Mehboob-Ur-Rehman (Dead) Through Lrs. vs Ahsanul Ghani on 15 February, 2019

Equivalent citations: AIR 2019 SUPREME COURT 1178, AIRONLINE 2019 SC 535, 2019 (3) ALJ 52, (2018) 4 CIVILCOURTC 271, (2019) 198 ALLINDCAS 137 (SC), (2019) 3 ALLMR 475 (SC), (2018) 250 DLT 544, (2019) 134 ALL LR 711, (2019) 144 REVDEC 409, (2019) 198 ALLINDCAS 137, (2019) 1 ALL RENTCAS 497, (2019) 1 CLR 797 (SC), (2019) 1 CURCC 196, (2019) 1 WLC(SC)CVL 696, (2019) 2 ANDHLD 54, (2019) 2 CAL HN 137, (2019) 2 CIVILCOURTC 399, (2019) 2 CIVLJ 612, (2019) 2 ICC 140, 2019 (2) KCCR SN 81 (SC), (2019) 2 RECCIVR 242, (2019) 3 ALLMR 475, (2019) 3 SCALE 545, (2020) 2 MAH LJ 58, AIR 2019 SC (CIV) 1359

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Bench: Abhay Manohar Sapre, Dinesh Maheshwari

1

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8199 OF 2009

MEHBOOB-UR-REHMAN (DEAD) THROUGH LRS. Appellant(s)

VS.

AHSANUL GHANI Respondent(s)

JUDGMENT

Dinesh Maheshwari, J.

The appellant herein (since deceased and represented by his legal representatives) had filed the suit for specific performance of Agreement to Sell, being O.S. No. 392 of 1979, that was decreed by the

Court of II Additional Civil Judge, Kanpur Nagar by the judgment and decree dated 10.12.1981. However, the decree so passed by the Trial Court was reversed by the Court of IX Additional District Judge, Kanpur Nagar in its judgment and decree dated 03.07.1995 in Appeal No.54 of 1982, essentially on the ground that the plaintiff had failed to aver and prove his continuous readiness and willingness to perform his part of the contract.

The High Court of Judicature at Allahabad, in its impugned judgment dated 10.12.2007 in R.S.A. No. 931 of 1995, while dismissing the second appeal filed by the plaintiff-appellant, affirmed the decree passed by the First Appellate Court. Aggrieved, the plaintiff-appellant has preferred this appeal.

2. Briefly put, the relevant background aspects of the matter are that on 13.08.1979, the plaintiff-appellant filed the suit aforesaid with the averments that the defendant-respondent had executed an agreement dated 16/17.04.1975 in his favour for sale of the property in question, being House Number 102 at Faithful Ganj, Kanpur Nagar, for a consideration of Rs. 30,000/-; and that a sum of Rs. 15,000/- was paid as earnest money while the remaining amount was payable at the time of execution and registration of the sale deed. The plaintiff- appellant further averred that after the agreement, the Urban Land (Ceiling and Regulation) Act, 1976 came to be promulgated prohibiting transfer of the property without permission of the Competent Authority; and the defendant-respondent was required to obtain such permission but failed to do so despite requests. The plaintiff-appellant yet further averred that on 06.05.1979, he served a notice on the defendant-respondent for obtaining permission from the Ceiling Authorities and for execution of the sale deed to which, the defendant-respondent sent a reply dated 06.07.1979 stating ignorance about the agreement and sought a copy thereof for proper reply while alleging that his signatures were obtained on some papers in relation to a suit filed by the State Bank of India. The plaintiff-appellant stated that these were the false pretexts taken by the defendant who was bound to execute the sale deed for the house in question after seeking necessary permission; and for him having failed to do so, the suit was being filed for enforcing specific performance of the agreement.

3. The defendant-respondent, while denying the plaint averments, inter alia, alleged that he was involved as a guarantor in relation to the loan taken by a firm M/s Adam Textiles from the State Bank of India and his house in question was hypothecated to the said bank; and when the bank threatened to take action against him, the plaintiff, who was known to him, assured of contesting the matter on his behalf and persuaded him to hand over possession of the house in question on rental basis. The defendant alleged that he got deceived on persuasion of the plaintiff and, for the purpose of conducting the trial of the suit filed by the bank, his signatures were obtained on blank papers on which, some document was fabricated; and that the copy of the alleged agreement was never supplied to him despite demand. The defendant also took the objections regarding limitation, valuation and court fees.

4. On the pleading of parties, the Trial Court framed the following issues for determination of the questions involved in the matter:-

> "1. Whether the suit is under valued and court fee paid is insufficient?

2. Whether the suit is barred by time?

3. Whether the agreement is forged as alleged?

4. Whether the agreement was got affected by fraud, misrepresentation as alleged in paras 12 to 15 of W.S.?

5. To what relief if any is the plaintiff entitled?"

5. After taking the evidence and having heard the parties, the Trial Court decreed the suit on 10.11.1981 while recording the findings, inter alia, to the effect that time was not the essence of the contract; that the defendant was required to obtain necessary permission from the Urban Ceiling Authorities and he having not done so, the suit was within time; that the defendant refused to honour his commitment in the letter dated 07.08.1979, which was received by the plaintiff on 17.08.1979, whereas the suit had already been filed on 13.08.1979 and hence, the same was well within limitation; that by way of his testimony as PW-1 and with the help of the notice dated 06.05.1979 (Exhibit 3), the plaintiff succeeded to prove that he was always ready and willing to perform his part of agreement; that the agreement was neither forged nor obtained by fraud or misrepresentation; and that in his reply notice dated 06.07.1979 (Exhibit A-12), the defendant did not challenge the existence of agreement.

6. While challenging the decree of the Trial Court, the defendant raised the grounds in the first appeal, inter alia, that the finding of the Trial Court that the plaintiff was ready and willing to perform his part of agreement was perverse and for want of necessary averments, the suit ought to have been dismissed.

7. As per the law applicable at the relevant point of time, the said first appeal was filed in the High Court and the plaintiff, while appearing in the said appeal as respondent, moved an application seeking leave to amend the plaint whereupon, the High Court passed the order dated 29.07.1982 that the application for amendment would be decided at the time of final hearing of the appeal. Later on, in view of alteration of jurisdiction, the appeal was transmitted by the High Court to the District Court and was ultimately assigned to the IX Additional District Judge, Kanpur Nagar as Appeal No. 54 of 1982. On 28.02.1995, the First Appellate Court rejected the plaintiff's application seeking leave to amend the plaint and thereafter, allowed the appeal on 25.04.1995 while holding that the plaintiff had failed to take the necessary averments in the plaint on his readiness and willingness to perform his part of the contract.

8. The second appeal preferred by the plaintiff-appellant against the judgment and decree so passed by the First Appellate Court was admitted by the High Court on the following substantial questions of law:-

"(i) Whether lower appellate court is justified in dismissing the suit for non-compliance of provisions of Section 14 and 16 of Specific Relief Act without any pleading and/or issue on the said point?

(ii) Whether the Lower Appellate Court ought to have framed the issues if relevant and ought to have remitted it to Trial Court?"

9. The High Court, in its impugned judgment dated 10.12.2007, examined in detail the contentions of the parties and law applicable to the case, particularly with reference to Section 16 of the Specific Relief Act, 1963 (hereinafter also referred to as 'the Act') and several decisions of this Court including that in Umabai and another vs. Nilkanth Dhondiba Chavan (Dead) by LRS. and another : (2005) 6 SCC 243, and rejected the contentions urged on behalf of the plaintiff-appellant while observing as under:-

"It is clear from the averments made in the plaint and from the evidence brought on record that there is complete absence of continuous readiness and willingness on the part of the plaintiff. There is nothing in his conduct which may even remotely show that prior to the notice dated 6.5.1979 the plaintiff had expressed any readiness and willingness to perform his part of the contract.

The contention of the learned counsel for the appellant that the defendant also did not raise such a plea does not help the plaintiff-appellant because under Section 16 (c) of the Act is for the plaintiff to aver and prove this fact. This is what was observed by the Supreme Court in Umabai (supra). The Trial Court, while deciding issue No. 5 merely observed that certain sections of the Act including section 16(c) of the Act was not applicable because the plaintiff has been ready and willing to perform his part of the contract. This finding has been arrived at without any discussion. The Lower Appellate Court, on the other hand, has elaborately dealt with this issue. It has observed that under the alleged agreement dated 16/17-4-1975 permission was required to be taken within one month of the agreement and then the sale-deed was required to be executed but the plaintiff not only failed to make any specific averment in the plaint about readiness and willingness but also failed to prove the same. In the light of the discussion made above, the finding recorded by the Lower Appellate Court is correct."

10. The contention on behalf of the plaintiff-appellant that the First Appellate Court was not justified in rejecting the application for amendment was also negatived by the High Court with the following observations:-

"The Lower Appellate Court by a detailed order had rejected the application filed at the belated stage for amending the plaint by adding a relief about readiness and willingness. At the time of the admission of the Second Appeal, the Court did not formulate any substantial question of law as to whether the amendment application had been illegally rejected. This plea, therefore, cannot be considered at the time of hearing of the Second Appeal. However, even otherwise there is no infirmity in the order rejecting the amendment application as it had been moved with a considerable delay and would involve a retrial as evidence would have to be led by the parties on this issue."

11. Assailing the judgment of the High Court, learned counsel for the appellant has strenuously argued that in the absence of any objection in the written statement regarding non-compliance of Section 16(c) of the Act and without any issue to that effect, the First Appellate Court and the High Court were not justified in non-suiting the appellant only on the ground of the so called want of pleading on readiness and willingness. Learned counsel would submit that for the purpose of Section 16(c) of the Act, while examining the question regarding readiness and willingness of the plaintiff to perform his part of the contract, the Court is required to see the pith and substance of the entire pleadings and evidence and not just the letter and form; and on the substance of the matter, such readiness and willingness is duly proved on record. Learned counsel would also argue that there was no justification in rejection of the application for amendment, if at all any question regarding averment on readiness and willingness was being raised; and for substantial justice between the parties, such an amendment ought to have been allowed. In this regard, learned counsel has also argued with reference to proviso to sub-section (5) of Section 100 of the Code of Civil Procedure, 1908 ('CPC') that even if a substantial question of law involved in the matter had not been formulated at the time of admission of appeal, the same could have been formulated and decided by the High Court for ensuring substantial justice; and in the present case, the High Court has wrongly confined itself only to the questions formulated at the time of admission, while putting the matter in a strait jacket. Per contra, learned counsel for the defendant- respondent has duly supported the judgment of the High Court with the submissions that the plaintiff-appellant having failed to establish his readiness and willingness to perform his part of the alleged agreement, the suit has rightly been dismissed.

12. Having bestowed anxious consideration to the rival submissions and having examined the record with reference to the law applicable, we are inclined to agree with the High Court that, in the present suit, specific performance of the agreement in question cannot be enforced in favour of the plaintiff-appellant for want of proof of his continuous readiness and willingness to perform his part of the essential terms of the contract.

13. It remains trite that the relief of specific performance is not that of common law remedy but is essentially an exercise in equity. Therefore, in the Specific Relief Act, 1963, even while providing for various factors and parameters for specific performance of contract, the provisions are made regarding the contracts which are not specifically enforceable as also the persons for or against whom the contract may be specifically enforced. In this scheme of the Act, Section 16 thereof provides for personal bars to the relief of specific performance. Clause (c) of Section 16 with the explanation thereto, as applicable to the suit in question, had been as follows:-

> "16. Personal bars to relief.- Specific performance of a contract cannot be enforced in favour of a person-
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> (a) *** *** ***
>
> (b)*** *** ***

(c) [who fails to aver and prove] 1 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 purpose of clause (c),---

(i) where a contract involves 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]2 performance of, or readiness and willingness to perform, the contract according to its true construction."

14. Though, with the amendment of the Specific Relief Act, 1963 by Act No. 18 of 2018, the expression "who fails to aver and prove" is substituted by the 1 By Act No. 18 of 2018, the expression "who fails to aver and prove" is substituted by the expression "who fails to prove" 2 By the same Act No. 18 of 2018, the expression " must aver" is substituted by the expression "must prove" expression "who fails to prove" and the expression "must aver" stands substituted by the expression "must prove" but then, the position on all the material aspects remains the same that, specific performance of a contract cannot be enforced in favour to the person who fails to prove that he has already 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 the terms of which, the performance has been prevented or waived by the other party. As per the law applicable at the relevant time, it was incumbent for the plaintiff to take the specific averment to that effect in the plaint. Of course, it was made clear by this Court in several decisions3, that such requirement of taking the necessary averment was not a matter of form and no specific phraseology or language was required to take such a plea. However, and even when mechanical reproduction of the words of statue was not insisted upon, the requirement of such pleading being available in the plaint was neither waived nor even whittled down. In the case of A. Kanthamani v. Nasreen Ahmed: (2017) 4 SCC 654, even while approving the decree for specific performance of the agreement on facts, this Court pointed out that the requirement analogous to that contained in Section 16(c) of the Specific Relief Act, 1963 was read in its forerunner i.e., the Specific Relief Act, 1877 even without specific provision to that effect. Having examined the scheme of the Act and the requirements of CPC, this Court said,- 3 vide Syed Dastagir v. T.R.Gopalakrishna Setty: (1999) 6 SCC 337; and Aniglase Yohannan v. Ramlatha and Ors.: (2005) 7 SCC 534, "22. Therefore, the plaint which seeks the relief of specific performance of the agreement/contract must contain all requirements of Section 16 (c) read with requirements contained in Forms 47 and 48 of Appendix 'A' CPC"

15. Such a requirement, of necessary averment in the plaint, that he has already performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him being on the plaintiff, mere want of objection by the defendant in the written statement is hardly of any effect or consequence. The essential question to be addressed to by the Court in such a matter has always been as to whether, by taking the pleading and the evidence on

record as a whole, the plaintiff has established that he has performed his part of the contract or has always been ready and willing to do so. In this regard, suffice it would be to refer to the principles enunciated by this Court in the case of Umabai (supra) as under:-

> "30. It is now well settled that the conduct of the parties, with a view to arrive at a finding as to whether the plaintiff-respondents were all along and still are ready and willing to perform their part of contract as is mandatorily required under Section 16 (c) of the Specific Relief Act must be determined having regard to the entire attending circumstances. A bare averment in the plaint or a statement made in the examination-in- chief would not suffice. The conduct of the plaintiff- respondents must be judged having regard to the entirety of the pleadings as also the evidences brought on records.
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> *** *** ***
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> 45. It was for the plaintiff to prove his readiness and willingness to pay the stipulated amount and it was not for the appellants to raise such question..."

16. When the pleadings in the present case are examined with reference to the principle aforesaid, it is but apparent that in the plaint, the plaintiff referred to the agreement in question whereby, the defendant had allegedly agreed to sell the house in question to him for a sale consideration of Rs. 30,000/- and averred that the defendant received a sum of Rs. 15,000/- from him. The plaintiff stated that the agreement was executed on 16/17.04.1975. Thereafter, the plaintiff straight away referred to the fact that subsequent to the execution of agreement, the Urban Land (Ceiling and Regulation) Act, 1976 was promulgated; and Section 27 thereof prohibited transfer of property without prior permission of the Competent Authority. The plaintiff further averred that he served notice dated 06.05.1979 on the defendant asking him to seek permission and to execute the sale deed; that the notice was personally served on the defendant on 17.05.1979; and that the defendant in his reply dated 06.07.1979, feigned ignorance about the agreement. The plaintiff further averred that the defendant was bound to execute the sale deed of the house after seeking necessary permission and for the defendant having failed to do so, the suit was being filed. There is not even a remote suggestion in the plaint averments that the plaintiff had performed or has always been ready and willing to perform his part of the contract. Even in the plaintiff's testimony as PW-1, it is difficult to find a categorical assertion that he had performed or has always been ready and willing to perform his part of the contract. The testimony of the plaintiff as PW-1 is essentially directed towards the existence and validity of the alleged agreement and the surrounding dealings of the parties; but is lacking in those material assertions on readiness and willingness on his part, which remain essential for grant of the relief of the specific performance.

17. In the above set of circumstances, we are unable to find any fault in the findings of the High Court that the plaintiff had failed to aver and prove his continuous readiness and willingness to perform his part of the contract. The suit was bound to fail on this ground alone.

18. So far as the proposition for amendment of the plaint is concerned, we are unable to find any illegality on the part of the First Appellate Court and the High Court in rejecting the prayer belatedly made by the plaintiff. As noticed, the averment and proof on readiness and willingness to perform his part of the contract has been the threshold requirement for a plaintiff who seeks the relief of specific performance. The principle that the requirement of such averment had not been a matter of form, applied equally to the proposition for amendment at the late stage whereby, the plaintiff only attempted to somehow improve upon the form of the plaint and insert only the phraseology of his readiness and willingness. In such a suit for specific performance, the Court would be, and had always been, looking at the substance of the matter if the plaintiff, by his conduct, has established that he is unquestionably standing with the contract and is not wanting in preparedness as also willingness to perform everything required of him before he could be granted a relief whereby, the performance of other part of the contract could be enjoined upon the defendant. In the present case, the plaintiff-appellant had failed to aver and prove his readiness and willingness to perform his part of the contract. The Trial Court made a rather assumptive observation that he had proved such readiness and willingness. Thereafter, the plaintiff sought leave to amend the plaint only when the ground to that effect was taken in the first appeal by the defendant. In the facts and circumstances of the present case, in our view, it was too late in the day for the plaintiff to fill up such a lacuna in his case only at the appellate stage. In other words, the late attempt to improve upon the pleadings of the plaint at the appellate stage was only an exercise in futility in the present case.

19. Moreover, the High Court has pointed out, and rightly so, that no substantial question of law as regards the correctness of the order refusing the application for amendment was formulated. In the scheme of the provisions relating to second appeal, it remains fundamental, as per Section 101 CPC, that no second appeal would lie except on the ground mentioned in Section 100. Sections 100 and 101 of the Code of Civil Procedure read as under:-

> “100. Second Appeal.- (1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.
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> (2) An appeal may lie under this section from an appellate decree passed ex parte.
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> (3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.
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> (4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question. (5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:
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> Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other

substantial question of law, not formulated by it, if it is satisfied that the case involves such question.

101. Second appeal on no other grounds.-No second appeal shall lie except on the grounds mentioned in Section 100."

20. As per Section 100 CPC, the appeal would lie to the High Court from the decree passed in appeal by any Court subordinate only if the High Court is satisfied that the case involves a substantial question of law; such question is required to be stated in the Memorandum of Appeal; the High Court is required to formulate the question on being satisfied that the same is involved in the case; the appeal is to be heard on the question so formulated; and at the time of hearing, the respondent could urge that the case does not involve such a question. The proviso to sub-section (5) of Section 100 CPC makes it clear that the Court could hear the appeal on any other substantial question of law not formulated by it, but only after recording the reasons that the case involves such a question. In the case of Surat Singh (Dead) v. Siri Bhagwan and Ors.: (2018) 4 SCC 562 this Court has pointed out the contours of the powers of High Court under the proviso to sub-section (5) of Section 100 CPC as under:-

"21..... The proviso to sub-section (5), however, also recognises the power of the High Court to hear the appeal on any other substantial question of law which was not initially framed by the High Court under sub-section (4). However, this power can be exercised by the High Court only after assigning the reasons for framing such additional question of law at the time of hearing of the appeal".

21. We are clearly of the view that the proviso to sub-section (5) of Section 100 CPC is not intended to annul the other requirements of Section 100 and it cannot be laid down as a matter of rule that irrespective of the question/s formulated, hearing of the second appeal is open for any other substantial question of law, even if not formulated earlier. The said proviso, by its very nature, could come into operation only in exceptional cases and for strong and convincing reasons, to be specifically recorded by the High Court. There being no such strong and convincing reason in the present case to formulate and hear the second appeal on any other question of law, the High Court cannot be faulted in rejecting the contentions urged on behalf of the plaintiff-appellant in this regard.

22. For what has been discussed hereinabove, we are satisfied that the relief of specific performance of agreement in question has rightly been declined by the First Appellate Court and the High Court. No case for interference being made out, the appeal stands dismissed.

.....J. (ABHAY MANOHAR SAPRE) .....J. (DINESH MAHESHWARI) 1 New Delhi, Dated: 15th February, 2019.