
Diwakar Mullick Vs Ganga Khandelwal and Others

First Appeal No. 20 of 2008

Court: CHHATTISGARH HIGH COURT

Date of Decision: Jan. 2, 2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) - Order 6 Rule 3, Section 96#Evidence Act, 1872 - Section 101, Section 103#Specific Relief Act, 1963 - Section 16, Section 16(c), Section 20, Section 20(2)

Citation: (2016) AIR(Chhattisgarh) 53 : (2016) 2 CGLJ 241 : (2016) 3 CivilLJ 604

Hon'ble Judges: Navin Sinha, C.J. and P. Sam Koshy, J.

Bench: Division Bench

Advocate: Sanjay Shyam Agrawal, for the Appellant; Praful Bharat and Anand Shukla, for the Respondent

Final Decision: Dismissed

Judgement

P. Sam Koshy, J.

1. The present appeal under Section 96 of Code of Civil Procedure has been preferred against the judgment and decree

passed in Civil Suit No. 7-A/2005 dated 24-10-2007 by the District Judge, Rajnandgaon. The brief facts relevant for adjudication of the First

Appeal is that the Appellant-Plaintiff Diwakar Mullick had filed a suit for specific performance seeking enforcement of an oral agreement for sale in

pursuance of which a money receipt dated 30-3-2005 was issued in part payment and also sought relief of permanent injunction. The dispute

pertains to 1500 Sq. ft. land situating in Sheet No. 48, Plot No. 52 in Ramadhin Marg, Rajnandgaon (hereinafter referred as suit property).

2. The Appellant-Plaintiff admittedly is a tenant of the Defendants. The suit property devolved upon Defendant No. 2, who is an old bedridden

widow, by a testamentary disposition executed in her favour by her late husband. Defendant No. 1 is the physically challenged daughter of

Defendant No. 2.

3. According to the plaintiff he had made an offer/proposal on 30-3-2005 to the Defendants for purchasing the suit property which was acceptable

to the defendants and an oral agreement was arrived at between the plaintiff and defendants for the sale of the suit property for a consideration of

Rs. 9,00,000/-. On the basis of the oral agreement arrived at between the parties on 30-3-2005 as an acceptance to the agreement the plaintiff

gave an amount of Rs. 11,000/- towards advance and it was agreed that the balance of Rs. 8.89 Lakh shall be paid in the Office of the Dy.

Registrar at the time of execution of the sale deed. The defendants issued a money receipt (Exhibit P/2) acknowledging receipt of Rs. 11000/-

towards advance on 30-3-2005 itself. As per the plaintiff the defendants had to get the sale deed executed within a period of four months from

30-3-2005 i.e. by 30-7-2005.

4. Since the defendants did not execute the sale deed and in between the plaintiff came to know that the defendants are in the process of

negotiating a sale with some third party, the plaintiff immediately served the defendants with a legal notice asking the defendants to appear before

the Registrar (Stamp) for execution of the sale deed on 18-7-2005 and on the said date he had kept a banker cheque prepared for an amount of

Rs. 8.89 lakhs and waited at the office of the Dy. Registrar (Stamp) for the whole day but the defendants did not turn up leading to the filing of the

Civil Suit seeking relief of specific performance and permanent injunction.

5. The defendants entered appearance before the trial Court and submitted a detailed reply categorically denying all the averments and contentions

made by the plaintiff in his pleading. They had also submitted that basis of the suit i.e. Exhibit P/2 was a forged, fabricated and suspicious

document praying for dismissal of the suit.

6. After the evidence was recorded, the trial Court vide judgment impugned dated 24-10-2007 dismissed the plaintiff's suit holding it to be devoid

of merit under the provisions of Specific Performance leading to filing of this First Appeal.

7. According to the plaintiff, Exhibit P/2 the receipt dated 30-3-2005, is not disputed by the Defendants. Rather the defendants have admitted the

same and also accepted receipt of Rs. 11,000/- towards advance against the suit property. The only aspect that the trial Court ought to have

considered was whether the payment of Rs. 11,000/- was towards advance of earnest money as token of the acceptance of the oral agreement of

sale of the suit property.

8. The plaintiff further contended that the defendants did not raise any objection in respect of Exhibit P/2 while the same was being exhibited and

marked during the course of the evidence on behalf of the plaintiff before the Trial Court and therefore the document long with its contents stand

admitted, proved and established. Yet the Court below did not accept the same and wrongly rejected the suit.

9. According to the plaintiff since when Exhibit P/2 was exhibited and marked with no objection raised by the defendants and on examining the

same they have also admitted the execution of it hence the burden of proof to rebut contention of the plaintiff falls upon the defendants to establish

that the receipt Exhibit No. P/2 was not a document in compliance with the oral agreement to sale between the plaintiff and the defendants. In

support of the contention, reliance has been placed on , 2003 (8) SCC 752 : (AIR 2003 SC 4548) (R.V.E. Venkatachala Gounder v. Arulmigu

Viswesaraswami and V.P. Temple and another). The plaintiff further challenged the findings of the trial Court contending that even if the findings in

respect of interpolation and overwriting or there was some suspicious contents in it, even if it is accepted on its face value it would not have altered

the nature of the document Exhibit P/2 in any manner as the contents minus interpolation also had the same meaning. In this contention, reliance has

been placed in , 1970 (1) SCC 56 : (AIR 1970 SC 1942) (Kalianna Gounder v. Palani Gounder and another). Therefore, the order of the trial

Court is bad in law, arbitrary and against the evidence in record.

10. According to counsel for the plaintiff, Exhibit P/2 was not an acknowledgment towards advance of rent, but was earnest money against the

oral agreement to sell the suit property which is established from the fact that the plaintiff himself at a later stage had issued a notice to the

defendants demanding for arrears of rent by Exhibit P/7.

11. The plaintiff had proved his case with regard to the contents of Exhibit P/2 and the circumstances in which it was executed by adducing

evidence of PW-3, Kumari Lalita Soni, who is the scribe of the document and who has the details of the transactions transpired before issuance of

Exhibit P/2. As such the plaintiff has discharged his duty by proving Exhibit P/2 and its contents, yet the court below did not appreciate the same

and disbelieved the version of plaintiff's evidence.

12. It is next submitted that pursuant to the oral agreement, the plaintiff got a bankers cheque prepared on 18-7-2005 i.e. a date on which the

defendants had to execute the sale deed and waited for the defendants the whole day in the office of the Sub-Registrar where the registration of the

suit property had to take place. This fact establishes that the Appellant/Plaintiff had showed his readiness and willingness for performing his part of

the contractual obligation. The fact that the plaintiff was keen to get the sale deed executed is also established from the paper publication which

was made by him in respect of the suit property (Exhibit P/3) cautioning others from dealing with the same. In the light of all these facts, the plaintiff

sought for the setting aside of the judgment and decree and prayed for a decree to be passed in his favour.

13. Counsel for the respondents/defendants opposing the appeal submitted that the First Appeal is totally misconceived and without any substance

and that it does not call for any interference by this Court. The Court below has considered all the submissions and evidences which the plaintiff

had adduced before the Court below and after fully appreciating the evidences which have been adduced on behalf of the plaintiff reached to the

conclusion that no case is made out in favour of the plaintiff for issuance of a decree in his favour, and thereby rejected the suit and as such there is

no further scope of interference left in the present appeal.

14. The suit was for enforcement of specific performance of contract under the Specific Relief Act, 1963 (for short, the Act, 1963). The plaintiff

primarily had to prove two things. Firstly the plaintiff had to establish that there was a valid agreement which is enforceable under the law and

secondly, the plaintiff had all along been ready and willing to perform his part of contract/agreement from the date of agreement till the date of

decree. The suit for specific performance can be decreed only in the event if the plaintiff is able to establish the above referred two conditions

convincingly.

15. In addition, the Defendants have also stressed upon the fact that after the fulfillment of the aforesaid two conditions, the plaintiff would also

have to meet the requirement under Section 16 of the Act, 1963, which creates a bar in grant of specific relief. One such bar is under Section

16(c) of the Act, 1963, which clearly stipulates that the plaintiff has to aver and prove that he has performed or has always been ready and willing

to perform the initial terms of the contract which are to be performed by him.

16. Likewise, it was also submitted that the decision under the Act, 1963, is a discretionary owner exercised by the trial Court and Section 20 of

the Act, 1963 clearly enumerates the condition which has to be made for the Court to properly exercise the discretion while decreeing a specific

performance. The plaintiff had also miserably failed to meet the test as is required under Section 20 of the Act, 1963. By referring to plaint filed by

the plaintiff as also the evidence which have been led on behalf of plaintiff, it is submitted on behalf of the defendants that the plaintiff has not

established the readiness and willingness to perform his part of contract. Referring to written statement filed on behalf of the defendants wherein

they have categorically denied all the averments put forth by the plaintiff in his plaint, it is submitted that burden of proof stands upon the plaintiff to

prove his pleadings. Referring to Exhibit P/2, it is submitted that the same is forged and fabricated document as there was an

interpolation/overwriting made in the same to project it as acknowledgment of receipt of earnest money in connection with the oral agreement to

sale. Some of the contents in the said document also are suspicious. The claim of the plaintiff was not sustainable for the reason that the defendant

No. 1 who is alleged to have entered into the oral agreement was not competent to enter into any sort of agreement as she was not the actual title

holder or exclusive owner of the suit property.

17. The defendants further drawing attention to the pleadings in the plaint submitted that the plaintiff has not been able to specify the suit property

by specific identification of the part of the land which has been allegedly agreed to sale by the defendants from among the total land belonging to

the defendants. In the absence of specific identification of the suit property itself, the case of the plaintiff loses its credibility. Further, the defendants

also submitted that the plaint also misses the details of the property measuring 1500 sq. ft. which the defendants have agreed to sell to the plaintiff

when the plaintiff is only a tenant over 1350 sq. ft. and there is categorical overwriting of 1350 sq. ft. made into 1500 sq. ft. in Exhibit P/2 with no

explanation whatsoever as to under what circumstances 1350 sq. ft. was made into 1500 sq. ft. and which is the 1500 sq. ft. agreed by the

defendants to sell to the plaintiff.

18. Exhibit P/2 which is the whole basis of the suit itself has not been proved properly to the extent that the witnesses to the said document whose

signatures are there on the said document have not been examined or produced as witnesses by the plaintiff. Admittedly, the Appellant/Plaintiff has

not taken any steps to ensure the presence/attendance of the witnesses to the said document Exhibit P/2 for their deposition before the Court so as

to prove the said document, and therefore, it appears to be a fictitious signatures, Referring to the evidence of PW-3, Kumari Lalita Soni, the

defendants submitted that the deposition of PW-3, Kumari Lalita Soni also establishes the fact that the witnesses who had signed the document

were not in fact witness to the execution of the document. The witnesses were standing somewhere outside and after Exhibit P/2 was reduced in

writing, these witnesses were called inside and thereafter their signatures were obtained. The plaintiff has even not been able to disclose the actual

persons who were witnesses to the document Exhibit P/2.

19. It is further submitted that the plaintiff was not ready and willing to perform his part of contract is also established from the fact that as per

evidence of plaintiff himself, he got bankers cheque prepared to be paid to the defendants on 18-7-2005 but the said banker cheque had been

cancelled on the very next day i.e. on 19-7-2005. There is no iota of pleading or evidence on the part of the plaintiff to establish and substantiate

the readiness and willingness on the part of the plaintiff in performing his part of the contract. According to defendants, only the preparation of

bankers cheque by itself cannot be construed or inferred to establish the readiness and willingness on the part of the plaintiff. The plaintiff is an

employee of the Bank and there is no evidence if he had the amount in his account before the bankers cheque was issued. The plaintiff has neither

pleaded nor given any proof to show that during all this period i.e. from the date of agreement till the filing of the suit he had sufficient balance in his

account to prove his preparedness to establish the readiness and willingness for performing his part of the contract.

20. The plaintiff also has failed to establish the fact that there was a valid contract entered into between the parties so as to invoke the provisions of

the Specific Relief Act. Admittedly, the exclusive ownership of the suit property lay with defendant No. 2 by virtue of a Will executed by the

husband of defendant No. 2 and the right of defendant No. 1 over the suit property would arise only after the death of the defendant No. 2. If it is

construed that the plaintiff entered into an oral agreement of sale with the defendant No. 1, the same would not bring it within the ambit of a valid

contract as the defendant No. 1 did not have any right over the suit property. The defendant No. 2 had a substantial right over the suit property

and without her consent if there was any agreement entered into, the same can never be said to be a valid contract. Merely recording of name of

defendant No. 1 in revenue records would not make her a title holder. Thus, the very fact that there was no valid contract between the parties, the

suit was rightly dismissed by the trial Judge.

21. According to defendants, the very fact that there was overwriting/manipulations and insertions made in the document Exhibit P/2 makes its

suspicious and non acceptance of the same by the trial Court cannot be said to be bad in law particularly in the light of discretionary jurisdiction

that the trial Judge has while dealing with a case of Specific Performance. The decree of specific performance being discretionary relief, such relief

can be denied by the trial Judge if the basis for the said relief i.e. document on basis of which the suit has been filed is suspicious. It is further

submitted by the defendants that there was a categorical and emphatic denial by the defendants all the averments made in the plaint, the plaintiff did

not carry out any consequential amendment in the plaint to counter the contentions of the defendants in their written statement so as to further

strengthen the pleading in the plaint. In the absence of any consequential amendment, the entire burden got shifted upon the plaintiff to have

established the entire case based on the pleadings made in the plaint.

22. So far as the contentions of the plaintiff as regards the notice of arrears of rent (Exhibit P/11) is concerned, the same is self explanatory to

show that the said notice was not a notice for arrears of rent, but was a notice issued to the plaintiff for eviction of the tenanted property and for

difference of rent paid by the plaintiff with that of the agreed amount as per the agreement.

23. It is further submitted that as per provisions of Section 101 of the Indian Evidence Act, 1872 (for short, the Act, 1872) the burden of proof

rests upon the plaintiff to assert his claim and prove his legal right. Further, as per Section 103 of the Act, 1872, the burden of proof lies on that

person who wishes the court to believe his contentions. In the instant case as is required under Section 16(c) of the Specific Relief Act, the plaintiff

has failed to assert in his pleadings and has also not been able to prove and establish his case. Referring to Order 6, Rule 3 of CPC, the defendants

submitted that the forms in Appendix-A shall be used for all pleadings, and therefore, the averment in the pleadings must be in substance and

indicate all the continuous readiness and willingness on the part of the person suing.

24. Thus, for all the aforesaid reasons, the defendants prayed for rejection of the Appeal.

25. We have considered the submissions on behalf of the parties and perused the records.

26. The form prescribed under Order 6, Rule 3 is procedural. It is a rule of pleading. This has for its object to advance the cause of justice and it is

not intended to short circuit decision on merits. Something which has been designed to facilitate justice and further its end. So far as Section 16(c)

of the Act, 1963 is concerned, for ready reference, the same is re-produced as under:

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

(a) xxxxxxx

(b) xxxxxxx

(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.

27. In the instant case, first of all interpolations/over writings made in the document Exhibit P/2, acknowledgment of receipt, itself is suspicious to

be a valid contract. Secondly, the conduct of the plaintiff by getting the banker cheque prepared on 18-7-2005 and getting it cancelled on 19-7-

2005 and no averment whatsoever that plaintiff was always ready and ever willing to perform his part of the contract and had sufficient funds in his

account makes his claim unsustainable. Thus, the trial Judge having serious doubts on the contract at the first instance and the conduct of the

plaintiff at the second instance, refused to grant a decree of specific performance.

28. So far as the contract being unfair is also reflected from the fact that for a property worth Rs. 9 Lacs, as per the version of the plaintiff, only on

amount of Rs. 11,000/- as earnest money seems to be highly improbable. Under these suspicious circumstances, the decree of specific

performance particularly for the reason of it being discretionary, the trial Judge has rightly denied to grant specific relief to the plaintiff as

discretionary relief can be denied if the basis of suit i.e. document Exhibit P/2 is suspicious.

29. Insofar as the decision relied upon in case of Kalianna (, AIR 1970 SC 1942) (supra) is concerned, the facts of the case is under entirely

different circumstances and is easily distinguishable. If we read para 13 of said judgment, it would reveal that the said judgment would rather go

against the plaintiff inasmuch as in that case the plaintiff had offered specific explanation so far as the ink in which portion of the document which

appears to be in slightly different shade from the rest of the document is concerned whereas, in the present case, the plaintiff neither in his pleadings

nor in his evidence has given any sort of explanation. PW. 3, Kumari Lalita Soni, in her evidence has not discussed anything about the overwriting

on Exhibit P/2. A plain perusal of Exhibit P/2 would clearly show that there has been an insertion of lines in its latter part and in which the claim of

the plaintiff is based. Further if the agreement had already been decided then there would not have been any occasion for making corrections in

Exhibit P/2 which is being claimed as nothing else but a receipt of the advance of earnest money. The overwriting with regard to the area subject-

matter of the agreement has also remained unexplained. Thus, the overwriting also gives rise to suspicion and doubt. Further the said document at

the place where the signature is written would also clearly show that the last line has been subsequently squeezed in giving it a clear picture of

forging the said document for the purpose of filing of the suit.

30. Likewise, the facts of R.V.E. Venkatachala (, AIR 2003 SC 4548) (supra) is also quite distinguishable from the facts of the present case. In

the instant case, the Defendants did not dispute the fact regarding receipt of Rs. 11,000/- in respect of the suit property, but there is specific denial

by the Defendants with regard to the said amount being towards earnest money against the agreement to sale of the suit property, rather it was as

an advance against the payment of monthly rent which the Plaintiff was paying to the Defendants and there is no dispute in respect of execution of

document Exhibit P/2. However, there is categorical denial of the later part of the entries made in the said document Exhibit P/2, which according

to defendants, are interpolations and forged entry made by the plaintiff to give it a picture of a part performance of oral agreement to sale.

31. The language of Section 16(c) of the Act, 1963 clearly stipulates that the plaintiff must aver that he has performed or has always been ready

and is willing to perform his part of contract. The readiness and willingness has to be in spirit and substance and not in letter and form.

32. The law in respect of Section 16(c) of the Act, 1963 is now well settled. The Supreme Court in , 1995 (5) SCC 115 : (AIR 1996 SC 116)

(N.P. Thirugnanam (dead) by LRs. v. Dr. R. Jagan Mohan Rao) in a very categorical term has held as under:

.....the continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. Right

from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract.

If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the

contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending

circumstances.

33. So far as Section 20 of the Act, 1963 is concerned, the wording of the said section itself denotes the nature of power which the Judge deciding

the suit for specific performance has. It clearly shows the nature of power exercised by the Court to be discretionary in nature. Section 20(2) of

the Act, 1963 enumerates certain circumstances where the Court may properly exercise discretion not to decree specific performance. Clause (a)

of Section 20(2) of the Act, 1963 also envisages the Courts to appreciate the conduct of the parties at the time of entering into contract and also

the other circumstances related to the contract while denying a decree of specific performance.

34. The Supreme Court in , 2008 (12) SCC 145 : (AIR 2008 SC 1786, para 8) (Bal Krishna v. Bhagwan Das (dead) by LRs) relying upon its

earlier judgments while dealing with Sections 16(c) and 20 of the Act, 1963 held as under:

13.....the person seeking specific performance of the contract, must file a suit wherein he must allege and prove that he has performed or has

been ready and willing to perform the essential terms of the contract, which are to be performed by him. The specific performance of the contract

cannot be enforced in favour of the person who fails to aver and prove his readiness and willingness to perform essential terms of the contract.

Explanation (ii) to clause (c) of Section 16 further makes it clear that plaintiff must aver performance of, or readiness and willingness to perform,

the contract according to its true construction. The compliance with the requirement of Section 16(c) is mandatory and in the absence of proof of

the same that the plaintiff has been ready and willing to perform his part of the contract suit cannot succeed. The first requirement is that he must

aver in plaint and thereafter prove those averments made in the plaint. The readiness and willingness of the plaintiff to perform the essential part of

the contract would be required to be demonstrated by him from the institution of the suit till it is culminated into decree of the Court.

14. It is also settled by various decisions of this Court that by virtue of Section 20 of the Act, the relief for specific performance lies in the

discretion of the Court and the Court is not bound to grant such relief merely because it is lawful to do so. The exercise of the discretion to order

specific performance would require the Court to satisfy itself that the circumstances are such that it is equitable to grant decree for specific

performance of the contract. While exercising the discretion, the Court would take into consideration the circumstances of the case, the conduct of

parties, and their respective interests under the contract. The Courts discretion to grant specific performance is not exercised if the contract is not

equal and fair, although the contract is not void.

35. In one of the recent decision in , 2015 (8) SCC 695 (Padmakumari v. Dasayyan) the Supreme Court has re-iterated its earlier stand and legal

position laid down in the aforesaid cases.

36. So far as the issue of burden of proof under Section 101 of the Act, 1872 is concerned, the Supreme Court in , 2011 (12) SCC 220 : (AIR

2011 SC 2344) (Rangammal v. Kuppuswami) has held that, Section 101 of the Evidence Act has clearly laid down that the burden of proving a

fact always lies upon the person who asserts the fact. Until such burden is discharged, the other party is not required to be called upon to prove his

case. The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at

such conclusion, he cannot proceed on the basis of weakness of the other party. When a person after attaining majority, questions any sale of his

property by his guardian during his minority, the burden lies on the person who uphold/asserts the purchase not only to show that the guardian had

the power to sell but further that the whole transaction was bona fide. The party who alleged the sale deed to be not genuine, sham or bogus has to

prove nothing until the party relying upon the document established its genuineness.

37. It is well established dictum of the Evidence Act that misplacing burden of proof would vitiate the judgment. The burden of proof may not be of

much consequence after both the parties lay evidence, but while appreciating the question of burden of proof, misplacing of burden of proof on a

particular party and recording findings in a particular way definitely vitiate the judgment as it has happened in the instant matter. The onus is on the

plaintiff to positively establish its case on the basis of the material available and it cannot rely on the weakness or absence of defence to discharge

the onus.

38. Thus, in view of the aforesaid facts and circumstances of the case and taking note of the decisions of the Supreme Court in the aforesaid cases,

this Court is of the opinion that no illegality or infirmity has been committed by the trial Judge while rejecting the plaintiff's suit for specific

performance. The appeal fails and is accordingly dismissed thereby affirming the judgment and decree passed by the trial Court.