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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 11th October, 2019

+ **CM (M) 1467/2019**

HARBHAGWAN SACHDEVA & ORS

..... Petitioners

Through: Mr. Pradeep Dewan, Senior Advocate
with Ms. Anupam Dhingra and Mr.
Bharat Sachdeva, Advocates. (M:
9811422603)

versus

MARWARI CHARITABLE TURST (REGD) & ORS

..... Respondents

Through: None.

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

CM APPL. 44622/2019 (exemption)

1. Allowed, subject to all just exceptions. Application is disposed of.

CM (M) 1467/2019 & CM APPL. 44621/2019 (stay)

2. The present petition challenges the impugned order dated 3rd July, 2019 by which the application under Order XIV Rule 5 CPC was decided by the Id. Trial Court.

3. The application sought the following relief:

“It is therefore, prayed that the Hon'ble Court may be pleased to frame the proposed issue stated in para No.6 above and the parties may be allowed to lead the evidence in support thereof in accordance with law, in the interest of justice.”

4. The background of the suit is that the Plaintiffs/Petitioners (*hereinafter, “Plaintiffs”*) filed a suit for specific performance of the

agreement to sell dated 30th June, 2003. In paragraph 15 of the plaint, the Plaintiffs had averred that they were always ready and willing to perform their part of the agreement. On 26th September, 2006, issues were framed in the suit to the following effect:

“1. Whether the suit has not been properly valued for the purposes of court fee and jurisdiction? OPD

2. Whether the plaintiff is entitled to a decree of Specific Performance as prayed in the plaint? OPP

3. Whether the plaintiff in the alternative is entitled for a decree of money and interest as prayed in the plaint in prayer clause (b).

4. Relief.”

5. Both parties have led evidence in the matter. At that stage, the present application seeking framing of an additional issue was moved by the Plaintiffs with a prayer to lead additional evidence. The said application was partially allowed with respect to the framing of an additional issue, however, the Id. Trial Court did not permit the leading of additional evidence in the matter.

6. The present petition, accordingly, challenges the impugned order to the extent that it does not allow leading of additional evidence. The operative portion of the impugned order reads as under:

“8. After hearing both the parties in the present case it is found that the plaintiff had sufficient opportunity to lead evidence in the present case knowing the nature of controversy between the parties. It is admitted case of the plaintiff that they had led evidence in this respect by deposition of PW1 that plaintiff have been at all relevant time were ready to perform contract, are still ready today and willing to pay the balance consideration. For the said purpose the consent letter

Ex.PW1/8 to Ex.PW1/11 were also filed. It was held in case titled Durgh Singh Vs. Mahesh Singh AIR 2004 MR 146 (149) that in a suit for specific performance of contract omission to frame issue on readiness and willingness of the plaintiff would not be fatal as the framed issue whether the plaintiff is entitled to decree of specific performance would also include readiness and willingness. However in the present case the defendant has not objected to framing of additional issues during the course of arguments but objected to leading of evidence in this respect as both the parties had opportunity to lead the evidence on the same. In such circumstances of the case and in view of the Law discussed above additional issues is allowed to be framed as issue no.4 as prayed by the plaintiff as under: –

"Issue no.4 - Whether the plaintiffs were throughout ready and willing to perform their part of contract in terms of original agreement to sell dated 30.06.2003? OPP"

9. However it is found that both the parties have understood the issues between them and led evidence in this respect as discussed above. It was held in case titled Khem Chand Vs. Harisaran A1988 HP 101 that mere omission to frame an issue on a matter of controversy between the parties cannot be regarded as fatal unless upon examination of the record it is found that the failure to frame the issue had resulted in the parties having gone to the trial without knowing that the said question was in issue between them and having therefore failed to adduce evidence on that point. In the present case both the parties not only understood case against each other but plaintiff had also led evidence in respect of the additional issues sought to be framed and therefore sufficient opportunity is already availed by both the parties in this respect and hence another opportunity for leading

evidence in this respect is not allowed to the plaintiff. Hence additional evidence is not allowed to the plaintiff and prayer for leading additional evidence is dismissed.

Matter is at the stage of final arguments. Put up for final arguments on 14.08.2019.”

7. The submission of the ld. Senior counsel appearing for the Plaintiffs is that considering that the issue in respect of readiness and willingness of the Plaintiffs to perform their part of the obligations has been framed only now, the Plaintiffs ought to be given an opportunity to lead evidence in respect of the said issue, in view of the provisions of Section 16 (c) of the Specific Relief Act, 1963. Mr. Dewan’s submission is that under Section 16 (c), it is not sufficient to aver that there is readiness and willingness to perform but the said averments also have to be proved by the party. Since the issue has been framed only now and the previous issue that was framed was a general issue, additional evidence ought to be permitted. Ld. Senior Counsel relies upon the judgment of a ld. Division Bench of the Chhattisgarh High Court in ***Bhagirathi Devangan v. Jhaduram & Ors., 2013 (1) Cg LJ 442.*** Reliance is placed on the following observations:

“11. Law on the issue of specific performance is well settled. It is governed by the provisions of Specific Relief Act read with Form No. 47 of Appendix-A appended to the Code of Civil Procedure. So far as requirement of readiness and willingness on the part of the plaintiff is concerned, it is provided in Section 16(c) of the Specific Relief Act, which reads as under:

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

(a) who would not be entitled to recover compensation for its breach; or

(b) who has become incapable of performing, or

violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or willfully acts at variance with, or in subversion of the relation intended to be established by the contract;

(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 of 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. Likewise Form No. 47 of Appendix A in C.P.C. Reads as under:

“SPECIFIC PERFORMANCE (No. 1)

(Title)

A.B., the above named plaintiff, states as follows:-

1. By an agreement dated the day of and signed by the defendant, he contracted to buy of [or sell to] the plaintiff certain immovable property therein described and referred to, for the sum of rupees.

2. The plaintiff has applied to the defendant specifically to perform the agreements on his part, but the defendant has not done so.

3. The plaintiff has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice.

[As in paras 4 and 5 of

Form No. 1]

6. The plaintiff claims that the Court will order the defendant specifically to perform the agreement and to do all acts necessary to put the plaintiff in full possession of the said property [or to accept a transfer and possession of the said property] and to pay the costs of the suit.”

13. It is, therefore, clear on mere perusal of Section 16(c) read with Form No. 47 sin quo non for the plaintiff in case of claiming specific performance of a contract is to plead and prove that he has performed or has always been ready and willing to perform the essential terms of the contract on which he has filed a suit and which entitles him to claim decree for specific performance of a contract. In the absence of these material pleadings and evidence, issue and lastly the findings, the suit cannot either be dismissed or decreed or rather it cannot proceed.”

8. This Court has heard the ld. Senior counsel and also perused the judgment of the Chhattisgarh High Court. A perusal of the pleadings in the suit shows that the suit relates to an agreement to sell dated 30th June, 2003 and was instituted in 2005. In paragraph 15 of the plaint, the Plaintiffs have consciously pleaded that they were ready and willing to perform their part of the agreement. In the application under Order XIV Rule 5 CPC, there is a specific plea to the following effect:

“5. That after completion of the pleadings and framing of issues, the plaintiffs lead their evidence and also examined one of the plaintiffs namely Shri Subhash Chander Sachdeva, as PW-1 on their behalf. The said witness categorically deposed that the plaintiffs have been at all relevant time and are still as on today ready but the defendants have flatly refused to perform their part of contract and execute the sale deed in favour of the plaintiffs.”

From the above paragraph it is clear that PW-1 deposed on behalf of the Plaintiffs in support of the Plaintiffs' readiness and willingness to pay the balance sale consideration and he must have even been cross examined on his aspect.

9. In a suit for specific performance, the Plaintiff has to be conscious of the fact that readiness and willingness, apart from being pleaded also has to be proved. The issue in respect of whether the Plaintiffs are entitled to specific performance would cover within it the question of readiness and willingness. At the stage of final arguments, the Id. Trial Court has framed an additional issue only by way of abundant caution. The Id. Trial Court has, however, while allowing the additional issue to be framed, rightly rejected the request for additional evidence, inasmuch as if additional evidence is permitted at the stage of final arguments it would amount to the reopening of evidence.

10. It is submitted that the Plaintiffs would finish evidence in one hearing. However, even if this is taken to be so, the prejudice to the Respondents/Defendants (*hereinafter*, "*Defendants*") would be immense inasmuch as the Defendants would have to then be allowed to lead rebuttal evidence on the question of readiness and willingness. Civil suits of this nature, which have been pending for almost a decade, cannot be allowed to be completely derailed in this manner at the stage of final arguments. Firstly, the issue of readiness and willingness ought to have been framed at the initial stage itself. Irrespective, the relief of specific performance can only be granted if readiness and willingness is urged, pleaded and proved. The Plaintiffs had to be conscious of this fact and cannot now seek to plug any loopholes which exist in their evidence under the garb of framing an

additional issue. To permit additional evidence at this stage would not be equitable.

11. Insofar as the judgment of the Id. Division Bench of the Chhattisgarh High Court is concerned, the actual issues that were initially framed in the said suit are not clear from paragraph 8 of the copy of the judgement which has been placed before this Court, as the issues have not been set out therein. It is not clear if an issue in respect of specific performance was even framed in the said suit. There is no doubt that at the stage of framing of issues, the Id. Trial Court ought to frame specific issues in respect of readiness and willingness, as also breach by a party in a suit for specific performance.

12. However, in the present case, this Court notices that the suit is of 2005, the issues were framed long ago and the parties have already led their evidence. The Plaintiffs have filed the application under Order XIV Rule 5 CPC at the very last stage. The Plaintiffs cannot now be allowed, in a circuitous way, to make up any lacunae, if any, in their evidence. The prayer for additional evidence has been rightly rejected by the Id. Trial Court. The Id. Trial Court is directed to dispose of the suit expeditiously on the basis of the pleadings and evidence already on record.

13. With these observations, the petition and all pending applications are disposed of.

PRATHIBA M. SINGH
JUDGE

OCTOBER 11, 2019/dk