

CASE NO.:
Appeal (civil) 2005 of 2008

PETITIONER:
Gurdial Kaur (D) Through Lrs

RESPONDENT:
Piara Singh (D) Through Lrs

DATE OF JUDGMENT: 14/03/2008

BENCH:
S.B. Sinha & V.S. Sirpurkar

JUDGMENT:
J U D G M E N T

CIVIL APPEAL NO. 2005 OF 2008
(Arising out of SLP(C) No. 8585 of 2007)

S.B. SINHA, J :

Leave granted.

1. Defendants in the Court below are the appellants before us. They are heirs and legal representatives of one Gurcharan Singh. He was the owner of the lands bearing Survey Nos. 101, 102, 159, 38, 85, Khatauni Nos. 118, 119, 224, 228, 45, 100 admeasuring 98 canals 19 marlas situated in Village Bora Walli, Tehsil Zira in the State of Punjab. He entered into an agreement for sale of the aforementioned lands on or about 5.10.1964 with the plaintiff-respondent. A registered deed of sale was to be executed in terms thereof on or before 15.6.1965. Indisputably, the respondent paid a sum of Rs. 7,000/- out of a total consideration of Rs. 15,000/- to the said Gurcharan Singh on 5.10.1964. He died on 13.3.1965.

2. Allegedly, prior thereto, the said Gurcharan Singh despite having been called upon to execute and register the document did not come to the Registration Office. A suit for specific performance of the agreement was filed against the appellants on 25.3.1966. In the alternative, it was prayed that a sum of Rs. 7,000/- be paid to the respondent together with interest.

3. Appellants herein in their written statement denied and disputed execution of the said agreement by Gurcharan Singh alleging that he was a drunkard. It was also alleged that Gurcharan Singh had executed a Will in their favour. In terms of a stipulation contained in the said agreement dated 5.10.1964 the possession of the lands was delivered to the vendee.

The said suit was decreed on 31.5.1966.

4. Appellants preferred an appeal thereagainst. By a judgment and order dated 20.10.1976, the said appeal was allowed and the suit was remanded to the Trial Court for a fresh decision.

5. First respondent filed an application for amendment of plaint changing the area of the land from 98 canals, 19 marlas to 89 canals, 17 marlas. Appellant in response to the said application, although admitted the relationship between the parties, but without making any specific averments stated that as to why the said application should not be allowed merely "other amendments are opposed".

Appellants also filed a suit against the first respondent for recovery of possession on 19.12.1977.

6. Respondent No. 1 filed another application for amendment whereby the area of the suit land was amended to 94 canals 3 marlas.

7. Both the suits were heard together. The learned Trial Judge, refused to grant a decree for specific performance of the agreement of sale, but decreed the suit in favour of respondent No. 1 granting his alternative prayer for recovery for a sum of Rs. 8,260/- from the appellants herein. In arriving at the said conclusion, the learned Trial Judge noticed the averments made in the plaint which are as under:-

"The plaintiff has been and is ready to perform his part of the contract. The plaintiff served a notice on Shrimati Prithpal Kaur for herself on behalf of her minor sons and daughter who are defendants through his counsel on 8.6.65 intimating her about the above contract. Defendant No. 2 Shrimati Prithpal Kaur refused to take delivery of the notice. The notice is attached therewith."

Opining that the requirements to make averments in regard to readiness and willingness on the part of vendee to perform his part of contract as contained in clause (c) of Section 16 of the Specific Relief Act, had not been satisfied, it was held:-

"The language of paras Nos. 3 and 5 of plaint will show that the plaintiff has averred that he is ready to perform his part of the contract, but he has failed to aver that he has always been also willing to perform his part of the contract."

8. An appeal was preferred thereagainst by the respondent No. 1 which was marked as Civil Appeal No. 32 of 1978.

9. The First Appellate Court disagreed with the findings of the learned Trial Judge as regards readiness and willingness on the part of the first respondent to perform his part of contract holding that such a strict construction of the pleading are not warranted.

It was opined:-

"The appellant stated that he had always been ready to perform his part of the contract. It was contended that it was not necessary to allege in the plaint that the plaintiff was ready and willing to perform his part of the contract but it is to be seen from the circumstances of the case whether he was so ready and willing to get the sale deed executed. The conduct of the appellant from the very beginning was that he made all efforts to get the sale deed executed and he had the required money with him. It was contended that the word readiness denotes the capacity of a purchaser to purchase the land while the word willingness denotes his conduct. In the plaint it was mentioned that the appellant was ready to perform his part of the contract and his willingness was to be inferred from his conduct and even if the word willingness was missing in the plaint that would not disentitle the plaintiff from the specific performance of the contract because in case all immoveable property damages do not furnish adequate relief\005."

The Court of First Appeal was of the opinion that as the plaintiff/respondent failed to show his readiness and willingness to perform his part of contract as contained in the said agreement of sale dated

5.10.1964, so far as the new khasra Nos. are concerned, he was not entitled to a decree for specific performance of contract stating:

"In the present case by adding two khasra numbers regarding which there was no contract of sale the plaintiff-appellant made a change in the essential conditions of the contract and thus he was not entitled to specific performance of the contract just as willingness of a purchaser can be inferred from his conduct. Similarly his willingness in words is not necessary. Where a purchaser includes land in the plaint seeking its sale by way of specific performance of the contract which was not originally the subject matter of the agreement he cannot be considered to be a person who is willing to perform his part of the contract. The plaintiff should be ready and willing to perform his part of the contract through-out the proceedings till the date of the decree and if prior to that he negatives his readiness and willingness to perform his part of the contract by his conduct he cannot claim specific relief of the contract."

It was furthermore observed:

"\005..In a suit for specific performance of the contract of sale the distinction between the conduct which would disentitle the plaintiff from specific performance and the conduct which would not so disentitle him is that the plaintiff's conduct shows that he was really unwilling to buy the property then he is disqualified from specific performance but he was always willing to buy the property but in doing so made a mistake in insisting on something which he was not entitled to get from the defendant then such mistake would not disqualify him from specific performance if the mistake was corrected in time and the plaintiff had made it clear that he had withdrawn the mistaken demand and the mistake did not detract his essential willingness to purchase the property."

10. Two second appeals were filed by the first respondent before the High Court. A learned Single Judge of the Punjab and Haryana High Court did not frame any substantial question of law at the outset and recorded as under:-

"After going through the record, I find that the application for amendment was filed on the basis that in the Revenue papers the ownership of Gurcharan Singh vendor was changed which must be due to Consolidation and the application was not opposed by the opposite side except claim in costs which were allowed by the order of the Trial Court dated 1st January, 1977. It is further clear from the record that in the written statement no plea was taken that because of amendment there has been negation of contract. On this basis it is urged by the learned counsel that the first appellate court had made out a new case in deciding the relief to the appellant on the ground of negation of contract.

The other finding in the end of para is to the effect that the appellant had been ready and willing to perform his part of the contract. Admitted stay to continue."

However, it appears that at a later stage, three substantial questions of law were formulated namely:

1. Whether there is negation of contract on account of change of khasra No. pleaded by the plaintiff by way of amendment in the plaint?
2. Whether the plaintiff was ready and willing to perform his part of the contract?
3. Whether the plaintiff is entitled to a decree for specific performance of agreement in the facts and circumstances of the case?

The said appeals were allowed.

11. Mr. L. Nageswara Rao, the learned senior counsel appearing on behalf of the appellant would submit that none of the questions aforementioned give rise to any substantial question of law. The third purported question according to the learned counsel is not at all a substantial question of law.

The first question according to the learned counsel is essentially a question of fact. In regard to the second question, it was submitted that although this Court in some decisions opined that it would be essentially a question of fact but in some decisions point out that it would be a mixed question of law and fact and thus, in any event, the same being not a substantial question of law, the impugned judgment cannot be sustained.

It was furthermore urged that the High Court committed a serious error as a decree could not have been passed in favour of the first respondent as the subject matter of the agreement had altered.

12. Mr. Paramjit Singh Patwalia, the learned senior counsel appearing on behalf of the respondent, on the other hand, submitted that in view of the change in the Khasra Nos. or Khewat Nos. in the revenue records, an amendment had to be brought about. The amendment having taken effect from the date of the institution of the suit, the judgment of the High Court should not be interfered with. It was urged that the learned Trial Judge as also the first Appellate Court having rejected the plea of the appellants as regards the genuineness of the agreement dated 5.10.1964 and/or purported execution of the Will by Gurcharan Singh, it is not a fit case where this Court should exercise its discretionary jurisdiction under Article 136 of the Constitution of India.

It was submitted that escalation in price by itself may also not be a sufficient ground for interfering with the impugned judgment particularly when the respondent had been in possession of the said land for a long time and had made improvements thereupon.

13. A suit for specific performance of contract provides for a discretionary remedy. The Court in terms of Section 20 of the said Act may for sufficient and cogent reasons refuse to grant a decree for specific performance of contract. In a case of this nature, the Court essentially would be concerned with the identity of the land which was the subject matter of agreement. Like any other suit, the Court in terms of Order 7 Rule 7 of the Code of Civil Procedure may, however, take into consideration the subsequent events including the change in the revenue survey numbers in respect of a particular land. In other words, if the land in suit remains the same which was the subject matter of an Agreement of Sale, a decree for specific performance can be granted.

The matter, however, would be different where having regard to the consolidation or any other proceedings, the subject matter of land itself changes resulting in substantive change in the original agreement. In terms of Section 16(c) of the Specific Relief Act, the Court must arrive at a finding that the plaintiff had not only averred, but also established readiness and willingness on his part to perform his part of the contract. In this case, the appellant paid a sum of Rs. 7,000/- on the date of the execution of the agreement. It has been stated before us which has not been denied or disputed that at the time of filing of the suit itself, the first respondent deposited the balance amount of Rs. 8,000/- in the Court.

The original description of the suit land was as under:-

"Suit for specific performance of contract of sale in respect of the land measuring 98 Kls 19 marlas, Khewat No. 101, 102, 159, 38, 85, Khatauni Nos. 118, 119, 224, 220, 228, 45, 100, Khasra Nos. 63 7(8-0) 8(8-0) 9(8-0)

63
13/1(1-2) 14(8-0) 17/1(7-7) 6/3 (0-16) 5/1 (5-0) 6/2 (5-0)

62
14(8-0) 7/2(0-13) 3/2(2-0) 4(8-0) 7/1 (7-7)

55 56 63
20/1(3-16) 13/1(1-10) 10(8-0) 18(8-0)"

However, upon amendment, the description of the suit lands as they stand now are as under:-

"Suit for specific performance of agreement of sale dated 5.10.64, that the defendant Kirandip Kaur or in the alternative all the defendants should execute a sale deed in respect of land measuring 94-kanals 3 marlas, khewat No. 47, khatoni Nos. 76 min, 76, 79, lilla Nos:

Rect. 58 Rect. 56 Rect. 62
13/1(0-16) 13(1(1-10), 7/1/2(2-0), 7/1/3(3-5)

Rect. 62
3/2(2-0) 4/1(2-8) 7/2(0-13) 14(8-0), 5/1(5-0) 6/2 (5-8)

Rect 65
6/5(0-16) 7(8-0) 9(8-0) 10/1(6-12) 13/2 (6-10) 14(8-0) 17/1 (7-17) 18(8-0)"

14. We have noticed hereinbefore that the appellants did not spell out as to what were his objections in regard to amendment of plaint. It was merely stated that "other amendments are opposed". In response to the application for amendment it was stated;

"the application for amendments is opposed, it is belated and after thought"

15. It is therefore, evident that Gurcharan Singh was given two new plots which were not the subject matter of the original agreement. The area also

diminished.

When the second application for amendment of plaint was filed, no objection thereto was raised. Allegedly, in the suit for recovery of possession, the appellants mentioned the same description of land. How despite alteration in the description of the land in respect of a part of the suit premises, the respondent came into possession, if at all, is not known.

16. We are not oblivious of the findings of the learned Court or the First Appellate Court that the plaintiff/respondent did not bring on records any material to show that owing to consolidation proceedings or otherwise, there had been a change in the suit land in the sense that some other lands had been allotted to Gurcharan Singh in stead and in place of the lands in suits.

17. We have noticed hereinbefore that the plaintiff/respondent was categorical in his statement as to why the amendment had to be brought about, but neither the same was opposed nor any amended written statement/additional written statement was filed. Except the two plots, identity of the rest of the plots remained the same.

18. Mr. L. Nageshwar Rao, learned senior counsel may be right in his submission that purported substantial questions of law as framed stricto sensu do not answer the description as contained in sub-Section (5) of Section 100 of the Code of Civil Procedure. We, however, feel that the proper substantial question which should have been framed having regard to the admitted position is as to whether the contract of sale came to an end only on account of change of Khasra Nos., although the subject matter of the agreement substantially remained the same.

19. If on the admitted fact, it is found that at least substantial portion of the land remained the same, in our opinion, there does not exist any bar in granting a decree in respect of a part of the suit property. For the said purpose, even Section 12 of the Specific Relief Act would not stand as a bar. Section 12 of the Specific Relief Act reads thus;
"Section 12 - Specific performance of part of contract
(1) Except as otherwise hereinafter provided in this section the court shall not direct the specific performance of a part of a contract.

(2) Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed be a only a small proportion to the whole in value and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

(3) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either--

(a) forms a considerable part of the whole, though admitting of compensation in money; or

(b) does not admit of compensation in money; he is not entitled to obtain a decree for specific performance; but the court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the other party--

(i) in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and a case falling under clause (b),1[pays or had paid] the consideration for the whole

of the contract without any abatement; and
(ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

(4) When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part."

Thus, for the reasons stated in the statutory provision, if a decree for specific performance cannot be granted in respect of the entirety, an option in terms thereof has to be exercised.

The rigours of Section 16(c) of the Act, however, are not such which would for all intent and purport to be strictly construed. Indisputably, it is necessary to make averments in regard to the readiness and willingness as is required under Section 16(c) of the Act in terms of Form 47 appended to the Code of Civil Procedure.

20. It is, however, trite that, even for the said purpose, the entirety of the plaint must be taken into consideration. If upon reading the plaint in its entirety, the Court comes to the conclusion that for all intent and purport, the requirements of Section 16(c) of the Specific Relief Act stood complied with, no exception thereto can be taken. We have noticed hereinbefore that the First Appellate Court inter alia opined that not only the plaintiff has expressed his readiness to purchase the land, his willingness to do so can be culled out from other averments made in the plaint as and in particular the one where he had stated that he had gone to the Registration Office for getting the deed of sale executed and registered but it was the defendant, who did not turn up thereafter. He has also fulfilled the criteria of his readiness and willingness to perform his part of the contract as not only he had paid a sum of Rs. 7,000/- on the date of the execution of the agreement, he had deposited a balance sum of Rs. 8,000/- on the date of presentation of the plaint. As a vendee what he could do was to offer the balance amount of consideration to the vendor and make arrangements for getting the sale deed executed and registered. If he has done all that, we are of the opinion that the Court of First Appeal was right in holding that he was ready and willing to perform his part of the contract.

21. The Court of First Appeal, however, committed a serious error insofar as it failed to take into consideration that the identity of a part of the land being the same, it was not necessary to make any further averment or proof that he had been ready and willing to perform his part of the contract in respect of the subject matter of the agreement. Readiness and willingness to perform one's part of the contract must be confined to the subject matter thereof. If subject matter of the suit remained the same only because Khewat Nos. or Khatauni Nos. changed, the same ipso facto would not change. To the extent the subject matter of the agreement remains the same, a suit for specific performance of the contract can be decreed. Respondent, furthermore has all along been in possession of the major portion of the land since a long time. He is said to have made improvements on the land. It would be not, thus, equitable to deprive him from possession at least from that portion of the land which was the subject matter of the original agreement.

22. We may at this stage also refer to a recent decision of this Court in Ramakrishna Pillai and Anr. v. Muhammed Kunju and Ors. [2008 (2) SCALE 696]. The dispute before this court was whether the High Court had erred in holding that the plea of readiness and willingness was not raised by the plaintiffs. Allowing the appeal, it was held:
"The High Court's judgment is clearly vulnerable.

Firstly, there was no dispute ever raised by the defendants about the readiness and willingness of the plaintiffs to fulfill their obligations. The High Court was clearly in error in holding that no plea regarding readiness and willingness was raised. As noted above, the trial court in its judgment has referred to various portions of the averments in the plaint where the plaintiffs had categorically stated that they were and are always willing to fulfill their part of the obligations. The High Court also failed to notice that there was no plea either the written statement or in the cross objections filed in the appeal before the High Court that the plaintiffs were not ready and willing to fulfill their part of the obligation."

As regards the findings of the High Court it was further held: "The conclusions are clearly contrary to the pleadings of the plaintiffs. It was categorically stated in the plaint in both the suits that the plaintiffs are always ready and willing to fulfill their part of the obligations and that defendants were evading the execution for one reason or the other."

23. For the views we have taken, we are of the opinion that we in exercise of our jurisdiction under Article 136 of the Constitution of India would refuse to interfere with the judgment of the High Court, save and except to the extent the decree passed in respect of two new Khasra Nos. namely 63-M/13/2(6-8) and 53M/13/1(0-16).

24. However, having regard to the fact that the plaintiff/respondent No. 1 was denied the decree for specific performance of contract by two courts, although he had been in possession of the lands, in question from 1964, this Court in exercise of its discretionary jurisdiction under Article 142 of the Constitution of India as also Section 28 of the Specific Relief Act direct him to pay a further sum of Rs. 30,000/- to the appellant. The said sum may be deposited within a period of six weeks from date. On deposit of the said sum, the Court should draw up a decree in terms of this judgment.

This appeal is allowed to the aforementioned extent. There shall, however, in the facts and circumstances of the case no order as to costs.