintiff has to prove his readiness and willingness to perform his part of the contract and the readiness and willingness has to be shown through out and has to be established by the plaintiff. In the case in hand, though the respondent – plaintiff has filed the suit for specific performance on 29th April, 2008, the respondent – plaintiff has not shown his capacity to

pay the balance sale consideration of Rs.22,00,000 (Rupees Twenty Two Lakhs). In his evidence, the respondent – plaintiff has stated that he has borrowed the amount from his friends and kept the money to pay the balance sale consideration. As rightly pointed out by the Trial Court, the respondent – plaintiff could not produce any document to show that he had the amount of Rs.22,00,000 (Rupees Twenty Two Lakhs) with him on the relevant date; nor was he able to name the friends from whom he raised money or was able to raise the money. Further more, as rightly pointed out by the Trial Court, the respondent - plaintiff could have placed on record his Accounts Book, Pass Book or the Statement of Accounts or any other negotiable instrument to establish that he had the money with him at the relevant point of time to perform his part of the contract. We are, therefore, in agreement with the view taken by the Trial Court that the respondent - plaintiff has not been able to prove his readiness and willingness on his part.”

Emphasis supplied

12. In the case at hand, the plaintiff has not produced any evidence of availability of funds. His witness Hemant Lunkar (PW-3) would state that he is possessed of Rs.5 lakhs belonging to the plaintiff and the same shall be paid to the plaintiff as and when he requires. However, he has not filed any document in support of his statement. The availability of funds is to be demonstrated by producing pass book, ledger, account etc. and not on the basis of oral statement of third person that he will pay the amount to the plaintiff as and when he requires. Thus the plaintiff having not proved availability of funds and his capacity to pay, he is deemed to be not ready and willing to purchase the property. The observation made by the Supreme Court in the matter of **Vijay Kumar**, referred to above, squarely applies to the case at hand.

13. The plaintiff has argued that he had gone to the defendant's house to pay the amount of Rs.4 lakhs, but the defendant being out of station, it was informed to his wife that as soon as the defendant returns to Durg, he should collect the draft. However, in his statement, the plaintiff would admit at para-18 of his cross-examination that before going to the defendant's house, he did not call the defendant over his mobile nor informed him in any other manner that he is reaching his house for handing over the draft. He further admits at para-19 of his cross-examination that the fact of calling the defendant over his mobile after reaching his house is stated for the first time in the Court. He informs the Court about the mobile number of the defendant. It is strange as to why the plaintiff would visit the defendant's house for payment of Rs.4 lakhs without informing him over mobile or by other means. In his statement, the defendant himself (examined as DW-1) would categorically state that the plaintiff never visited his house on 30.11.2007. The defendant has also stated that much before the notice served upon him by the plaintiff's lawyer for collecting draft of Rs.4 lakhs, the agreement was already cancelled, therefore, there was no point in visiting the plaintiff's residence. In view of the definite stand of the defendant that he was in need of funds for purchasing some other property which he could not purchase because of plaintiff's failure to pay him Rs.4 lakhs and subsequently he was not in need of money and the agreement was cancelled, we are thus of the considered opinion that the plaintiff had not gone to the defendant's house before 30.11.2007 to

pay the amount of Rs.4 lakhs, therefore, he was not ready and willing to perform his part of contract, on the basis of this part of evidence also.

14. The trial Court has not considered the material on record nor the law laid down by the Supreme Court in the matters of **I.S. Sikandar** and **J. Samuel** (Supra) has been looked into by the trial Court. Therefore, the impugned judgment is based on perverse finding and wrong application of law and it deserves to be set aside.

15. Accordingly, we set aside the impugned judgment and decree and allow the present Appeal preferred by the defendant. Consequently, the plaintiff's suit for specific performance fails and is hereby dismissed.

16. A decree be drawn accordingly.

17. Parties to bear their own cost.

Sd/-
(Prashant Kumar Mishra)
Acting Chief Justice

Sd/-
(Vimla Singh Kapoor)
Judge

Barve