

Ranjit theodore Vs. Ramawatar Ram

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Court : Jharkhand

Decided On : May-07-2004

Reported in : [2004(3)JCR218(Jhr)]

Judge : Vishnudeo Narayan, J.

Acts : Hindu Law; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 100; [Specific Relief Act, 1963](#) - Sections 16 and 20

Appeal No. : A.F.A.D. No. 162 of 1989 (R)

Appellant : Ranjit theodore

Respondent : Ramawatar Ram

Advocate for Def. : None

Advocate for Pet/Ap. : Manjul Prasad and; Shekhar Sinha, Advs.

Disposition : Appeal dismissed

Judgement :

Vishnudeo Narayan, J.

1. This appeal at the instance of the plaintiff-appellant has been preferred against the impugned judgment and decree dated 13.7.1989 and 31.7.1989 respectively passed in Title Appeal No. 10 of 1987, by Smt. Shakuntala Sinha, . 2nd Additional

District Judge, Singhbhum, Chaibasa whereby and whereunder the judgment dated 27.5.1987, dismissing the Title Suit No. 62 of 1979 by 3rd Subordinate Judge, Chaibasa for specific performance of contract for sale with a direction for refund of the earnest money to the plaintiff-appellant was affirmed and the said appeal was dismissed.

2. The plaintiff-appellant had filed Title Suit No. 62 of 1979 for specific performance of contract of sale of the suit properly described in Schedule A of the plaint directing the defendant-respondent to execute and register the sale deed in favour of the plaintiff-appellant failing which the sale deed may be executed and registered by the Court.

3. The case of the plaintiff-appellant in brief, is that the defendant-respondent is the owner of Chaibasa Town Khas Mahal holding No. 31/1822 plot No. 1648 having an area of 5 kathas 17 dhoors i.e. 15 decimals situate in Mohalla Bari Bazar Kumhatoli in the town of Chaibasa fully detailed in Schedule A of the plaint under a lease granted by the State for a periods of 39 years effective from 1.4.1965, the defendant-respondent fell in need of money and desired to sell the suit property and the original plaintiff (since dead) agreed to purchase the same for a consideration of Rs. 4,000/- and a registered deed of agreement of sale dated 18.11.1976, was executed by both the parties in view of the fact that the requisite permission of the Deputy Commissioner, Singhbhum is required for the sale of the suit land and the plaintiff paid Rs. 3000/- only as earnest money and undertook to pay the balance of the consideration money at the time of the registration of the sale deed and the defendant-respondent as per the terms of the agreement agreed to apply for necessary permission for the said transfer within one year and in part performance of the agreement of sale the defendant-respondent delivered possession to the plaintiff-appellant over the suit, property and the plaintiff-appellant continued in possession of the said property and has been using the same as a firewood depot thereon. It is alleged that there had been a proceeding under Section 144 of the Code of Criminal Procedure at the instance of the defendant-respondent against the plaintiff-appellant and Tej Ram Mistri in respect of the suit property which was subsequently converted into a proceeding under Section 145 of the Code of Criminal Procedure in which the possession of the

defendant-respondent was declared and the revision filed by the plaintiff-appellant against the said order is subjudice. It is further alleged that the defendant-respondent did not comply to the terms of the agreement of sale in spite of repeated demands and has also not applied for permission for the sale of the suit property and is also not taking any interest for executing the sale deed which he is bound to do whereas the plaintiff-appellant has always been prepared to comply with the terms of the agreement and it prepared to make the payment of Rs. 1,000/- i.e. the balance amount of the consideration.

4. The case of the defendant-respondent inter alia, is that he is the owner of the suit property along with his sons and wife and the said property is his ancestral property and the suit property can be sold only when his sons and his wife agree to sell the same as they jointly hold the suit property and there was an understanding between him and the plaintiff-appellant that in case the sons and the wife do not agree, the earnest money with compensation shall be returned to the plaintiff-appellant and the said transaction was neither for legal necessity nor for the benefit of the joint family and on the said understanding the deed of agreement for sale was executed. It is alleged that he sent a notice to the plaintiff-appellant to take back the earnest money with compensation when his sons and wife refused to sell the suit property but the plaintiff-appellant expressed her unwillingness to take back the earnest money. The further case of the defendant-respondent is that the suit property is a lease hold property and any transfer in respect thereof requires permission of the Town Khas Mahal Authority and the said agreement for sale is not lawful without the permission of the said authority as per terms and conditions of the lease and the defendant-respondent had never agreed and undertook to apply for necessary permission within one year but always stated to the plaintiff-appellant that in case his sons and wife agree he will apply for permission for sale. It is alleged that the plaintiff-appellant through Tej Ram Mistri had attempted to take forcible possession over the suit property and tried to stack firewood for which the plaintiff-appellant himself lodged an information to the police on the basis of which a proceeding under Section 144 of the Code of Criminal Procedure was initiated which was later on converted in a proceeding under Section 145 of the Code of Criminal Procedure and in the said proceeding the possession of the defendant-respondent was confirmed and the

plaintiff-appellant is not entitled to have a specific performance of the contract in the circumstances stated above.

5. In view of the pleadings of the parties the learned trial Court has framed the following issues for adjudication in this case :

(1) Has the plaintiff got any cause of action for the suit?

(2) Is the suit as framed maintainable in its present form?

(3) Is the suit barred by limitation?

(4) Is the plaintiff entitled for specific performance of contract for sale or for damages?

(5) Is the agreement for sale between the parties valid and lawful?

(6) To any other relief or reliefs to which the plaintiffs may be entitled?

6. The learned trial Court while deciding issue No. (2) has held that on the death of original plaintiff Ramela Theodor one Ranjit Theodor said to be her son was, substituted but neither the original plaintiff Ramels Theodor nor the substituted plaintiff Ranjit Theodor have taken oath to state that plaintiff was ready to perform his part of contract and according to Section 16(c) of the Specific Relief Act the plaintiff has not only to aver but also to prove that she was ready and willing to pay the balance amount of Rs. 1,000/- and get the document executed in his favour according to the terms of the contract and the evidence of PW 7 Tej Ram Mistri who claims himself to be the husband of the original plaintiff that he was willing and ready to perform the part of the contract on behalf of his wife i.e. the original plaintiff is unreliable in view of the fact that his identity as such is doubtful and having not complied with the provisions contained in Section 16(c) of the said Act, the suit of the plaintiff-appellant is fit to be dismissed on this ground alone. While deciding issue Nos. (4) and (5) it has been held that the contract for sale was to take effect only on happenings of a particular event i.e. grant of permission for sale by the competent authority on a application of the vendor within one year from the date of agreement and the defendant-respondent did not take any step in this

direction and as such the agreement (Ext. 1) is void and not enforceable. However, the learned trial Court while dismissing the suit of the plaintiff-appellant for specific performance of contract directed and ordered the defendant-respondent to refund Rs. 3,000/- along with interest @ 12% per annum from the date of the filing of the suit till its realization.

7. Aggrieved by the judgment and decree by the trial Court the plaintiff-appellant preferred Title Appeal No. 10 of 1987. The learned appellate Court below affirmed the finding arrived at by the trial Court on re-appraisal and re-appreciation of the evidence oral and documentary on the record and dismissed the appeal as per the impugned judgment and decree. The learned appellate Court below has held that the suit property for which the contract of sale has been entered into between the parties is the ancestral property of the defendant-respondent, and the sons of the defendant-respondent had certainly interest in the suit property and hence the defendant-respondent could not have even entered into an agreement of sale with regard to the property in question without any legal necessity. It has also been held that due to the non-examination of the original plaintiff-appellant and her son Ranjit Theodore and her husband T.P. Theodore the evidence of PW 7 Tej Ram Mistri who claims himself to be the husband of original plaintiff-appellant, lacks credence there in no legal evidence at all on the record to prove that she has performed or has always been ready to perform the essential terms of the contract which are to be performed by her and in this view of the matter as per the mandate of Section 16(c) of the Specific Relief Act, the plaintiff-appellant is not entitled to get the relief of specific performance of the contract. It has also been held that the compromise petition filed during the pendency of this appeal did not contain the signatures of the parties to the suit and the said compromise petition was subsequently withdrawn and as such the said compromise petition has no bearing in the matter. In view of the findings aforesaid the learned appellate Court had affirmed the judgment of the Trial Court, and had dismissed the appeal.

8. The plaintiff-appellant being aggrieved by the impugned judgment has preferred this appeal before this Court.

9. This Court while admitting the appeal has formulated the substantial question of law which runs thus :

'Whether the Courts below could have dismissed the suit only on the ground that the plaintiff did not examine himself in support of his case.'

10. Assailing the impugned judgment it. has been submitted by the learned counsel for the appellant that though the original plaintiff-appellant or her son on being substituted as plaintiff on her demise have not taken oath in this case but PW 7 Tej Ram Mistri who claims to be the husband of the original plaintiff has deposed in the most clear and unequivocal terms in his evidence that the original plaintiff-appellant has performed and has always been ready and willing to perform the essential terms of the contract which are to be performed by her and in this view of the matter the mandates as contained in Section 16(c) of the said Act stands proved and thus the non-examination of either the original plaintiff-appellant or her son, the present plaintiff-appellant or her alleged husband T.P. Theodore cannot be termed as a lacuna warranting the dismissal of the suit of specific performance of contract of the plaintiff-appellant and the learned Courts below have committed a manifest error in dismissing the suit of the plaintiff-appellant and viewed thus the impugned judgment is unsustainable, in support of his contention reliance has been placed upon the ratio of the case of Panduran Jivaji Apte. v. Ramchandra Gangadhar Ashtekar (dead) by L. Rs. and Ors., AIR 1981 SC 2235.

11. In spite of service of appeal notice the defendant-respondent has not appeared in this appeal.

12. It will admit of no doubt that original plaintiff-appellant Ramela Theodore has described herself in the registered deed of agreement as the daughter of late Chira Lakra and there was an agreement of sale of the suit property detailed in Schedule A of the plaint for Rs. 4000/- between her on the one hand and defendant-respondent on the other hand and a deed of agreement was duly executed and registered on 18.11.1976. There is no dispute in respect of the fact that the suit property was the lease hold property for a fixed periods under Chaibasa Town Khas Mahal. Authority and the suit property is the ancestral

property of the defendant-respondent. PW 7 in para 11 of his evidence has admitted that the defendant-respondent had inherited the suit property from his father. He has not denied the fact that the defendant-respondent had three sons besides his wife. In view of the admission of PW 7, the suit property is joint family property of the defendant-respondent in which his sons have interest. It is the well recognized proposition of law that no coparcener can alienate even for value his undivided interest without the consent of other coparcener unless the alienation is for legal necessity or for payment of antecedent debts. The deed of agreement (Ext. 1) does not show the existence of any legal necessity or of payment of any antecedent debt incurred by the father of the defendant-respondent for entering into an agreement of sale of the suit property. The agreement (Ext. 1) simply recites that the defendant-respondent being in need of money expressed his desire to sell four kathas of land towards north out of the said plot for Rs. 4000/-. It, therefore, appears that both the parties to the suit have entered into an agreement (Ext. 1) with the mutual mistake and misapprehension of the fact of the title in respect of the suit property which in fact does not vest in the defendant-respondent exclusively and thus the only legal consequence that shall follow is that the agreement is liable to be set aside as having proceeded upon a common mistake and furthermore the interest of the sons of the defendant-respondent in the said plot stands adversely affected. In the case of Baudhu Mathon v. Bhagwat Ram and Ors., 2000 (3) BLJ 114, It has been observed that where a contract for sale of properties made by a person who is not having title to transfer the same, such claim cannot be sustained and the Court cannot direct such person to execute the sale deed. In the case of Mayawanti v. Kaushalya Devi, (1990) 3 SCC 1, The Apex Court has observed that the jurisdiction to order specific performance of a contract is based on the existence of a valid and enforceable contract. Where a valid and enforceable contract has not been made, the Court will not make a contract for them. Specific performance will not be ordered if the contract itself suffers from some defect which makes the contract invalid or unenforceable. It has also been observed that the specific performance of the contract is the actual execution of the contract according to its stipulations and terms, and the Courts direct the party in default to do the very thing which he contracted to do. The stipulations and terms of the contract have, therefore, to be certain and the parties

must have been consensus ad idem. The acceptance must be absolute, and must correspond with the terms of the offer. The burden of showing the stipulations and the terms of the contract and that the minds were ad idem is, of course, on the plaintiff. If the stipulations and terms are uncertain, and the parties are not ad idem, there can be no specific performance for there was no contract at all. In this connection ratio of the case of Sohan Lal (dead) by L.Rs. v. Union of India and Anr., AIR 1991 SC 955, is also referred to. In the case of Tarsem Singh v. Sukhminder Singh, AIR 1998 SC 1400, it has been observed by the Apex Court which runs thus :

'.....The remedies available under Sections 73 and 74 for the breach of contract contemplate a valid and binding agreement between the parties. If the forfeiture clause is contained in an agreement which is void on account of the fact that the parties were not ad idem and were suffering from mistake of fact in respect of a matter which was essential to the contract, it cannot be enforced as the agreement itself is void under Section 20 of the Contract Act.'

In the case of Smt. Annapoorani Ammal v. G. Thangapalam, (1989) 3 SCC 287, it has been observed by the Apex Court that the specific performance of contract can be decreed only against executant of the contract having right to dispose of the suit property. It is needless to say that a relief for specific performance is an equitable relief under Section 20 of the Specific Relief Act. The jurisdiction to decree specific performance is discretionary and the Court is not bound to grant such relief merely because it is lawful to do so. The principles stated in Section 20 of the said Act are not exhaustive and the Court's discretion in order to grant specific performance is not confined to them and in special cases where there are some good and reasonable grounds for not exercising this discretion in favour of plaintiffs respondent the Court will not hesitate to exercise that discretion against them. In the case of Parakunnam Veetil Joseph's Son Mathew v. Nedumbara Kuruvila's Son and Ors., AIR 1987 SC 2328, the Apex Court has observed that :

'.....Section 20 preserves judicial discretion to Courts as to decreeing specific performance. The Court should meticulously consider all facts and circumstances of the case. The Court is not bound to grant specific performance merely because

it is lawful to do so.'

Thus the agreement (Ext. 1) is ab initio void and it cannot be enforced.

13. Now adverting to the substantial question of law as stated above it is essential to look into the averments made in the plaint regarding the readiness and willingness to perform the terms of the contract which are to be performed by the plaintiff-appellant. It has been averred in para 11 of the plaint that the plaintiff has always been prepared to comply with the terms of the agreement and is prepared to make the payment of balance amount of Rs. 1000/-only. The defendant-respondent in para 13 of the written statement has controverted the said averment and it has been stated that averments made in para 11 of the plaint is wrong and the plaintiff-appellant is never entitled to have a specific performance of contract in the circumstances as stated above and there is no lawful contract which can be acted, upon in respect of the suit property. Section 16(c) of the [Specific Relief Act, 1963](#) mandates that specific performance of a contract cannot be enforced in favour of a person 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. It, therefore, appears that a person seeking specific performance of the contract must file a suit wherein he must aver 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 words 'ready and willing' implied that the plaintiff was prepared to carry out those parts of the contract to their logical end so far as they depend upon this performance. A Bench of this Court in case of *Md. Khalil v. Hamida and Ors.*, 2000 (1) PLJR 841, has observed that it is well settled that in order to sustain a decree for specific performance it is not only necessary for the plaintiff to plead readiness and willingness but to prove the same by sufficient evidence that he was always ready and willing to perform his part of the agreement till the date of institution of the suit. In the case of *Durjyodhan Palei and Ors. v. Padama Charan Das and Ors.* AIR 1978 Orissa 5, it has been observed that in a suit for specific performance of contract of sale of land the plaintiff must plead and prove that he was continuously ready and willing to perform his part of the contract, namely, to pay the sale price between the date of the contract and hearing of the suit and if he fails to do so his claim for specific

performance must fail and the absence of any averment by the defendant in his written statement that the plaintiff was not ready and willing to perform his part of the contract at the relevant time would be of no consequence. As per the mandate contained under Section 16(c) of the said Act the plaintiff-appellant has not only to aver but also to prove her readiness and willingness by sufficient legal evidence that she was always ready and willing to perform her part of the agreement till the date of the institution of the suit. The recording of the evidence in this case on behalf of the plaintiff commenced on 28.9.1982, which continued till 9.10.1982. The original plaintiff-appellant did not take oath in this case. She has admittedly died on 12.7.1983, i.e. after the recording of the evidence on behalf of the defendant-respondent in this case. Her son Ranjit Theodore who is the present appellant was substituted in this case on her death. He has also not taken oath in this case. It appears that the said Ranjit Theodore is the son of T.P. Theodore which stands conclusively established as per the substitution petition. This T.P. Theodore has also not come forward to take oath in this case for his wife, the original plaintiff. They are the competent persons to substantiate the case of the plaintiff-appellant regarding the fact that she has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by her. No cogent explanation has come on the record for their non-examination in this case. PW 7, Tej Ram Mistri who also claims himself to be the husband of the original plaintiff has deposed that the original plaintiff Ramela Theodore has performed and has always been ready and willing to perform the essential terms of the contract which are to be performed by her. There is a big question mark regarding the identity of this witness as the husband of the original plaintiff Ramela Theodore and both the Courts below have raised pointing fingers in respect thereof and I see no reason to differ with the reasonings advanced by both the Courts below in respect thereof. Further more PW 7, cannot be said to have, specific means of knowledge of the affairs of original plaintiff Ramela Theodore and the Courts below have rightly disbelieved his evidence. In the facts and circumstances of this case the original plaintiff Ramela Theodore or her son, the present plaintiff-appellant or her husband T.P. Theodore in the only competent person to depose in respect of readiness and willingness on the part of the original plaintiff to perform the essential terms of the contract which are to be performed by

her. Therefore, there is no iota of legal evidence on the record to prove that original plaintiff Ramela Theodore was always ready and willing to perform her part, of the contract till the date of the institution of the suit. Viewed thus the learned Courts below have rightly refused to grant a decree of specific performance of contract in the facts and circumstances of this case. The facts of the case of panduran Jivaji Apte, (supra), is quite distinguishable from the facts of the instant case and as such the ratio of this case has no appellation in the facts of this case and it is of no help to the plaintiff-appellant. I, therefore, see no force in the contention put forward on behalf of the appellant. There is no illegality in the impugned judgment requiring an interference therein.

14. There is no merit in the appeal and it fails. The impugned judgment of the learned appellate Court below is hereby affirmed. The appeal is dismissed. There shall be no order as to costs in the facts and circumstances of this case.

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