

CASE NO.:
Appeal (civil) 1501 of 2000

PETITIONER:
H.P. Pyarejan

RESPONDENT:
Dasappa(dead) by L.Rs. & Ors.

DATE OF JUDGMENT: 06/02/2006

BENCH:
ARIJIT PASAYAT & TARUN CHATTERJEE

JUDGMENT:
J U D G M E N T

ARIJIT PASAYAT, J.

Challenge in this appeal is to the judgment rendered by a learned Single Judge of the Karnataka High Court allowing the second appeal filed by the plaintiff.

Factual background in a nutshell is as follows:

The case of the plaintiff was that he entered into an agreement of sale on 22.8.1977. Though defendants 1 to 5 were to execute the agreement, at the time of agreement, the fifth defendant went out saying that he would come and sign later, but did not sign it at all and only defendants 1 to 4 signed the agreement of sale. However, the plaintiff claimed that defendant-5 must also join in execution of the sale deed and prayed for a decree for specific performance.

In the written statement filed by the first defendant, it was contended that all the defendants are tenants in common and co-owners. Defendants 2 to 4 were in need of money during 1977 and approached the plaintiff to advance loan. The plaintiff agreed to advance loan provided the defendants execute an agreement of sale in his favour for the security of the loan borrowed and expressed his intention that all the defendants should execute nominal agreement of sale and then only he would pay the amount. Under the circumstances the first defendant and defendants 2 to 4 who were in need of money were forced to sign the document and believing the words of the plaintiff, executed a nominal agreement of sale. The fifth defendant who filed a separate written statement, however, claimed that there is a collusion between the plaintiff and defendants 1 to 4 and the suit was brought to harass him and deprive him of his legal right and interest over the suit property. They also contended that there is undue delay on the part of the plaintiff and the suit was instituted just to overcome the period of limitation which was about to expire.

The Trial Court as well as the First Appellate Court held that there was no evidence adduced by the plaintiff to show that he was ready and willing to perform his part of the contract. It was also noticed that there was no specific pleading showing readiness and willingness of the plaintiff to perform his part of the contract. Accordingly the suit and the first appeal were dismissed. Plaintiff filed second appeal under Section 100 of the Code of Civil Procedure, 1908 (in

short the 'Code'). The High Court framed the following questions for adjudication:

- 1) Whether the lower Courts were in error in holding that there is no specific pleading showing the readiness and willingness of the plaintiff to perform his part of the contract?
- 2) Whether the lower appellate Court was in error in taking the view that the contract of sale is indivisible and that defendants 1 to 4 cannot convey their even 4/5th share?"

The High Court held that there was specific pleading as regards the readiness and willingness of the plaintiff to perform his part of the contract. It, however, did not record any finding so far as the second question is concerned. It accordingly allowed the second appeal.

Learned counsel for the appellant has submitted that in order to satisfy the requirement of Section 16(c) of the Specific Relief Act, 1963 (in short the 'Act') the plaintiff not only requires to plead that he is ready and willing to perform his part of the contract but also to prove that aspect. In the instant case no proof was adduced. On the contrary, the findings of fact recorded by the Trial Court and the First Appellate Court to the effect that the plaintiff had failed to establish that he was ready and willing to perform his part of the contract have been set aside without even formulating a question of law, which is impermissible. It was further submitted that the High Court has placed reliance on some of the discussions made by the Trial Court and the First Appellate Court completely ignoring the findings recorded.

Learned counsel for the respondents on the other hand submitted that the High Court has taken note of the factual position and on a proper analysis of the judgments of the Trial Court and the First Appellate Court recorded a finding that requirement of Section 16(c) of the Act was fulfilled.

The Trial Court recorded the following findings:

"Therefore, the evidence of the plaintiff is an utter lie and he has not offered any amount as alleged on 22.11.1977.

Even conceding for a moment that the plaintiff offered to pay Rs.11,000/- on 22.11.977 and the first defendant has agreed to execute the sale deed only on 30.11.1977, the point is, whether the plaintiff again offered to pay the amount on 30.11.1977. Admittedly according to P.W.2, the plaintiff has not offered to pay the defendants 2 to 5. So far as defendants 2 to 5 are concerned, the plaintiff has not performed his part of the contract by offering to pay the balance of the amount to them. Secondly, there is no evidence to show whether the plaintiff has offered to pay the said amount again on 30.11.1977. So far as the plaintiff himself is concerned, he has clearly admitted in his evidence that only once i.e. about 3 or 4 days prior to the expiry of three months period

from the date of agreement he has offered to pay to the defendants and thereafter he has never offered the amount. This clearly shows that the plaintiff has never offered the amount on 30.11.1977."

These conclusions were affirmed by the First Appellate Court.

In order to appreciate the rival submissions Section 16(c) needs to be quoted along with the Explanations. The same reads as follows:

"16. Personal bars to relief:

- (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 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 accordingly to its true construction."

In *Ardeshir H. Mama v. Flora Sassoon* (AIR 1928 PC 208), the Privy Council observed that where the injured party sued at law for a breach, going to the root of the contract, he thereby elected to treat the contract as at an end himself and as discharged from the obligations. No further performance by him was either contemplated or had to be tendered. In a suit for specific performance on the other hand, he treated and was required by the Court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove a continuous readiness and willingness from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment brings with it and leads to the inevitable dismissal of the suit. The observations were cited with approval in *Prem Raj v. The D.L.F. Housing and Construction (Private) Ltd. and Anr.* (AIR 1968 SC 1355).

The requirements to be fulfilled for bringing in compliance of the Section 16(c) of the Act have been delineated by this Court in several judgments. While examining the requirement of Section 16(c) this Court in *Syed Dastagir v. T.R. Gopalakrishna Setty* (1999 (6) SCC 337) noted as follows:

"So the whole gamut of the issue raised is, how to construe a plea specially with reference to

Section 16(c) and what are the obligations which the plaintiff has to comply with in reference to his plea and whether the plea of the plaintiff could not be construed to conform to the requirement of the aforesaid section, or does this section require specific words to be pleaded that he has performed or has always been ready and is willing to perform his part of the contract. In construing a plea in any pleading, courts must keep in mind that a plea is not an expression of art and science but an expression through words to place fact and law of one's case for a relief. Such an expression may be pointed, precise, sometimes vague but still it could be gathered what he wants to convey through only by reading the whole pleading, depending on the person drafting a plea. In India most of the pleas are drafted by counsel hence the aforesaid difference of pleas which inevitably differ from one to the other. Thus, to gather true spirit behind a plea it should be read as a whole. This does not distract one from performing his obligations as required under a statute. But to test whether he has performed his obligations, one has to see the pith and substance of a plea. Where a statute requires any fact to be pleaded then that has to be pleaded may be in any form. The same plea may be stated by different persons through different words; then how could it be constricted to be only in any particular nomenclature or word. Unless a statute specifically requires a plea to be in any particular form, it can be in any form. No specific phraseology or language is required to take such a plea. The language in Section 16(c) does not require any specific phraseology but only that the plaintiff must aver that he has performed or has always been and is willing to perform his part of the contract. So the compliance of "readiness and willingness" has to be in spirit and substance and not in letter and form. So to insist for a mechanical production of the exact words of a statute is to insist for the form rather than the essence. So the absence of form cannot dissolve an essence if already pleaded."

Again in *Motilal Jain v. Ramdasi Devi (Smt.) and Ors.* (2000 (6) SCC 420) it was noted as follows:

"7. The other contention which found favour with the High Court, is that plaint averments do not show that the plaintiff was ready and willing to perform his part of the contract and at any rate there is no evidence on record to prove it. Mr. Choudhary developed that contention placing reliance on the decision in *Varghese case* ((1969) 2 SCC 539). In that case, the plaintiff pleaded an oral contract for sale of the suit property. The defendant denied the alleged oral agreement and pleaded a different agreement in regard to which the plaintiff neither amended his plaint nor filed subsequent pleading and it was in that context

that this Court pointed out that the pleading in specific performance should conform to Forms 47 and 48 of the First Schedule of the Code of Civil Procedure. That view was followed in Abdul Khader case (1989) 4 SCC 313).

8. However, a different note was struck by this Court in Chandiok case ((1970) 3 SCC 140). In that case 'A' agreed to purchase from 'R' a leasehold plot. 'R' was not having lease of the land in his favour from the Government nor was he in possession of the same. 'R', however, received earnest money pursuant to the agreement for sale which provided that the balance of consideration would be paid within a month at the time of the execution of the registered sale deed. Under the agreement 'R' was under obligation to obtain permission and sanction from the Government before the transfer of leasehold plot. 'R' did not take any steps to apply for the sanction from the Government. 'A' filed the suit for specific performance of the contract for sale. One of the contentions of 'R' was that 'A' was not ready and willing to perform his part of the contract. This Court observed that readiness and willingness could not be treated as a straitjacket formula and that had to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the party concerned. It was held that in the absence of any material to show that 'A' at any stage was not ready and willing to perform his part of the contract or that he did not have the necessary funds for payment when the sale deed would be executed after the sanction was obtained, 'A' was entitled to a decree for specific performance of contract.

9. That decision was relied upon by a three-Judge Bench of this Court in Syed Dastagir case ((1999) 6 SCC 337) wherein it was held that in construing a plea in any pleading, courts must keep in mind that a plea is not an expression of art and science but an expression through words to place fact and law of one's case for a relief. It is pointed out that in India most of the pleas are drafted by counsel and hence they inevitably differ from one to the other; thus, to gather the true spirit behind a plea it should be read as a whole and to test whether the plaintiff has performed his obligations, one has to see the pith and substance of the plea. It was observed :

"Unless a statute specifically requires a plea to be in any particular form, it can be in any form. No specific phraseology or language is required to take such a plea. The language in Section 16(c) of the Specific Relief Act, 1963 does not require any specific phraseology but only that the plaintiff must aver that he has performed or has always been and is willing to perform his part of the contract. So the

compliance of 'readiness and willingness' has to be in spirit and substance and not in letter and form."

It is thus clear that an averment of readiness and willingness in the plaint is not a mathematical formula which should only be in specific words. If the averments in the plaint as a whole do clearly indicate the readiness and willingness of the plaintiff to fulfil his part of the obligations under the contract which is the subject-matter of the suit, the fact that they are differently worded will not militate against the readiness and willingness of the plaintiff in a suit for specific performance of contract for sale."

Lord Campbell in *Cork v. Ambergate etc. and Railway Co.* (1851) 117 ER 1229 observed that in common sense the meaning of such an averment of readiness and willingness must be that the non-completion of the contract was not the fault of the plaintiffs, and that they were disposed and able to complete it had it not been renounced by the defendant.

The basic principle behind Section 16(c) read with Explanation (ii) is that any person seeking benefit of the specific performance of contract must manifest that his conduct has been blemishless throughout entitling him to the specific relief. The provision imposes a personal bar. The Court is to grant relief on the basis of the conduct of the person seeking relief. If the pleadings manifest that the conduct of the plaintiff entitles him to get the relief on perusal of the plaint he should not be denied the relief.

Section 16(c) of the Act mandates the plaintiff to aver in the plaint and establish as the fact by evidence aliunde that he has always been ready and willing to perform his part of the contract. The principles were recently elaborated in *Aniglase Yohannan v. Ramlatha and Ors.* (2005 (7) SCC 534).

As rightly contended by learned counsel for the appellant no question was even formulated regarding the correctness or otherwise of the findings of facts recorded by the Trial Court. The High Court has also not discussed as to in what way the requirement of Section 16(c) regarding the proof of readiness and willingness of the plaintiff to perform his part of the contract was fulfilled.

In our opinion, therefore, the judgment of the High Court suffers from serious infirmities. It suffers from the vice of exercise of jurisdiction which did not vest in the High Court under the law. Under Section 100 of the Code (as amended in 1976) the jurisdiction of the High Court to interfere with the judgments of the courts below is confined to hearing on substantial questions of law. Interference with finding of fact by the High Court is not warranted if it involves re-appreciation of evidence (see *Panchugopal Barua v. Umesh Chandra Goswami* (1997) 4 SCC 713) and *Kshitish Chandra Purkait v. Santosh Kumar Purkait* (1997) 5 SCC 438). High Court has not even discussed any evidence. No basic finding of fact recorded by the courts below has been reversed much less any reason assigned for taking a view contrary to that taken by the Courts below. The finding on the question of readiness and willingness to perform the contract which is a mixed question of law and fact has been upset. It is

statutorily provided by Section 16(1)(c) of the Act that to succeed in a suit for specific performance of a contract the plaintiff shall aver and prove that he has performed and has always been ready and willing to perform the essential terms of the contract which were to be performed by him other than the terms the performance of which has been prevented or waived by the defendant.

Looked at from any angle the judgment of the High Court is vulnerable and needs to be set aside and it is so directed.

The appeal is allowed without any order as to costs.

JUDIS