

**(1996) 08 AHC CK 0100**

**Allahabad High Court**

**Case No:** Second Appeal No. 15 of 1996

Abdul Mazeed

APPELLANT

Vs

Tek Chand

RESPONDENT

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**Date of Decision:** Aug. 9, 1996

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 27
- Specific Relief Act, 1963 - Section 16

**Citation:** (1996) AWC 605 Supp

**Hon'ble Judges:** S.K. Phaujdar, J

**Bench:** Single Bench

**Advocate:** N.C. Rajvanshi, for the Appellant; V.K. Goyal, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

S.K. Phaujdar, J.

This appeal is directed against the concurrent decisions of the trial court and the first appellate court against the Appellant in a suit for specific performance. Original Suit No. 802 of 1992 was filed by the present Respondent for specific performance of a contract of sale dated 18.5.1992. The Respondent accepted the contract and also service of notice upon him asking him to execute the sale-deed, but it was stated that he had taken a loan from the Punjab National Bank (PNB, in short) and had mortgaged the suit property to secure that loan and proceedings for realisation of that loan were pending against him. It was further stated that the agreement with the Plaintiff was for sale of the land at a price of Rs. 1,00,000 and not for Rs. 50,000 as alleged. It was also stated that the Plaintiff was never ready and willing to perform the essential terms of the contract which were to be performed by him. The trial court decreed the suit believing the Plaintiffs story and directed the Defendant to register the deed in terms of the contract dated 18.5.1992 on receipt of Rs. 25,000 that was due. This decree was recorded by the Vth. Addl. Civil Judge, Meerut, on 26.10.1994.

2. An appeal was preferred in Civil Appeal No. 155 of 1994 and was dismissed by the VIIIth Addl. Distt. Judge, Meerut, on 22.12.1995 confirming all the findings of the trial Judge.
3. In this appeal, the judgments and decrees of the two courts below are challenged on the ground that the house in dispute having been mortgaged to PNB, there could not have been any direction for execution of the sale-deed in favour of the Plaintiff. It was further stated that there was no averment on behalf of the Plaintiff that he was ready and willing to perform his part of the contract. On the first point, the learned Counsel for the Appellant also made a prayer for accepting additional evidence under Order XLI, Rule 27. The papers concerning mortgage to the bank were proposed to be brought on record. The normal rule under Order XLI, Rule 27 is not to allow any party to adduce evidence at the appellate stage. There are, however, three exceptions as indicated in clauses (a), (aa) and (b) of this rule. There was a definite pleading in the written statement about the alleged mortgage of the property in favour of the PNB. Thus, it was fully within the knowledge of the Defendant that the onus lay on him to prove this averment. The Defendant, however, failed to produce these papers in the two courts below. The only reason which has been advanced for not filing these documents at the earlier stages was that the counsel did not consider it relevant for a proper decision in the case. This may not be a ground for condoning the lapses on the part of the Appellant in not filing the documents and Order XLI, Rule 27 cannot be used as a tool to allow any party to fill in a lacuna.
4. Regarding the second aspect of the argument, the learned Counsel for the Appellant vehemently argued that Section 16(c) of the Specific Relief Act requires that there should be specific averment and proof on the side of the Plaintiff indicating his willingness and readiness to perform his part of the contract. Reliance was placed on a decision of the Allahabad High Court reported in [Mahmood Khan and Another Vs. Ayub Khan and Others](#) . It was held herein that in the absence of any averment in the plaint, mere giving evidence that the Plaintiff was ready and willing to perform his part of the contract was not sufficient and amendment of plaint to Incorporate such averment was also denied. With the same reasoning, another argument was placed before me quoting a decision in All India Land Laws Reporter, 9 (Supp) 526 . The case law was, however, not produced and I take It to be an argument only of the learned Counsel to the effect that mere proof of readiness and willingness where the essential Ingredients are absent in the pleading ought to be deemed to be an exercise in vain. A third case law on this point stands reported in [Bhaurao Shamrao Bhalme and Others Vs. Mahadeo Raghu Yelekar](#) . Here also It was observed that when there was absence of averment in the plaint by the Plaintiff about the willingness to perform his part of the contract, the suit was to be dismissed. The same view was taken by the Allahabad High Court in the case reported in [Narendra Bahadur Singh Vs. Baijnath Singh and Another](#) . It was held that the provisions of Section 16(c) of the Specific Relief Act was mandatory and

absence of necessary averments in the plaint was vital and the court disallowed an amendment application seeking to cure the defect. In another decision of the Allahabad High Court (Lucknow Bench), It was held that when the plaint did not conform to the Forms 47 and 48 as per the Appendix A, Schedule I, Code of Civil Procedure, and there was no averment of readiness and willingness on the part of the Plaintiff to perform his part of the contract, he was not entitled to specific performance.

5. The learned Counsel for the Respondent read out the plaint and stated that although in paragraph 6 of the plaint the word "TAYYAR" (meaning, "ready") was used and there was absence of the term "ICHCHUK" (willing), the same could be Inferred from the averments made in paragraphs 4 and 5 of the plaint and it was submitted that the use of the particular word "willing" was never Intended by law, rather there were consistent decisions that this willingness is to be Inferred from the averments made in the plaint although the actual term "willing" may not be used. Reliance was placed on a decision of the Supreme Court as reported in JT 1996 (6) SC 309 . It was a case where the Respondent had pleaded his willingness and readiness to pay the amount, the Supreme Court held that this plea was sufficient and It was not necessary that the Respondent should have with him ready cash to meet his part of the contract. This case law, in my view, does not touch the controversy now raised regarding actual use of the term "willing" in the plaint averments. Reliance was placed on a decision of the Allahabad High Court in the case of [Anwarul Haq \(deceased by L. Rs.\) Vs. Nizam Uddin \(deceased by L. Rs.\) and Another,](#) . This very question which is now posed before this Court was also raised in the case of Anwarul Haq. It was a suit for specific performance of a contract. Regarding readiness and willingness of the Plaintiff, there was averment in the plaint but there was no literal compliance to the language in Forms 47 and 48 of Appendix A of the CPC It was held that literal compliance was not Imperative. The substantive provision in Section 16(c) did not Insist upon any particular set of words to be used and the averments must in substance indicate the continuous readiness and willingness on the part of the person suing. Almost the same interpretation of Section 16(c) was given in another judgment of the Allahabad High Court as reported in [Bijai Bahadur and Others Vs. Shri Shiv Kumar and Another,](#) . It was held herein that the law did not insist upon any particular language or specific form in which the averment as to the Plaintiffs willingness and readiness is or ought to be made. It was held that the language was not that Important, rather the crucial matter was the totality of the averments made in the plaint which must indicate the readiness and willingness of the Plaintiff even though by necessary Inference. In a Kerala High Court decision also, this particular question came for consideration, as reported in [Nambarukandi Marakkar Vs. Nallithodi Thavalaparambil Appu and Another,](#) . It was a suit for specific performance. There was an averment in the plaint that the Plaintiff was always "ready" to perform his part of the contract and the expression "willing" was not used. It was held that absence of the expression

"willing" was not vital on the basis of the pleading as a whole and the conduct of the Plaintiff and the court held that the word "ready" meant willingness.

6. In the case at our hand, a reading of the plaint Indicates, however, that the Plaintiff showed his willingness to have the deed executed. In fact, he did send a notice to the Defendant for execution of the deed and this notice is not denied. He had clearly averred that he was ready to perform his part of the contract and in evidence, both readiness and willingness have been asserted. In my view, the pleadings ought to indicate in its totality the readiness and willingness of the Plaintiff to perform his part of the contract and the courts are not to insist on specific reference to any particular term. I am further of the view that the totality of the averments of the Plaintiff in the present case clearly indicated not only his readiness but also the willingness of the Plaintiff as required u/s 16(c) Specific Relief Act and under this interpretation, the point raised by the Appellant must fail.

7. The appeal accordingly fails and is dismissed. There shall be no orders as to costs.