



NEUTRAL CITATION NO. 2024:MPHC-IND:32499

**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE
BEFORE
HON'BLE SHRI JUSTICE PRANAY VERMA**

FIRST APPEAL No. 138 of 2002

VIRENDRA PAGARE

Versus

DHARMESH JAIN AND OTHERS

Appearance:

Shri Vinay Zelawat - Senior Advocate along with Shri Anendra Singh Parihar - Advocate for the appellant.

Shri Harish Joshi - Advocate for respondent No.1.

None for respondent No.2 though served.

Reserved on :18.09.2024

Pronounced on :20.11.2024

J U D G M E N T

This appeal under Section 96 of the Code of Civil Procedure has been preferred by defendant No.2 being aggrieved by the judgment and decree dated 04.02.2002 passed in Civil Suit No.33-A/1997 by the Second



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Additional District Judge, Indore, whereby the claim of plaintiff/respondent No.1 for specific performance of contract dated 05.05.1998 has been decreed.

2. The claim of plaintiff is that defendant No.1 had entered into an agreement with him for sale of the suit property, which is a flat bearing number 301, for a consideration of Rs.3.50 lakhs on 05.05.1995. A written agreement was also executed between them on that day and entire sale consideration was also paid by plaintiff to defendant No.1 who had agreed that she would soon deliver possession of the suit flat to him and shall execute the requisite sale deed in his favour. She had also requested that even though there is an averment in the agreement that possession has been handed over to plaintiff, but she may be permitted to retain possession till she finds alternate accommodation for herself. The plaintiff accepted the said request but defendant No.1 did not deliver possession to her. On 15.10.1997 she assured the plaintiff that she would execute the sale deed in his favour within a week. After a week when plaintiff went to the flat she was met by defendant No.2 who stated that he is the owner thereof and is residing therein in that capacity. On inquiry defendant No.1 stated that she has given the suit flat to defendant No.2 for residence for some time. Plaintiff then asked defendant No.1 to execute the sale deed in his favour, but she refused to do so and defendant No.2 also refused to deliver possession of the suit flat to him.



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3. On such contentions, on 04.05.1998 the plaintiff instituted an action for specific performance of contract dated 05.05.1995.

4. Defendant No.1 contested the claim by filing her written statement submitting that no agreement to sale was executed between plaintiff and her. No amount has ever been paid by plaintiff nor was any letter written by her to plaintiff on 15.10.1997. On 12.08.1997 she has sold the suit flat to defendant No.2 under a registered sale deed and has delivered possession of the same to him. The defendant No.2 also filed his written statement submitting that he is the owner of the suit flat by virtue of the sale deed executed in his favour by defendant No.1 and is in legal possession of the same.

5. Upon pleadings of the parties issues were framed by the trial Court and thereafter plaintiff and defendant No.2 led evidence in support of their respective contentions. Defendant No.1, however, did not lead any evidence. By the impugned judgment and decree, the trial Court has decreed plaintiff's claim by holding that he has proved that an agreement to sale was executed between him and defendant No.1 on 05.05.1995 upon payment of a sum of Rs 3,50,000/- by him to her and that plaintiff has always been ready and willing to perform his part of the contract but defendant No.1 has not done so and has executed sale deed with respect to the suit flat in favour of defendant No.1 which is not binding upon him.



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6. Learned senior counsel for defendant No.2 has submitted that the judgment and decree passed by the trial Court is wholly illegal and deserves to be set aside. By way of her evidence the plaintiff has totally failed to prove the factum of execution of the agreement dated 05.05.1995 between him and defendant No.1. There is no plea as regards readiness and willingness on part of plaintiff to perform his part of the contract neither has the same been proved by him by way of his evidence. The agreement was allegedly entered into on 05.05.1995 whereas the suit has been instituted on 04.05.1998 just one day prior to expiry of period of limitation. No notice was issued by plaintiff to the defendants prior to institution of the suit. The possession of the suit flat is with defendant No.2 and the averment of plaintiff that possession was delivered to him at the time of execution of the agreement to sale is contrary to its averments and statement of plaintiff himself. It is further submitted that in view of overall conduct of plaintiff, he is not entitled for grant of discretionary relief of specific performance in his favour. Reliance has been placed on the decision of the Apex Court in *Lourdu Mari David and Others v. Louis Chinnaya Arogiaswamy and Others*, AIR 1996 SC 2814 and of the Madras High Court in *P. Retnaswamy v. A. Raja*, AIR 2002 MADRAS 131.

7. *Per contra*, learned counsel for the plaintiff has submitted that the decree passed by the trial Court is perfectly legal. By way of the evidence adduced by plaintiff in the form of himself and his witnesses, he has categorically proved the execution of the agreement to sale dated 05.05.1995



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by defendant No.1 in his favour. He has also proved that on 15.10.1997 defendant No.1 had assured in writing that she would execute the requisite sale deed in his favour within a week but did not do so. The plaintiff has specifically pleaded and proved that he has always been ready and willing to perform his part of the contract, but it is defendant No.1 who has committed breach of its terms. Even otherwise the appeal has been preferred by defendant No.2, who is a subsequent purchaser and is not entitled to question the readiness and willingness of plaintiff to perform his part of the contract. He even cannot challenge the factum of execution of agreement between plaintiff and defendant No.1. Defendant No.2 has not pleaded that he had purchased the suit flat without being aware of the agreement between plaintiff and defendant No.1. It is hence submitted that the appeal deserves to be dismissed. Reliance has been placed on the decision of the Apex Court in *M.M.S. Investments and Others v. V. Veerappan and Others, (2007) 9 SCC 660*.

8. I have considered the submissions of the learned counsel for the parties and have perused the record.

9. For the purpose of proving the factum of execution of the agreement dated 05.05.1995, the plaintiff has examined himself as P.W.1 and has stated that the agreement was executed in presence of witnesses Jitendra Kumar Jain and Kusum Tiwari, who had signed upon the same. At that time



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itself a sum of Rs.3,50,000/- was paid by him to defendant No1. He has also examined one of the attesting witnesses of the agreement, namely; Jitendra Jain as P.W.2, who has stated that the agreement was executed in his presence by plaintiff in favour of defendant No.1 on 05.05.1995 and both of them had signed on the agreement and the other attesting witness Kusum Tiwari and he had also signed thereupon. When the cross examination of both these witnesses is perused, it is seen that nothing has been brought out therein to discredit them or to doubt their correctness. Though learned senior counsel for defendant No.2 has taken this Court through the statements of the witnesses in detail to contend that from them the execution of the agreement has not been proved, but the contention is not acceptable. The statements of plaintiff's witnesses are cogent and trustworthy and have not been controverted in any manner hence deserve to be relied upon. The finding of the trial Court that plaintiff has proved the execution of the agreement dated 05.05.1995 is hence affirmed.

10. The crucial question for determination is whether it is open for defendant No.2, purchaser from defendant No.1, to raise plea that plaintiff was never ready and willing to perform his part of the contract. This question arose for consideration before the Apex Court in *Ram Awadh and others v. Achhaibar Dubey and anothers*, (2000) 2 SCC 428 and answering the same, the Apex Court categorically held that subsequent purchasers of the property who are defendants in the suit can very well raise the plea that plaintiff has



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never been ready and willing to perform his part of the contract. It was held as under:

“3. In *Jugraj Singh case* [(1995) 2 SCC 31] upon substantially similar facts, this Court noted Section 16(c) of the Specific Relief Act and the dictum of the Privy Council in *Ardeshir Mama v. Flora Sassoon* [(1927-28) 55 IA 360 : AIR 1928 PC 208] that in a suit for specific performance the averment of readiness and willingness on the plaintiff's part, up to the date of the decree, was necessary. It also noted that this Court in *Gomathinayagam Pillai v. Palaniswami Nadar* [AIR 1967 SC 868 : (1967) 1 SCR 227] had held that it was for the plaintiff in a suit for specific performance

“to establish that he was, since the date of the contract, continuously ready and willing to perform his part of the contract. If he fails to do so, his claim for specific performance must fail”.

Jugraj Singh case however, held:

“That plea is specifically available to the vendor/defendant. It is personal to him. The subsequent purchasers have got only the right to defend their purchase on the premise that they have no prior knowledge of the agreement of sale with the plaintiff. They are bona fide purchasers for valuable consideration. Though they are necessary parties to the suit, since any decree obtained by the plaintiff would be binding on the subsequent purchasers, the plea that the plaintiff must always be ready and willing to perform his part of the contract must be available only to the vendor or his legal representatives, but not to the subsequent purchasers.”

4. The decision in *Jugraj Singh case* was noted by a Bench of two learned Judges in *Lakhi Ram v. Trikha Ram* [(1998) 2 SCC 720] and doubted, but the appeal there was decided on another point.

5. Section 16 of the Specific Relief Act, 1963 reads:

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

(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 the



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performance of which has been prevented or waived by the defendant.”

6. The obligation imposed by Section 16 is upon the court not to grant specific performance to a plaintiff who has not met the requirements of clauses (a), (b) and (c) thereof. A court may not, therefore, grant to a plaintiff who has failed to aver and to prove that he has performed or has always been ready and willing to perform his part of the agreement the specific performance whereof he seeks. There is, therefore, no question of the plea being available to one defendant and not to another. It is open to any defendant to contend and establish that he mandatory requirement of Section 16(c) has not been complied with and it is for the court to determine whether it has or has not been complied with and, depending upon its conclusion, decree or decline to decree the suit. We are of the view that the decision in *Jugraj Singh* is erroneous.”

11. The aforesaid judgment was followed by the Apex Court in *Azhar Sultana versus B.Rajamani and others, (2009) 17 SCC 27* in which it was held as under:

“30. It is also a well-settled principle of law that not only the original vendor but also a subsequent purchaser would be entitled to raise a contention that the plaintiff was not ready and willing to perform his part of contract.”

12. In **M.M.S. Investments (supra)** relied upon by learned counsel for the plaintiff, the property was conveyed to the plaintiff after the suit having been decreed by the trial Court. It is only thereafter that the appellants therein had purchased the property. In the case of *B. Vijaya Bharathi v. P. Savitri and others , (2018) 11 SCC 761* the judgments in the case of **M.M.S. Investments (supra) and Ram Awadh (supra)** were considered by the Apex Court, and it was held as under :



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“13. However, Mr Rao has pressed into service a judgment of this Court in M.M.S. Investments v. V. Veerappan (2007) 9 SCC 660]. While stating the background facts, the learned Judges referred to a suit for specific performance which resulted in a decree passed by the trial court. After the decree was passed, the defendants through their power of attorney sold a large extent of properties, including the subject-matter of the suit, in favour of certain other persons, who happened to be the appellants before this Court. In that case, the High Court held that there would be no bar for the appellant to raise any issue on merits of the appeal on the facts of that case except the defence of readiness and willingness as provided under Section 16(c) of the Specific Relief Act.

14. This Court went on to distinguish a three-Judge Bench judgment in Ram Awadh v. Achhaibar Dubey and held as follows:

“6. Questioning the plea of readiness and willingness is a concept relatable to an agreement. After conveyance the question of readiness and willingness is really not relevant. Therefore, the provision of the Specific Relief Act, 1963 (in short “the Act”) is not applicable. It is to be noted that the decision in Ram Awadh case relates to a case where there was only an agreement. After the conveyance, the only question to be adjudicated is whether the purchaser was a bona fide purchaser for value without notice. In the present case the only issue that can be adjudicated is whether the appellants were bona fide purchasers for value without notice. The question whether the appellants were ready and willing is really of no consequence. In Ram Awadh case the question of the effect of a completed sale was not there. Therefore, that decision cannot have any application so far as the present case is concerned. Once there is a conveyance the concept would be different and the primary relief could be only cancellation.”

15. Ram Awadh is a judgment by three Judges of this Court overruling Jugraj Singh v. Labh Singh (1995) 2 SCC 31] in which it was held that the plea that the plaintiff is not ready and willing to perform the contract is personal only to the seller defendant. Subsequent purchasers cannot take this plea. This was stated to be an erroneous view of the law by the three-Judge Bench, and the judgment in Jugraj Singh was set aside as follows:



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“6. The obligation imposed by Section 16 is upon the court not to grant specific performance to a plaintiff who has not met the requirements of clauses (a), (b) and (c) thereof. A court may not, therefore, grant to a plaintiff who has failed to aver and to prove that he has performed or has always been ready and willing to perform his part of the agreement the specific performance whereof he seeks. There is, therefore, no question of the plea being available to one defendant and not to another. It is open to any defendant to contend and establish that the mandatory requirement of Section 16(c) has not been complied with and it is for the court to determine whether it has or has not been complied with and, depending upon its conclusion, decree or decline to decree the suit. We are of the view that the decision in Jugraj Singh case is erroneous.

16. In the facts of M.M.S. Investments case, after the trial court decreed the suit, the property was conveyed to the plaintiff. It is only thereafter that the appellants in that case purchased the property. In the facts of the present case, Defendants 2 and 3 purchased the property even before the suit for specific performance was filed. In the present case there is no conveyance in favour of the plaintiff after which Defendants 2 and 3 purchased the property. The ratio of M.M.S. Investments would therefore be of no assistance to the appellant herein. On the other hand, the three-Judge Bench decision in Ram Awadh would apply on all fours.”

13. Thus, in view of the decision of the Apex court in **Ram Awadh (supra)** and **B. Vijaya Bharathi (supra)**, the plaintiff cannot be granted any benefit of the decision rendered in the case of **M.M.S. Investments (supra)** since sale deed has not been executed in favor of plaintiff but had been executed by defendant No.1 in favour of defendant No.2 prior to filing of suit for specific performance by plaintiff. The plea of absence of readiness and willingness of plaintiff to perform his part of the contract hence is very much available to be raised by defendant No.2.



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14. It is now to be considered whether the plaintiff has pleaded and proved that he has always been ready and willing to perform his part of the contract. In this regard, the plea as taken by him in the plaint need be noticed. Only at one place has it been stated in paragraph eight that on 26.04.1998 plaintiff had expressed his readiness and willingness to defendant No.1. However, there is no plea that ever since the date of execution of the agreement to sale and up to the date of filing of the suit the plaintiff has always been and is still ready and willing to perform his part of the contract. His averment of expressing such readiness and willingness to defendant No.1 once cannot by any stretch of imagination be said to be a substitute for his plea as was required to be taken as per law. Thus, it is held that there is no plea by plaintiff as regards readiness and willingness as required under Section 16(c) of the Specific Relief Act, 1963.

15. Though it is well settled that any amount of evidence in absence of plea would not be permissible, but even if evidence of plaintiff as regards his readiness and willingness is considered then also it is observed that in paragraph No.6 of his deposition as P.W.-1 he has stated that he **had** been willing to get the sale deed executed in his favour. In paragraph No.12 he states that he wants the sale deed with respect to the suit flat to be executed in his favour and obtaining its possession. These statements cannot be regarded as statements by plaintiff of him always having been, ever since the date of



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execution of the agreement to sale till date of filing of the suit, ready and willing to perform his part of the contract. It may also be noted that the suit was instituted by plaintiff on 04.05.1998 i.e. just one day prior to the expiry of the period of limitation of three years for its institution. Thus it is held that plaintiff has utterly failed to prove that he has always been and is still ready and willing to perform his part of the contract.

16. In view of the aforesaid discussion, the judgment and decree passed by the trial Court cannot be sustained, and are hereby set aside. Consequently, the suit for specific performance of contract filed by the plaintiff stands dismissed. However, he is held entitled for refund of the amount of sale consideration of Rs.3,50,000 paid by him to defendant No.1 on 05.05.1995 with interest at the rate of 6% per annum from the date of payment till date of recovery. The appeal is accordingly allowed. However, there shall be no order as to cost.

(PRANAY VERMA)
JUDGE

jyoti