

Bal Krishna & Anr vs Bhagwan Das (Dead) & Ors on 25 March, 2008

Equivalent citations: AIR 2008 SUPREME COURT 1786, 2008 AIR SCW 2467, 2008 (5) SRJ 166, (2008) 3 ALLMR 809 (SC), (2008) 2 CLR 304 (SC), 2008 (1) CTLJ 337, 2008 (2) CLR 304, 2008 (4) SCALE 805, 2008 (12) SCC 145, 2008 (3) ALL MR 809, (2008) 2 ALL RENTCAS 893, (2008) 2 ALL WC 1760, (2008) 3 CIVILCOURTC 153, (2008) 3 ICC 378, (2008) 4 SCALE 805, (2008) 3 CAL HN 35

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Bench: P.P. Naolekar, Lokeshwar Singh Panta

CASE NO.:

Appeal (civil) 4033 of 2004

PETITIONER:

Bal Krishna & Anr.

RESPONDENT:

Bhagwan Das (Dead) & Ors.

DATE OF JUDGMENT: 25/03/2008

BENCH:

P.P. NAOLEKAR & LOKESHWAR SINGH PANTA

JUDGMENT:

J U D G M E N T P.P. NAOLEKAR, J.:

1. By this appeal, the appellants (plaintiffs in the suit) (hereinafter referred to as the plaintiffs for the sake of convenience) have challenged the judgment and order of the High Court dated 7.5.2002 whereby the suit filed by the plaintiffs on 10.5.1973 for specific performance of the contract to reconvey the suit property by Manaklal, the predecessor-in-interest of respondents Nos. 1 and 2 herein (original defendant No. 1 in the suit) (hereinafter referred to as the defendant for the sake of convenience) was dismissed by the High Court.

2. The facts necessary are that the suit property was a joint family property of the plaintiffs, namely, Bal Krishna and Ramanlal, both brothers and their late grandmother Mainabai. The parents of the plaintiffs as also their grandfather late Ramnarayan Bhutda, husband of late Mainabai had died much before the execution of the transaction in dispute. On 19.7.1952, when the plaintiffs were minors, their late

grandmother Mainabai purporting to act for herself and as guardian of the plaintiffs executed a registered sale deed vide Exhibit D/1 for consideration which was stated to be Rs.25,000/- in the sale deed and delivered possession to the defendant/vendee. Mainabai died on 1.3.1964 and her legal representatives, besides the plaintiffs, were joined as proforma defendants Nos. 2 to 14. In the plaint, it was pleaded by the plaintiffs that they being in need of funds required for discharging the business debts of the joint family of the plaintiffs, their grandmother Mainabai, for herself and as their guardian entered into an agreement with the defendant, according to which a sale deed of the suit house was executed by her on behalf of herself and as guardian of the plaintiffs in favour of the defendant and the defendant was to execute an agreement of reconveyance on certain terms and conditions in favour of said Mainabai and the plaintiffs.

Accordingly, Mainabai purporting to act on her own behalf and also as guardian of the plaintiffs, who were both minors at that time, executed a registered sale deed of the house on 19.7.1952 in favour of the defendant for consideration which was stated in the deed to be a sum of Rs.25,000/- and delivered possession of the house to him except one room and one gachhi which is still in possession of the plaintiffs. Although the consideration mentioned in the sale deed was stated to be Rs.25,000/-, as a matter of fact only a sum of Rs.10,000/- was paid by the defendant as consideration which has been clearly accepted and acknowledged by the defendant in the agreement of reconveyance which he later executed in favour of Mainabai and the plaintiffs on the same day. By this agreement, the defendant agreed to reconvey the house to Mainabai and the plaintiffs after receiving from them the sum of Rs.10,000/- and interest on this amount. It was further pleaded by the plaintiffs that all essential terms of reconveyance not having been fully and properly stated in the aforesaid agreement which was executed by the defendant on 19.7.1952, certain terms and conditions were notified by a further agreement which the defendant executed in favour of the plaintiffs and their grandmother Mainabai on 21.7.1952. The terms and conditions for reconveyance as agreed and stated in this document were as follows:

- (1) The defendant No.1 will reconvey the house to Mainabai and the two plaintiffs whenever they shall call upon him to do so by a notice in writing.
- (2) For such reconveyance, Mainabai and the two plaintiffs will be liable to pay the defendant No.1 the real and original amount which the later had paid to them for the initial sale of the house, together with interest on it @ 6% per annum from the date of the original sale to the date of reconveyance.
- (3) The amount which the defendant No. 1 shall realize by way of rent of the house in question shall after deducting from it the amount spent by him on house-tax, water tax, tokhat tax, electric charges and expenditure on repairs, be either paid to him to Mainabai and the plaintiffs or credit for it shall be given to them towards the amount payable by them for the reconveyance.

(4) No amount on account of electric charges or water charges shall be deducted by the defendant No.1 from the rent collected by him in case he was not required to pay the same and it was collected by him from the tenants.

(5) It will be open to Mainabai and the plaintiffs to pay to the defendant No. 1 such sums as they may like from time to time towards the price of reconveyance and the same shall be accepted and accounted for by the defendant No. 1 when accounts shall be taken and interest shall be calculated by `kat-miti .

It was further pleaded in the plaint that towards the said agreement of reconveyance, the plaintiffs had paid to the defendant Rs.1,000/- on 13.10.1953 and Rs.4,000/- on 1.2.1955 and the defendant has executed in their favour two receipts on 13.10.1953 and 1.2.1955 respectively. As per the plaint, according to the agreement of reconveyance, the plaintiffs and defendants Nos. 2 to 14 were entitled to require the defendant (No. 1) to reconvey the suit house to them by a registered deed after receiving from them the amount of consideration payable to him as per that agreement. He had already been paid Rs.1,000/- on 13.10.1953 and Rs.4,000/- on 1.2.1955. He was further entitled to receive the balance amount of Rs.5,000/- less the net rental income of the house received by him which was to be ascertained after taking an account. For determining the precise balance of the consideration payable to the defendant according to the agreement of reconveyance he was to give an account of all sums collected by him as rent of the house and also of all sums spent by him on account of taxes, repairs or any other charges and after deducting the amounts spent by him from the payable amount realized as rent, to adjust the sum towards the balance amount of Rs.5,000/- and interest which was to be paid to him. On 7.5.1973, the plaintiffs had approached the defendant personally and requested him to take the balance price of Rs.5,000/- together with interest of Rs.10,000/- by kat-miti and after adjusting towards it the net rental income realized by him to be ascertained after an account, to reconvey the house to the plaintiffs and defendants Nos. 2 to 14 by executing a registered sale deed of the house in their favour at their own cost. Then in paragraph 12 of the plaint, it was averred that `the plaintiffs have been and are ready and willing to perform their part of the contract according to its true construction . As per the plaint, the cause of action accrued on service of notice on 9.5.1973 when the defendant failed to comply with the plaintiffs` notice dated 7.5.1973. For the purposes of court fee and jurisdiction, the suit for specific performance was valued according to the consideration for the reconveyance on it by kat-miti from 19.7.1952 to the date when the defendant failed to perform the contract in spite of notice taking into account the two payments of Rs.1,000/- and Rs.4,000/- already made to the defendant. The amount of interest by kat-miti on Rs.10,000/- comes to Rs.6,930/-. Accordingly, the suit for specific performance was valued at the total amount of Rs.16,980/- for the purposes of court fee and jurisdiction. The plaintiffs, inter alia, made a prayer that `defendant No. 1 may be directed to reconvey the suit house to the plaintiffs and defendants Nos. 2 to 14 by a registered sale deed to be executed by him in consideration of Rs.11,930/- and to deliver possession of the same to them .

3. The defendant had died even before filing of the written statement which was then filed by his legal representatives. It was denied in the written statement that the sale deed dated 19.5.1952 was for consideration of Rs.10,000/- only and not for Rs.25,000/-. Agreement of reconveyance by Manaklal either on 19.7.1952 or 21.7.1952 was denied. They also denied the terms set out in the

agreement. It was submitted that the signature of Manaklal was obtained by the plaintiffs on some papers in connection with a suit filed against late Ramanandji, father of the plaintiffs and it appeared to them that false agreement and receipts had been prepared by the plaintiffs using those signed papers. The demand either oral or by any letter by the plaintiffs from late Manaklal for execution of the sale deed was denied.

4. The trial court recorded the finding that the sale deed was for Rs.25,000/- and not Rs.10,000/-; that there was an agreement of reconveyance between the parties but for a total consideration of Rs.25,000/-; that the agreement dated 21.7.1952, not the one dated 19.7.1952, was enforceable; that the plaintiffs had paid Rs.5,000/- to late Manaklal and they had always been and were still willing to perform their part of the contract; that the suit was within limitation; and that the plaintiffs were entitled to get the deed of reconveyance executed from the legal representatives of late Manaklal on payment of balance amount of Rs.20,000/-. On these findings, the plaintiffs' claim for specific performance was decreed with direction to the plaintiffs to pay or deposit the balance consideration amount of Rs.20,000/-.

5. Both parties aggrieved by the impugned judgment and decree of the trial court filed first appeals before the High Court. The grievance of the plaintiffs was that the trial court committed an error in holding that the sale deed dated 19.7.1952 was for a total sum of Rs.25,000/- and that said amount was fixed as consideration for executing the deed of reconveyance. It was asserted that the plaintiffs were liable only to pay Rs.10,000/- as consideration amount to get the deed of reconveyance from the legal representatives of late Manaklal, whereas the legal representatives of late Manaklal (deceased defendant No. 1) assailed the entire judgment and decree contending that the trial court erred in holding that execution of the two agreements Ex.P/1 and Ex. P/2 was duly proved; that the two documents were not only contradictory and inconsistent but also suspicious. The finding that a sum of Rs.5,000/- was paid to late Manaklal and plaintiffs' willingness to perform their part of the contract were also challenged. It was submitted that as per the plaintiffs' own showing it was clear that they were never ready or willing to pay the entire consideration for reconveyance as stipulated in the agreement Ex.P/2 and the plaintiffs' readiness and willingness was only to make the payment as per the agreement Ex.P/1 dated 19.7.1952 and not agreement Ex.P/2 dated 21.7.1952.

6. Both appeals – one filed by the plaintiffs and the other by legal representatives of late Manaklal – were dismissed by the High Court on 10.4.1995. However, in letters patent appeals, the judgment dated 10.4.1995 was set aside and the cases were remanded back to the learned Single Judge for rehearing and deciding the matter afresh.

7. On remand, the High Court found that as per plaintiffs' own showing a subsequent agreement Ex.P/2 was entered into between the parties on 21.7.1952, i.e., two days after execution of the agreement Ex.P/1 dated 19.7.1952. It was observed by the High Court that although it was the case of the plaintiffs that the subsequent agreement Ex.P/2 was executed by way of modification/clarification of the agreement Ex.P/1, but a bare reading of the agreement Ex.P/2 would show that it was wholly an independent document making absolutely no reference of Ex.P/1. So even if the agreement Ex.P/1 was executed between the parties, the same stood substituted by a new agreement Ex.P/2 and the agreement Ex.P/1 became non-existent and neither of the parties

was obliged to perform the same. The execution of the agreement Ex.P/2 was not seriously contested by the counsel for the defendants and the High Court concurred with the finding of the trial court that the factum of execution of agreement Ex.P/2 dated 21.7.1952 was duly established. The High Court further considered whether the plaintiffs were ready and willing to perform their part of the contract as per the agreement Ex.P/2 and held that clause (c) of Section 16 of the Specific Relief Act, 1963 provides 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. Explanation (ii) to clause (c) makes it clear that the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction. The compliance of the requirement of Section 16(c) is mandatory and in the absence of necessary averment in the plaint and in the absence of proof of the same that the plaintiff has always been ready and willing to perform his part of the contract, a suit cannot succeed. The High Court has held that the plaintiffs have failed to make averment and lead evidence to prove their readiness and willingness to perform their part of the contract according to its true construction, i.e., in accordance with the terms and conditions of the agreement dated 21.7.1952. The High Court has further held that although the sale deed was dated 19.7.1952 and the agreement to reconveyance was dated 21.7.1952 the only step taken by the plaintiffs was to pay back the amount of Rs.1,000/- on 13.10.1953 and amount of Rs.4,000/- on 1.2.1955 and thereafter till the service of notice dated 7.5.1973 and 10.5.1973 when the suit was filed, no steps were taken by the plaintiffs on their part to show their readiness or willingness to perform their part of the contract. Plaintiff No. 1 kept quiet almost for 18 years after attaining majority and plaintiff No. 2 for 7 years, which is indicative of callous indifference and wilful negligence on the part of the plaintiffs and, therefore, they were held not entitled for equitable relief of specific performance of the contract in their favour and consequently the decree for specific performance passed by the trial court was set aside and plaintiffs' suit was dismissed. However, the legal representatives of late Manaklal (original defendant No. 1 in the suit) were directed to pay back to the plaintiffs a sum of Rs.5,000/- with interest at the rate of 6 per cent per annum. Aggrieved by this order, the plaintiffs have come up before this Court by filing a special leave petition which has been converted into the present appeal.

8. Section 16 of the Specific Relief Act, 1963 (hereinafter referred to as the Act) corresponds with Section 24 of the old Act of 1877 which lays down that the person seeking specific performance of the contract, must file a suit wherein he must allege 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 specific performance of the contract cannot be enforced in favour of the person who fails to aver and prove his readiness and willingness to perform essential terms of the contract. Explanation (ii) to clause (c) of Section 16 further makes it clear that plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction. The compliance of the requirement of Section 16(c) is mandatory and in the absence of proof of the same that the plaintiff has been ready and willing to perform his part of the contract suit cannot succeed. The first requirement is that he must aver in plaint and thereafter prove those averments made in the plaint. The plaintiff's readiness and willingness must be in accordance with the terms of the agreement. The readiness and willingness of the plaintiff to perform the essential part of the contract would be required to be demonstrated by him from the institution of the suit till it is culminated into decree of

the court. It is also settled by various decisions of this Court that by virtue of Section 20 of the Act, the relief for specific performance lies in the discretion of the court and the court is not bound to grant such relief merely because it is lawful to do so. The exercise of the discretion to order specific performance would require the court to satisfy itself that the circumstances are such that it is equitable to grant decree for specific performance of the contract. While exercising the discretion, the court would take into consideration the circumstances of the case, the conduct of parties, and their respective interests under the contract. No specific performance of a contract, though it is not vitiated by fraud or misrepresentation, can be granted if it would give an unfair advantage to the plaintiff and where the performance of the contract would involve some hardship on the defendant, which he did not foresee. In other words, the court's discretion to grant specific performance is not exercised if the contract is not equal and fair, although the contract is not void.

9. As per the pleadings, the plaintiffs' allegation is that on the date of the execution of the said deed dated 19.7.1952, there was an agreement of resale entered into between the parties on 19.7.1952 itself. It is further alleged that as the terms of the agreement dated 19.7.1952 were not complete, another supplementary agreement of reconveyance was entered into and executed between the parties on 21.7.1952.

10. On 19.7.1952, an agreement is said to have been executed by Manaklal, predecessor-in-title of the defendants in favour of the plaintiffs. As per that agreement, he had purchased the suit house by a registered sale deed on the same day. Although an amount of Rs.25,000/- has been mentioned in the sale deed as sale consideration, he had not paid the said amount to the plaintiffs. He had only given Rs.10,000/- and the balance amount has been paid by the plaintiffs which has been added to the amount and the amount of Rs.25,000/- has been paid as sale consideration. When the resale of the house will be executed, the plaintiffs will be required to pay only an amount of Rs.10,000/- along with interest and the sale deed will be executed. Execution of this document does not stand to reason as to how the amount of Rs.15,000/- has been paid by the plaintiffs to the defendant to be included along with the amount of Rs.10,000/- which has been paid by him to show the consideration of Rs.25,000/- as sale consideration. When the need of execution of the sale deed in favour of the defendant was alleged to be the plaintiffs' need of money on that date, then how it is that Rs.15,000/- has been paid by the plaintiffs to the defendant whereas only Rs.10,000/- was secured by sale of the house to the defendant. If the plaintiffs were in need of money and already possessed of Rs.15,000/-, then why they will sell the house for a consideration Rs.10,000/- only. Apart from this fact, the amount of Rs.10,000/- in the document is written by hand, whereas other contents of the document are typed. The handwritten figure has not been initialled by the defendant or the plaintiffs. The sale deed executed on 19.7.1952 shows that the consideration for the sale of the house was paid :

Rs.5000/- as cash and Rs.20,000/- by way of Cheque No.877383 drawn on Punjab National Bank, Siyaganj Branch. Sale deed does not show that the amount of Rs.10,000/- was paid in cash. Endorsement on the sale deed shows that this amount was paid by cash and cheque to the plaintiffs before the Registrar. These facts clearly belie the case of the plaintiffs that the sale deed was executed for only amount of Rs.10,000/- and that agreement of resale was executed by the defendant for a

consideration of Rs.10,000/- only. Both the courts have for different reasons disbelieved this document. Execution of the document for resale on the date of execution of the sale deed for different consideration by the defendant than the sale consideration cannot be believed.

11. Ex.P/2 dated 21.7.1952 is a document executed by the defendant after execution of the sale deed dated 19.7.1952 and the alleged document Ex.P/1 dated 19.7.1952. It is the plaintiffs case that as the terms of Ex.P/1 were not complete, the second document was executed on 21.7.1952. From a bare reading of the document dated 21.7.1952, it does not appear to be so. The document Ex.P/2 dated 21.7.1952 does not refer to the document dated 19.7.1952, nor is there any mention that the sale consideration was Rs.10,000/- only. This documents contends that the defendant had purchased the suit house for a consideration of Rs.25,000/- by registered sale deed; and that the house was sold by the plaintiffs as they were in need of money. It was agreed by the parties that whenever the plaintiffs would want to purchase the house, then the sale deed would be executed by the defendant in their favour on certain terms and conditions which have already been referred by us. From a bare reading of this document, it does not appear that the document was executed in pursuance of the first document. The document dated 21.7.1952 is an independent separate document wherein the defendant had agreed to reconvey the house whenever asked for by the plaintiffs.

12. It is urged by Shri S.K. Gambhir, learned senior counsel for the appellants that on the language used in clause (c) of Section 16 read with Explanation (ii), a contract may be open to more than one construction and a plaintiff may allege the alternative construction to which the contract may be open and claim relief on that basis. The true construction of the contract would be that construction which is finally accepted by the court. The plaintiff's suit would not be dismissed merely because one of the constructions placed by the plaintiff to the contract was not accepted by the court where the alternative construction is being alleged and proved.

13. In the present case, the plaintiffs placed reliance on paragraph 12 of the plaint where it has been averred that the plaintiffs have been and are ready and willing to perform their part of the contract according to its true construction. This construction is, no doubt, in tune with the words used in clause (c) and its explanation (ii) of Section 16 of the Act, but when one reads this averment in the context of the other averments made in the plaint, then the averment made in paragraph 12 has a reference to the averments made in the foregoing paragraphs of the plaint.

14. In *Syed Dastagir v. T.R. Gopalakrishna Setty*, AIR 1999 SC 3029, this Court has held in para 9 as under:

In construing a plea in any pleading, Courts must keep in mind that a plea is not an expression of art and science but an expression through words to place fact and law of one's case for a relief. Such an expression may be pointed, precise, some times vague but still could be gathered what he wants to convey through only by reading the whole pleading, depends on the person drafting a plea. In India most of the pleas are drafted by counsels hence aforesaid difference of pleas which inevitably differ from one to other. Thus, to gather true spirit behind a plea it should be read as a whole. This does not distract one from performing his obligations as required under a statute. In *Motilal Jain v. Ramdasi Devi (Smt.) and Others*, (2000) 6 SCC 420, this Court has held that an averment as to readiness and willingness in plaint is sufficient if the plaint, read as a whole, clearly indicates that the plaintiff was always and is still ready and willing to fulfil his part of the obligations. Such averment is not a mathematical formula capable of being expressed only in certain specific words or terms.

Further, in *Umabai and Another v. Nilkanth Dhondiba Chavan (Dead) by LRs. and Anr.*, (2005) 6 SCC 243, this Court in para 30 has said as under: It is 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.

15. When the entire plaint is read, there is no reference of the agreement dated 21.7.1952 about which the plaintiffs have alleged that they are ready and willing to perform their part of the contract as per the agreement. From the entire tenor of the plaint, it is clear that the plaintiffs have pleaded for their readiness and willingness to perform their part of the contract as per the agreement dated 19.7.1952. The agreement dated 21.7.1952 has been referred to only for the purposes of accounting to be made for the payment of the consideration for resale of property and there also the plaintiffs have specifically stated that they have already paid Rs.1,000/- on 13.10.1953 and Rs.4,000/- on 1.2.1955 and the defendant is entitled to receive the balance of Rs.5,000/- less the net rental income of the house received by him.

16. In the evidence also, the plaintiffs have throughout maintained that the agreement of reconveyance was for a sale consideration of Rs.10,000/- only of which Rs.5,000/- has already been paid Rs.1,000/- on 13.10.1953 and Rs.4,000/- on 1.2.1955. There is no specific statement made by the plaintiffs in examination-in-chief or in cross-examination that plaintiff No.1 Bal Krishna and/or his brother plaintiff No.2 Ramanlal were/was ready or are/is ready and willing to pay the entire amount of Rs.25,000/- as consideration amount to the defendant for reconveying the suit house. It may also be pertinent to note that the finding recorded by the trial court

that the sale consideration of the suit house was Rs.25,000/- was even challenged by the plaintiffs by filing an appeal before the High Court.

17. We have already recorded a finding that the document Ex.P/1 dated 19.7.1952 was not executed by the defendant in favour of the plaintiffs. The document Ex.P/2 dated 21.7.1952, which has been executed after the sale deed dated 19.7.1952, was executed by the defendant for reconveying the property in favour of the plaintiffs. That document indicates that the consideration for the reconveyance would be Rs.25,000/-. The plaintiffs case throughout in the plaint as well as in the evidence was that they were and are ready and willing to purchase the suit house for the consideration of Rs.10,000/-. In the absence of pleadings or proof by the plaintiffs as to their willingness and readiness to perform their part of the contract and get the sale deed executed in their favour on payment of Rs.25,000/-, no case is made out by the plaintiffs for specific performance of the contract of reconveyance.

18. On the above findings, we need not go into the question whether it would have been just, fair and equitable in the circumstances of the case to grant the relief of specific performance to the plaintiffs exercising discretionary power in favour of the plaintiffs.

19. For the aforesaid reasons, the appeal is dismissed. However, in the circumstances of the case, there shall be no order as to costs.