Mst. Sugani vs Rameshwar Das & Anr on 25 April, 2006

Equivalent citations: AIR 2006 SUPREME COURT 2172, 2006 (11) SCC 587, 2006 AIR SCW 2606, 2006 (4) ALL LJ 262, 2006 (4) AIR KANT HCR 628, 2006 (7) SRJ 205, (2006) 42 ALLINDCAS 926 (SC), (2007) 1 CIVLJ 7, (2007) 1 JCR 218 (SC), 2006 (42) ALLINDCAS 926, 2006 (4) SCALE 491, 2006 (2) HRR 1, (2006) 6 ALLMR 28 (SC), (2006) 2 CLR 160 (SC), (2006) 3 CTC 108 (SC), 2006 HRR 2 1, (2006) 5 ANDHLD 165, 2006 ALL CJ 3 2210, (2006) 5 ANDH LT 10, (2006) 3 CIVILCOURTC 506, (2006) 2 WLC(SC)CVL 162, (2006) 3 ALL WC 2392, (2006) 4 MAD LW 959, (2006) 5 SCJ 59, (2006) 4 SUPREME 684, (2006) 4 RECCIVR 319, (2006) 3 ICC 491, (2006) 4 SCALE 491, (2006) 63 ALL LR 772, (2006) 4 CAL HN 26, (2006) 4 ANDHLD 41, (2006) 2 ALL RENTCAS 726

Author: Arijit Pasayat

Bench: Arijit Pasayat, Tarun Chatterjee

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           CASE NO.:
Appeal (civil)  3465 of 2000

PETITIONER:
Mst. Sugani

RESPONDENT:
Rameshwar Das & Anr.

DATE OF JUDGMENT: 25/04/2006

BENCH:
ARIJIT PASAYAT & TARUN CHATTERJEE

JUDGMENT:
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J U D G M E N T ARIJIT PASAYAT, J.

Challenge in this appeal is to the judgment rendered by a learned Single Judge of the Allahabad High Court allowing a Second Appeal filed under Section 100 of the Code of Civil Procedure, 1908 (in short the 'CPC'), by reversing the judgment and decree passed by the trial court as affirmed by the Appellate Court.

The factual background, as projected by the appellant in a nutshell is as follows:

> An agreement to sell was executed between the appellant, herein and Mahadeo defendant No.1 in the suit (since deceased) in respect of the suit property for a sum of

> Rs.7,000/- on 13.12.1975. Out of the said sum Rs.5,000/- was paid as earnest money on the date of agreement and the balance was payable on the date of the sale . Registration of the sale could not be done as admittedly there was a prohibition on sale of urban property at the relevant point of time. The agreement to sell was made on 13.12.1975. Defendant No.1 Mahadeo executed a sale deed in favour of respondents 1 & 2 (defendant Nos. 2&3 in the suit) for a sum of Rs.6,000/- allegedly on the basis of and agreement to sell dated 13.12.1975. On 3.7.1978 a notice was sent by respondent Nos. 1 & 2 demanding arrears of rent from the appellant. On 3.1.1979 appellant filed the suit for specific performance of the agreement dated 13.12.1975. It was inter alia indicated that the defendant No.1 put off the registration of the sale deed on one pretext or other, on 3.7.1978 she came to know that Mahadeo had executed a sale deed in favour of respondent nos. 1 & 2 and, therefore, suit was filed on 3.1.1979. Further the respondent nos. 1 & 2 had full knowledge of agreement to sale executed by Mahadeo in favour of the appellant, and in spite of that respondent Nos. 1& 2 got the sale deed executed. It was specifically stated in the plaint that she was throughout ready and willing to get the sale deed executed. Written Statement of Mahadeo and the respondents 1 & 2 i.e. defendants 2 & 3 was to the fact that Mahadeo had not entered into any agreement to sell the suit property on 13.12.1975. On the other hand, Mahadeo had entered into an agreement to sell the property dated 18.12.1973 with respondents 1 & 2 which culminated in the sale deed dated 18.4.1977. Mahadeo further alleged that the agreement to sell was a forged document and it did not bear either the signature or L.T.I. of Mahadeo and the defendant Nos.2 & 3 i.e. respondents 1 & 2 herein, had no knowledge of the agreement to sell purported to have been executed on 13.12.1975.

Respondents 1 & 2 further took the stand that the sale deed dated 18.4.1977 was executed by Mahadeo and with the full knowledge of the plaintiff appellant who was the tenant. Mahadeo never signed in Hindi and used to sign in Mahajani.

Following issues were framed by the trial court:

> 1.(A) Whether defendant No.1 Mahadeo executed an agreement deed on 13.12.1975 for the sale of the house detailed at the foot of the plaint for Rs.7,000/- in favour of the plaintiff?

(B) Whether defendant Mahadeo accepted Rs.5,000/- as earnest money on that date and thereafter executed an agreement deed?

2. Whether the sale deed dated 18.4.1977 regarding the disputed house executed by Mahadeo in favour of Rameshwar Das and Jamuna Prasad is null and void?

3. Whether defendants No. 2& 3 are bonafide purchase for value and without notice?

4A Whether the suit is under valued?

B Whether court fee paid is insufficient?

5. Whether the suit is barred by the principle of mutality?

6. Whether the plaintiff is in possession of the disputed house as a tenant or in part performance of the said agreement deed?

7. To what relief if any is the plaintiff entitled?

Both the trial court and the First appellant court answered all the questions in favour of the plaintiff.

In the second appeal following questions were raised by the present respondents who were the appellants before the High Court:

> 1. Whether there was no evidence to suggest that the thumb impressions on the agreement relied upon by the plaintiff was that of Mahadeo?
>
> 2. Whether the suit was barred by time?
>
> 3. Whether the appellants are the bonafide purchasers for value without notice?
>
> 4. Whether the sale deed was validly executed by Mahadeo in favour of the appellant?

The High Court held that the pleadings in the plaint do not satisfy the requirement of Section 16 (c) of the Specific Relief Act, 1963 (in short the 'Act') read with Form Nos. 47 & 48 of the Appendix A of the First Schedule of the CPC. It was held that the defendants 2 & 3 were bonafide purchasers for value without notice. The reasons given by the courts below to hold that the defendant Nos. 2 & 3 had knowledge of the plaintiff's agreement were imaginary reasons and they were not acceptable. The plaintiff cannot get a decree for specific performance of the contract as the legal heirs were not brought on record in place of deceased defendant No.1. The trial court while dealing with issue No.7 as noted above recorded as follows:

> "In issue Nos. 1 and 2 the plaintiff has corroborated her statement that she want to get the sale deed executed in her favour by all the defendants. The defendant No. 1 Mahadeo had died having no successor and on this basis no sale deed can be executed by him. So far as the defendants No. 2 and 3 are concerned, the sale deed executed by Mahadeo was found null of void. Hence they also can not execute sale deed. In such circumstances after receiving remaining Rs.2000/- only Court can order to execute the sale deed."

The above conclusions of the trial court as affirmed by the first appellate court have not been considered by the High Court, and the appeal was accordingly allowed.

Learned counsel for the appellant submitted that in the plaint specific averments were made about the readiness and willingness. Answering issue No.6 the trial court had noted that the execution of the alleged agreement dated 18.12.1973 was not proved. The defendant no.1 had categorically admitted about the ban on registration. In the written statement Mahadeo, defendant no. 1 also admitted about the ban and had at paragraph 6 stated about the sale deed dated 19.7.1977. The first appellate court noted that there was no dispute that during the concerned period there was prohibition on registration of sale deed. As there was a prohibition on registration, the agreement to sale was executed. The High Court came to hold that the suit was barred by time, in answering the question No. 3 formulated by it. It is to be noticed that no such issue was framed in the suit. In any event, bare perusal of Article 54 of the Limitation Act, 1963 (in short 'the Limitation Act') shows that the suit was within time. There was no issue framed regarding readiness and willingness in terms of Section 16(c) of the Act. In any event in the plaint categorical statements were made and evidence was also specifically led in this regard. The High Court came to hold that the decree was not executable even if granted as defendant No.1 had died and no legal representative was brought on record. The findings of fact recorded by the trial court as endorsed by the First appellate court the defendant Nos. 2 & 3 were not bonafide purchasers were set aside by the High Court in a Second Appeal which is clearly impermissible. The trial court and first appellate Court clearly recorded a finding about collusion which has been set aside without any material.

In reply it was stated by learned counsel for the respondents that the conclusions of the trial court and the first appellate court were clearly erroneous and, therefore, the High Court rightly interfered in the matter.

It has to be seen that the High Court had formulated questions for determination in respect of issues which were not even decided by the trial court. No issue as to whether the suit was barred by time was framed by the trial court. Even otherwise in terms of Article 54 the starting point of limitation is three years from the date when a date is fixed and in the instance case no date was fixed and on the contrary the execution of the agreement was denied. The High Court proceeded as if the period of limitation started from the alleged date of agreement dated 3.12.1975. The notice about execution of Sale deed in favour of defendant Nos. 2 and 3 was received in July, 1978 and the suit was filed on 3.1.1979. Article 54 reads as follows:

> Description of suit Period of Limitation Time from which period begins to run For specific performance of a contract Three years The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.
>
> Therefore, the suit was clearly within time.
>
> Further no issue was framed as regards the alleged non- fulfillment of the requirement of Section 16 (c) of the Act. Strangely the High Court upset the factual findings recorded by the trial court and the first appellate Court holding that the requirements of Section 16(c) of the Act were not fulfilled.

Section 16(c) needs to be quoted along with the Explanations. The same reads as follows:

"16. Personal bars to relief:

(a) .....

(b) .....

(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 of 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 performance of, or readiness and willingness to perform, the contract accordingly to its true construction."

In Ardeshir H. Mama v. Flora Sassoon (AIR 1928 PC

208), the Privy Council observed that where the injured party sued at law for a breach, going to the root of the contract, he thereby elected to treat the contract as at an end himself and as discharged from the obligations. No further performance by him was either contemplated or had to be tendered. In a suit for specific performance on the other hand, he treated and was required by the Court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove a continuous readiness and willingness from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment brings with it and leads to the inevitable dismissal of the suit. The observations were cited with approval in Prem Raj v. The D.L.F. Housing and Construction (Private) Ltd. and Anr. (AIR 1968 SC 1355).

The requirements to be fulfilled for bringing in compliance with Section 16(c) of the Act have been delineated by this Court in several judgments. Before dealing with the various judgments it is necessary to set out the factual position. The agreement for sale was executed on 15.2.1978 and the period during which the sale was to be completed was indicated to be six months. Undisputedly, immediately after the expiry of the six months period lawyer's notice was given calling upon the present appellant to execute the sale deed. It is also averred in the plaint that the plaintiff met the defendant several times and requested him to execute the sale deed. On finding inaction in his part, the suit was filed in September, 1978. This factual position has been highlighted in the plaint itself.

Learned Single Judge after noticing the factual position as reflected in the averments in the plaint came to hold that the plaint contains essential facts which lead to inference to plaintiff's readiness and willingness. Para 3 of the plaint indicates that the plaintiff was always ready to get the sale deed prepared after paying necessary consideration. In para 4 of the plaint reference has been made to the lawyer's notice calling upon the defendant to execute the sale deed. In the said paragraph it has also been described as to how after the lawyer's notice was issued plaintiff met the defendant. In para 5 it is averred that defendant is bound to execute the sale deed on receiving the balance amount and the plaintiff was entitled to get the document executed by the defendant. It is also not in dispute that the balance amount of the agreed consideration was deposited in Court simultaneously to the filing of the suit. While examining the requirement of Section 16(c) this Court in Syed Dastagir v. T.R. Gopalakrishna Settty (1999 (6) SCC 337) noted as follows:

> "So the whole gamut of the issue raised is, how to construe a plea specially with reference to Section 16(c) and what are the obligations which the plaintiff has to comply with in reference to his plea and whether the plea of the plaintiff could not be construed to conform to the requirement of the aforesaid section, or does this section require specific words to be pleaded that he has performed or has always been ready and is willing to perform his part of the contract. 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, sometimes vague but still it could be gathered what he wants to convey through only by reading the whole pleading, depending on the person drafting a plea. In India most of the pleas are drafted by counsel hence the aforesaid difference of pleas which inevitably differ from one to the 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. But to test whether he has performed his obligations, one has to see the pith and substance of a plea. Where a statute requires any fact to be pleaded then that has to be pleaded may be in any form. The same plea may be stated by different persons through different words; then how could it be constricted to be only in any particular nomenclature or word. Unless a statute specifically requires a plea to be in any particular form, it can be in any form. No specific phraseology or language is required to take such a plea. The language in Section 16(c) does not require any specific phraseology but only that the plaintiff must aver that he has performed or has always been and is willing to perform his part of the contract. So the compliance of "readiness and willingness" has to be in spirit and substance and not in letter and form. So to insist for a mechanical production of the exact words of a statute is to insist for the form rather than the essence. So the absence of form cannot dissolve an essence if already pleaded."

Again in Motilal Jain v. Ramdasi Devi (Smt.) and Ors. (2000 (6) SCC 420) it was noted as follows:

> The other contention which found favour with the High Court, is that plaint averments do not show that the plaintiff was ready and willing to perform his part of the contract and at any rate there is no evidence on record to prove it. Mr. Choudhary

> developed that contention placing reliance on the decision in Varghese case ((1969) 2 SCC 539). In that case, the plaintiff pleaded an oral contract for sale of the suit property. The defendant denied the alleged oral agreement and pleaded a different agreement in regard to which the plaintiff neither amended his plaint nor filed subsequent pleading and it was in that context that this Court pointed out that the pleading in specific performance should conform to Forms 47 and 48 of the First Schedule of the Code of Civil Procedure. That view was followed in Abdul Khader case ((1989) 4 SCC
>
> 313).

However, a different note was struck by this Court in Chandiok case ((1970) 3 SCC 140). In that case 'A' agreed to purchase from 'R' a leasehold plot. 'R' was not having lease of the land in his favour from the Government nor was he in possession of the same. 'R', however, received earnest money pursuant to the agreement for sale which provided that the balance of consideration would be paid within a month at the time of the execution of the registered sale deed. Under the agreement 'R' was under obligation to obtain permission and sanction from the Government before the transfer of leasehold plot. 'R' did not take any steps to apply for the sanction from the Government. 'A' filed the suit for specific performance of the contract for sale. One of the contentions of 'R' was that 'A' was not ready and willing to perform his part of the contract. This Court observed that readiness and willingness could not be treated as a straitjacket formula and that had to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the party concerned. It was held that in the absence of any material to show that 'A' at any stage was not ready and willing to perform his part of the contract or that he did not have the necessary funds for payment when the sale deed would be executed after the sanction was obtained, 'A' was entitled to a decree for specific performance of contract. That decision was relied upon by a three-

Judge Bench of this Court in Syed Dastagir case ((1999) 6 SCC 337) wherein it was held that 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. It is pointed out that in India most of the pleas are drafted by counsel and hence they inevitably differ from one to the other; thus, to gather the true spirit behind a plea it should be read as a whole and to test whether the plaintiff has performed his obligations, one has to see the pith and substance of the plea. It was observed:

> "Unless a statute specifically requires a plea to be in any particular form, it can be in any form. No specific phraseology or language is required to take such a plea. The language in Section 16(c) of the Specific Relief Act, 1963 does not require any specific phraseology but only that the plaintiff must aver that he has performed or has always been and is willing to perform his part of the contract. So the compliance of 'readiness and willingness' has to be in spirit and substance and not in letter and form."

It is thus clear that an averment of readiness and willingness in the plaint is not a mathematical formula which should only be in specific words. If the averments in the plaint as a whole do clearly indicate the readiness and willingness of the plaintiff to fulfil his part of the obligations under the contract which is the subject-matter of the suit, the fact that they are differently worded will not militate against the readiness and willingness of the plaintiff in a suit for specific performance of contract for sale."

Lord Campbell in Cork v. Ambergate etc. and Railway Co. (1851) 117 ER 1229 observed that in common sense the meaning of such an averment of readiness and willingness must be that the non-completion of the contract was not the fault of the plaintiffs, and that they were disposed and able to complete it had it not been renounced by the defendant.

The basic principle behind Section 16(c) read with Explanation (ii) is that any person seeking benefit of the specific performance of contract must manifest that his conduct has been blemishless throughout entitling him to the specific relief. The provision imposes a personal bar. The Court is to grant relief on the basis of the conduct of the person seeking relief. If the pleadings manifest that the conduct of the plaintiff entitles him to get the relief on perusal of the plaint he should not be denied the relief.

Section 16(c) of the Act mandates the plaintiff to aver in the plaint and establish as the fact by evidence aliunde that he has always been ready and willing to perform his part of the contract. On considering almost identical fact situation it was held by this Court in Surya Narain Upadhyaya v. Ram Roop Pandey and Ors. (AIR 1994 SC 105) that the plaintiff had substantiated his plea.

These aspects were highlighted in Aniglase Yohannan v. Ramlatha and others (2005 (7) SCC 534).

The trial court and the first appellate court recorded categorical findings that there was prohibition on the registration of the sale deed at the relevant point of time and, therefore, only agreement of sale was executed. Interestingly the High Court found that the decree passed was not executable as the defendant No. 1 had died and the legal heirs were not brought on record. There was no issue framed in that regard and even no question of law was formulated in the second appeal. The trial court and the first appellate court recorded findings of fact that there was collusion between defendant No.1 and defendant Nos. 2 & 3. That being so factual findings were recorded that the defendant Nos. 2 & 3 had knowledge about the agreement with the plaintiff.

The first appellate court in great detail examined the question as to whether the defendants 2 & 3 had knowledge. It was noted that a plea that there was part payment by defendants 2 & 3 were clearly contrary to the evidence of defendant No.1. Scope of interference with factual findings is rather limited. Unless the factual finding is perverse, contrary to material on record, there is practically no scope for interference.

Despite amendment by the amending Act 104 of 1976, Section 100 CPC appears to have been liberally construed and generously applied by some Judges of various High Courts with the result that the drastic changes made in the law and the object behind that appears to have been frustrated.

The amending Act was introduced on the basis of various Law Commission Reports recommending for making appropriate provisions in the CPC which were intended to minimise the litigation, to give the litigant fair trial in accordance with the accepted principles of natural justice, to expedite the disposal of civil suits and proceedings so that justice is not delayed, to avoid complicated procedure, to ensure fair deal to the poor sections of the community and restrict the second appeals only on such questions which are certified by the courts to be substantial questions of law.

After the amendment a second appeal can be filed only if a substantial question of law is involved in the case. The memorandum of appeal must precisely state the substantial question of law involved and the High Court is obliged to satisfy itself regarding the existence of such a question. If satisfied, the High Court has to formulate the substantial question of law involved in the case. The appeal is required to be heard on the question so formulated. However, the respondent at the time of the hearing of the appeal has a right to argue that the case in the court did not involve any substantial question of law. The proviso to the section acknowledges the powers of the High Court to hear the appeal on a substantial point of law, though not formulated by it with the object of ensuring that no injustice in done to the litigant where such a question was not formulated at the time of admission either by mistake or by inadvertence. It has been noticed time and again that without insisting for the statement of such a substantial question of law in the memorandum of appeal and formulating the same at the time of admission, the High Courts have been issuing notices and generally deciding the second appeals without adhering to the procedure prescribed under Section 100 CPC. It has further been found in a number of cases that no efforts are made to distinguish between a question of law and a substantial question of law. In exercise of the powers under this section the findings of fact of the first appellate court are found to have been disturbed. It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the section must be strictly fulfilled before a second appeal can be maintained and no court has the power to add to or enlarge those grounds. The second appeal cannot be decided on merely equitable grounds. The concurrent findings of facts howsoever erroneous cannot be disturbed by the High Court in exercise of the powers under this section. The substantial question of law has to be distinguished from a substantial question of fact. This Court in Sir Chunilal v. Mehta and Sons Ltd. v. Century Spg. & Mfg. Co. Ltd. (1962 Supp (3) SCR 549) held that :

> "The proper test for determining whether a question of law raised in the case in substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."

It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact. It is true that the lower appellate court should not ordinarily reject witness accepted by the trial court in respect of credibility but even where it has rejected the witnesses accepted by the trial court, the same is no ground for interference in second appeal, when it is found that the appellate court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences are possible. One drawn by the lower appellate court is binding on the High Court in second appeal. Adopting any other approach is not permissible. The High Court cannot substitute its opinion for the opinion of the first appellate court unless it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at without evidence.

If the question of law termed as a substantial question stands already decided by a larger Bench of the High Court concerned or by the Privy Council or by the Federal Court or by the Supreme Court, its merely wrong application on the facts of the case would not be termed to be a substantial question of law. Where a point of law has not been pleaded or is found to be arising between the parties in the absence of any factual format, a litigant should not be allowed to raise that question as a substantial question of law in second appeal. The mere appreciation of the facts, the documentary evidence or the meaning of entries and the contents of the document cannot be held to be raising a substantial question of law. But where it is found that the first appellate court has assumed jurisdiction which did not vest in it, the same can be adjudicated in the second appeal, treating it as a substantial question of law. Where the first appellate court is shown to have exercised its discretion in a judicial manner, it cannot be termed to be an error either of law or of procedure requiring interference in second appeal. This Court in Reserve Bank of India v. Ramkrishna Govind Morey (1976 1 SCC 803) held that whether the trial court should not have exercised its jurisdiction differently is not a question of law justifying interference.

The above position was noted in Kondiba Dagadu Kadam v. Savitribai Sopan Gujar & Ors (1999 (3) SCC 722). Looked at from any angle the impugned order of the High Court is indefensible and is set aside. The appeal is allowed. The judgment and the decree of the trial court as affirmed by the first appellate court stand restored. No Costs.