BOMBAY HIGH COURT

Trimbak Shankar Tidke

Vs

Nivratti Shankar Tidke

(S Manohar, J.)

20.06.1984

JUDGMENT

S Manohar, J.

1. This appeal has got to be allowed on the narrow ground that the view taken by the learned Assistant Judge, who has clearly accepted all the contentions of the plaintiff but, all the same, has dismissed the plaintiff's suit for specific performance, is a hypertechnical view.

2. The facts are very simple. The plaintiff came before the Court contending that he himself and the defendant formed a joint family. Both of them had sold certain property to one Deoram Shivram Tidke. Out of the consideration to be received by both of them from Deoram Shivram Tidke, defendant persuaded the plaintiff to take an amount less than what was receivable by him as per his share in the property. The plaintiff took Rs.7000/- less and correspondingly the defendant took Rs.7000/- more in that transaction. In this manner, therefore, the plaintiff had given Rs.7000/- to the defendant. In consideration of this amount the defendant entered into an agreement with the plaintiff to sell the suit property to him for the said amount of Rs.7000/-. The plaintiff was even put in possession of the property. The defendant, however, would not help the plaintiff in getting the property transferred to the name of the plaintiff in the revenue records and he was adamant in not executing the regular sale deed in his favor. Hence in the year 1976 the instant suit, namely Regular Civil Suit No. 296 of 1976, was filed by the plaintiff for specific performance of the said agreement dt. 23-2-1973.The plaintiff also filed an application for injunction restraining the defendant from interfering with his possession of the suit property.

3. By his written statement Exh. 21, the defendant resisted the suit. In the written statement the defendant raised various contentions for the purpose of ventilating his various grievances against the plaintiff; but the most astonishing fact is that the relevant averments made by the plaintiff in the plaint were nowhere denied by him in the written statement. The fact that in the transaction

with Deoram Shivram Tidke the defendant had received a larger amount than was receivable by him and that the plaintiff had received a smaller amount than the one which should have been received by him to the extent of Rs.7000/- was not denied. Further the fact that on 22-3-1973 he in fact executed the agreement of sale in favor of the plaintiff was not denied by the defendant. The fact that the possession of the suit property was in fact made over to the plaintiff was not denied by him. All the same he wanted the suit to be dismissed.

4. On these pleadings appropriate issues were framed by the learned trial Judge and in view of the meaningless written statement filed by the defendant the trial Court had no other alternative but to decree the plaintiff's suit for specific performance.

5. In appeal the learned Assistant Judge has accepted all the relevant findings of the trial Court. The existence and validity of the agreement dt. 23-2-1973 was accepted by him. The finding recorded by the learned trial Judge in connection with the existence and validity of the agreement was not disturbed by him. The learned Assistant Judge however took a very strange view viz. that in the plaint the plaintiff had not made a statement that he was ready and willing to perform his part of the agreement. On this ground the learned Assistant Judge held that the suit for specific performance filed by the plaintiff was not maintainable and on this ground he set aside the decree for specific performance and ordered, instead, the return of the amount of Rs.7000/- by the defendant to the plaintiff.

6. As stated above at the outset, this view is hypertechnical. Such a view should not be taken in any Court unless the Court is absolutely compelled to take such a hypertechnical view. The point is that in the instant case there was nothing to be performed by the plaintiff at all. The entire amount of Rs.7000/- which was the consideration for the sale deed is already lying in the coffers of the defendant. The possession of the land has already been made over by the defendant in favour of the plaintiff. So far as the plaintiff is concerned, it is an executed contract on his part; what remains executory is the part to be performed by the defendant. These are the facts averred in the plaint and not denied in the written statement at all. If this is the position, it beats understanding as to what is that part that the plaintiff is yet to perform. Pleadings are intended to reflect the substantive rights claimed by the parties. In the instant case every shade of the right of the plaintiff stands fully reflected in the plaint. None of the authorities referred by the learned Assistant Judge has any bearing on this state of facts. This is not a case where the plaintiff is yet to perform something towards the agreement the readiness and willingness to perform which has got to be reflected in the plaint. The plaintiff has stated in the plaint that he himself has done everything that he had to perform under the contract. If any part of the performance of the agreement had remained, then he would have been duty bound to state in the plaint that he was willing to perform that part of the agreement but no such position exists in the present case. I will

go a step further and state that in case such statement is not made by the plaintiff when it is necessary to be made, the Court should normally give an opportunity to the plaintiff to amend the plaint for incorporating such averment in the plaint because by doing so the plaintiff does not change the nature of the case at all and normally no prejudice is caused to the defendant if the plaintiff is allowed to amend the plaint in such circumstances. If the plaintiff refused to amend the plaint even after such direction by the Court, the Court may be required to consider whether the plaintiff's suit for specific performance should be decreed or not in the absence of such necessary averment in the plaintiff; but all this discussion is academic so far as the present case is concerned. In the present case there remains nothing for the plaintiff to perform towards the contractual obligation. If this is so, failure on his part to express his willingness to perform his obligation is of no legal consequence.

7. The provision of S. 16(c) of the Specific relief Act no doubt appears to be of a peremptory character. Said cl. (c) of S. 16 if the Act read along with its operative part reads as follows :--

> "Specific performance of a contract cannot be enforced in favour of a person-
>
> (a) & (b) .....
>
> (c) who fails to aver and prove that he had 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."

Relying upon this provision and relying also upon the judgment of the Supreme Court in the Appeal Court has held that the plaintiff's suit for specific performance has got to be dismissed.But what the learned Assistant Judge has failed to notice is that the averment of readiness and willingness is required to be made only in case in which the plaintiff has not already performed his part of the contract. In the case of performance on his part as fait accompli, averment has to be of his actual performance, not of his readiness and willingness for such performance.

Coming to the question of proof contemplated by the said Cl. (c), the plaintiff was relieved of the obligation even of "proving" his performance, because the fact that the plaintiff had even performed his part is something which was averred by the plaintiff in so many words in the plaint and was not as much as denied by the defendant even by one word in his written statement. It, thus, followed that no question arose of plaintiff's being required either to plead or prove his readiness and willingness in the instant case.The fallacy in the learned judge's reasoning stemed from the fact that he overlooked the first part of cl. (c) of S. 16 which deals with pleadings and

proof and failed to notice that as performance as fait accompli was established, question of pleading and proving "readiness and willingness" did not arise. Reliance on said S. 16(c) for non-suiting the plaintiff was, therefore, quite misplaced.

8. Reliance on the judgment of the Supreme Court in the case of Ouseph Vaarghese v. Joseph Aley is similarly misplaced. That was not a case where nothing remained to be performed by the plaintiff before he called upon the defendant to execute the sale deed. The facts of the case were as follows :--The plaintiff sold certain property to defendant 1, who was the husband of defendant 2, in or about the year 1921 for a certain amount. His contention in the suit was that there was a contemporaneous oral agreement between himself and defendant 1 for re-conveyance of the said property to the plaintiff for the same price. Defendant 1 died immediately after the suit. His wife, defendant 2, filed a written statement and denied the alleged contemporaneous oral agreement between the plaintiff and deceased defendant 1. However, she contended that out of the said properties, property Item No.1 (minus one acre therefrom) was agreed to be sold by defendant 1, some time before his death, to the plaintiff for the sum of Rs.11,500/-.The trial Court decreed the suit as prayed for by the plaintiff; but the High Court, in appeal, did not accept the plaintiff's plea as regards the existence of the contemporaneous oral agreement. All the same, the High Court granted the decree in favour of the plaintiff for specific performance for the said property Item No. 1 (minus one acre) with a direction to the plaintiff to pay Rs.11,500/- for the same.In appeal to the Supreme Court, the Supreme Court agreed with the High court's view relating to the contemporaneous oral agreement and held that the same was not satisfactorily proved by the plaintiff. But so far as the other agreement set up by the defendant was concerned, the Supreme Court held that the plaintiff had not asked for specific performance of that agreement at all. The plaintiff had not amended his plaint and had not expressed his readiness and willingness to perform his part of the contract pleaded by the defendant. In this view of the matter, the Supreme Court held that the mandatory requirement of Forms 47 and 48 of the First Schedule in the CPC disentitles the plaintiff for a claim to the decree for specific performance. The provisions of Forms 47 and 48 of the First Sch. in the CPC are, more or less, similar as the provisions of S. 16(c) of the Specific Relief Act. Both the provisions ordain that an averment relating to his readiness and willingness to perform his part of the contract has got to find a place in the plaintiff's plaint itself.Even a casual glance at the judgment of the Supreme Court is enough to reveal that the contract that the Supreme Court was dealing with was entirely an executory contract. The plaintiff had yet to perform his part of the obligation. Hence there did not arise any question of his pleading and proving his "performance" as a fait accompli; but there did arise the question as to whether he was himself willing to perform his part of the agreement or not and that is the reason why it was held that the averment to that effect in the plaint was indispensable having regard to the provisions of Forms 47 48 of the First Sch. in the CPC. The

basic difference in the present case in comparison with the Varghese case is that in the instant case the agreement of sale is wholly an executed agreement of sale is wholly an executed agreement so far as the plaintiff is concerned. It is in no way an executory contract. The principle of law applicable to an executory contract cannot therefore, be applied to the present type of contract at all.

9. If there was anything yet to be performed by the plaintiff under the agreement and if there existed unimpeachable evidence of the plaintiff's readiness and willingness to perform his part of the contract, I would have directed the plaintiff to amend the plaint and to incorporate therein the averment relating to his readiness and willingness to perform his part of the contract. I would have done so because in the case such as the present one in which plaintiff has done and has been doing everything on his part vis--vis the contract, a Court of equity should not allow his suit to be defeated if the Court was satisfied that the shortcoming in his pleadings had not in any way prejudiced the defendant. In such cases the Courts have not only the power but even the duty to direct such amendment. But, to my mind, this is meaningless in the instant case, because once it becomes an admitted fact that the plaintiff has done everything that was required to be done by him under the contract, securing assurance from him that he was ready and willing to perform his part of the contract was an exercise in futility, apart from being an exercise in irrationality not ordained by the statute.

10. The appeal is, therefore, allowed. The decree passed by the lower appellate Court is set aside and the one passed by the trial Court is restored. There shall be no order as to costs.

11. Appeal allowed.