

Prabhakaran Vs. Bhavani and ors.

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Court : Kerala

Decided On : Nov-13-1973

Reported in : AIR1974Ker153

Judge : N.D.P. Namboodiripad, J.

Acts : [Specific Relief Act, 1963](#) - Sections 16

Appeal No. : Second Appeal No. 829 of 1971

Appellant : Prabhakaran

Respondent : Bhavani and ors.

Advocate for Def. : K.G. Devarajan, Adv.

Advocate for Pet/Ap. : K.N. Narayanan Nair and; K. Chandrasekharan, Adv.

Disposition : Appeal dismissed

Judgement :

N.D.P. Namboodiripad, J.

1. The appellant-plaintiff sued for enforcement of Ext.-P1, an agreement he entered into with the defendants in this case whereby the defendants agreed to sell the plaint schedule property to the plaintiff for a total consideration of Rs. 225/- . The plaintiff paid in advance an amount of Rs. 125/-, and the contract was to be

performed within one year from the date of the agreement. Since there was no move on the part of the defendants to perform their part of the contract the plaintiff issued Ext.-P4 notice, which was addressed only to the 1st defendant though in the body of the notice all the three defendants were specifically named. Ext. P4 was returned with the endorsement that the addressee refused to accept it. The suit was laid for specifically enforcing the agreement for conveyance. The defendants resisted the action on various grounds, most of which, if not all, were false. The trial Court decreed the suit, but on appeal by the defendants the lower appellate Court took the view that there cannot be a decree for specific performance inasmuch as the plaint does not contain the necessary averments as laid down in Section 16(c) of the Specific Relief Act. The plaintiff was, therefore, awarded a decree only to realise the advance paid with interest thereon.

2. The short question for decision is whether the relief sought for with respect to specific performance should fail for want of proper pleadings in this case. The position at law is fairly clear. Section 16(c) of the Specific Relief Act, 1963 is extracted below:

'16. Specific performance of a contract cannot be enforced in favour of a person-

X X XX X (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 performance of which has been prevented or waived by the defendant.

Explanation.-- For the purposes of Clause (c),--

(i) where a contract involved the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in Court any money except when so directed by the Court.

(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.'

In *Ouseph Varghese v. Joseph Aley*, 1969-2 SCWR 347 the Supreme Court held as follows:

'..... He must further plead that he has been and is still ready and willing to specifically perform his part of the agreement. In the absence of such an allegation the suit is not maintainable. In the present case the plaintiff did not plead either in the plaint or at any subsequent stage that he was ready and willing to perform the agreement pleaded in the written statement of the defendant. A suit for specific performance has to conform to the requirements prescribed in Forms 47 and 48 of the 1st Schedule in the Civil Procedure Code.' (See the headnote).

I was taken through the plaint in this case. Paragraph 1 recites as to how the defendants obtained the property. Paragraph 2 mentions the factum of the execution of Exhibit P-1 as also its contents. Paragraph 4 avers that the defendants have not performed their part of the contract and that they are trying to sell the property to third parties. Paragraph 5 avers that the plaintiff demanded the defendants to sell the property through mediators as well as by registered notice dated 24-6-1966 and that the defendants have not acceded thereto. Paragraph 6 sets out the cause of action. These are the only averments in the plaint to sustain the prayer for specific performance.

3. I may, as can vassed by the learned counsel for the appellant, out a very liberal interpretation on the plaint. But I find that any amount of liberal approach on my part cannot supply the inherent lacuna in the plaint. It is not possible to hold in view of Section 16(c) of the Specific Relief Act as also by the dictum laid down by the Supreme Court in the above mentioned decision that a pleading in the plaint to the effect that the plaintiff is always ready and willing to perform his part of the contract is an empty formality. The legislature has chosen to make a positive provision in the statute to the effect that such an averment is necessary for granting a decree for specific performance. Even by the utmost straining of the averments in the plaint it is not possible to spell out that the plaintiff has signified his willingness to perform the contract at all times. It was apparently because of this difficulty that the learned counsel for the appellant wanted me to treat Exhibit P-4 notice as part of the plaint. It is doubtful whether such a course is permissible in view of the decision of the Supreme Court as also of the contents of Section 16(c) of the Specific Relief Act. Nevertheless I may refer to Exhibit P-4 as well. The first difficulty with regard to that notice is that though the body of the notice

mentions all the three defendants it was specifically addressed only to the 1st defendant. If the notice was received by the 1st defendant probably one can say that the other defendants must be credited with the knowledge of the contents of the notice. What happened in this case was that the notice was returned unserved on the ground that the addressee refused to accept. That being the state of affairs it has to be doubted whether Ext. P-4 is in that sense a notice to defendants 2 and 3 in this case. At any rate, when once the notice was returned unserved the plaintiff should have been all the more careful in averring in the plaint his readiness and willingness to perform his part of the contract. I may go a step further and presume for the sake of the learned counsel for the appellant that Exhibit P-4 is a valid notice against all the defendants herein. Even then I cannot find any improvement in the position as far as the plaintiff in this suit is concerned. In Exhibit P-4 also one would search in vain to find an averment that the plaintiff was ready and willing to perform his part of the contract. Thus even the notice cannot cure the defect in the plaint. No wonder the lower appellate Court refused to decree specific performance.

4. The learned counsel for the appellant brought to my notice the decision reported in Ramakrishna Panicker v. Krishna Pillai, 1970 Ker LT 245. I do not think that that decision lays down any proposition which runs counter to what I have held now. The Supreme Court's decision cited above was followed by a Bench of this Court in A. S. No. 65 of 1967 (Ker) taking the view that the averment with regard to the willingness and readiness of the plaintiff to perform his part of the contract is indeed essential to sustain an action for specific performance.

The appeal fails and it is hereby dismissed. In the circumstances of the case I make no order as to costs.