

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment reserved on 4-7-2017****Judgment delivered on 25-8-2017****FA No. 82 of 2013**

1. Sanjay Maheshwari S/o Late Satyanarayan Maheshwari Aged About 42 Years R/o Ganj Line, P.S. City Kotwali, Rajnandgaon, Distt. Rajnandgaon C.G.....(Plaintiff)

---- Appellant/Plaintiff

Versus

1. Punaram Sahu S/o Late Mehatar Sahu Aged About 40 Years

2. Smt. Laltin Bai (Dead Through LRs)

2. (i) Devki Bai Aged about 48 Years Wd/o Tularam, (Daughter-In-Law Of Laltin Bai)

2. (ii) Ghanshyam Aged about 30 Years S/o Late Tularam

2. (iii) Yashwant Aged about 26 Years S/o Late Tularam

2. (iv) Umesh Aged about 23 Years S/o Late Tularam,

All are R/o Village Ghorda, Post Arjuni, Tahsil And P.S. Dongargaon, District Rajnandgaon (Chhattisgarh)

2. (v) Mohanlal Aged about 57 Years S/o Anupram Sahu, (Son-In-Law Of Latin Bai), R/o Village Semariya, Post Latiya, P.S. Bori, Tahsil Dhamdha, District Durg (Chhattisgarh)

2. (vi) Rakesh Kumar Aged about 32 Years S/o Mohanlal, R/o Village Semariya, Post Litiya, P. S. Bori, Tahsil Dhamdha, District Durg (Chhattisgarh).....(Defendants)

---- Respondents/Defendants

For Appellant

Shri Sumesh Bajaj, Advocate

For Respondent No.1

Shri Aditya Bhardwaj, Advocate

For Respondent No.2(i) to (vi)

None

Hon'ble Shri Justice Prashant Kumar Mishra
Hon'ble Shri Justice Arvind Singh Chandel

C A V judgment

The judgment of the Court was delivered by **Prashant Kumar Mishra, J.--**

1. This is plaintiff's first appeal challenging dismissal of his suit for specific performance and possession while decreeing the same only to the extent of refund of earnest money.
2. Facts of the case, in brief, are that the plaintiff preferred a suit for specific performance of the sale agreement dated 17-6-2008 (Ex.P/1) in relation to the land bearing Khasra No.132/2 area 1.09 acre, khasra No.133/2 area 0.91 acre, total area 2.00 acres situated at village Ghorda, PH 23, R.I. Circle & Tahsil Dongargaon, District Rajnandgaon, which the defendants agreed to sell for a consideration of Rs.24,50,000/- and received Rs.51,000/- in cash & Rs.2,50,000/- by cheque, total amount of Rs.3,51,000/- and to execute the sale deed within 11 months by receiving the balance sale consideration.
3. According to the plaintiff, despite repeated requests the documents concerning the land and the demarcation report were not handed over nor the house standing on the suit land was repaired and despite repeated requests the sale deed was not

executed, therefore, since the plaintiff is always ready and willing to perform his part of the contract, the defendants deserve a direction to execute the sale deed by receiving the balance sale consideration and hand over possession of the suit land to him.

4. The defendants admitted the sale agreement, but defended the suit on the plea that the plaintiff failed to pay the balance sale consideration within the stipulated time, therefore, the legal notice was served on the plaintiff immediately after the expiry of stipulated period, which shows that the plaintiff was never willing to perform his part of contract and get executed the sale deed.

5. The trial Court framed 9 issues for determination and eventually held that the execution of agreement and receipt of advance amount by the defendants has been proved, however, while answering issue Nos.3 & 4, the trial Court found that the plaintiff was not ready and willing to perform his part of contract, therefore, he is not entitled for decree for specific performance. The trial Court also held, while answering issue No.5, that the earnest money cannot be forfeited and it deserves to be refunded to the plaintiff.

6. The trial Court further held that the suit is properly valued and the Court has jurisdiction to try the suit and the defendants are not entitled to seek damages of Rs.10,000/-, however, the defendants having not preferred any cross-objection nor had argued challenging the findings on these issues, which were dealt with vide issue Nos.6, 7 & 8 or for that matter the issue Nos.1, 2 & 5 regarding execution of agreement and forfeiture of earnest money respectively, we shall confine the decision in this appeal on issue Nos.3 & 4 on which the plaintiff has been non-suited.

7. Shri Sumesh Bajaj, learned counsel appearing for the appellant, would argue that time was not the essence of the contract, therefore, since in reply to the defendants' legal notice (Ex.P/3), the plaintiff replied vide Ex.P/4 showing readiness and willingness to purchase the property and even before that the plaintiff having issued newspaper publication on 5.4.2009 showing intent to purchase the property, the finding by the trial Court that the plaintiff was not ready and willing to perform his part of contract is perverse and the suit deserves to be decreed. To buttress his contention, Shri Bajaj would place reliance upon the decisions rendered in **H.P. Pyarejan v. Dasappa (Dead)** by

LRs & Ors.¹, Azhar Sultana v. B. Rajamani & Ors.², Coromandel Indag Products Private Limited v. Garuda Chit and Trading Company Private Limited and Another³, G. Jayashree & Ors. v. Bhagwandas S. Patel & Ors.⁴, Motilal Jain v. Smt. Ramdasi Devi and Others⁵, and Swarnam Ramachandran (Smt.) and Another v. Aravacode Chakungal Jayapalan⁶.

8. Shri Aditiya Bhardwaj, learned counsel appearing for the respondent No.1, *per contra*, would support the impugned judgment. Shri Bhardwaj would read the evidence to argue that the findings that the plaintiff was not ready and willing to perform his part of contract is borne out from the evidence available on record.

9. In order to assess the correctness of the finding recorded by the trial Court, we shall first dwell on the documentary evidence adduced by the parties including the terms of the sale agreement.

10. The agreement (Ex.P/1) recites that the suit land has a super structure, fencing, bore, trees, etc. The sale deed for the suit

1 AIR 2006 SC 1144

2 AIR 2009 SC 2157

3 (2011) 8 SCC 601

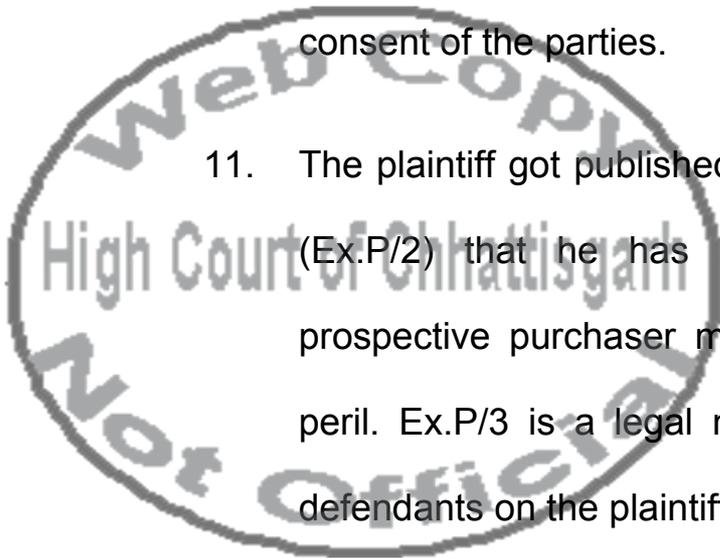
4 AIR 2009 SC 1749

5 AIR 2000 SC 2408

6 (2004) 8 SCC 689

land shall be executed within 11 months after receiving the balance sale consideration and further that the purchaser can get the sale deed registered in his name or in the name of any other person. It also recites that the seller shall get the land demarcated before registration of the sale deed and in the event the purchaser fails to get executed the sale deed the earnest money shall be forfeited and further that if the sale deed is not executed within time, the same shall be extended with the consent of the parties.

11. The plaintiff got published a newspaper publication on 3.9.2009 (Ex.P/2) that he has already filed a suit, therefore, any prospective purchaser may purchase the property at his own peril. Ex.P/3 is a legal notice dated 18.5.2009 served by the defendants on the plaintiff noticing him that since the plaintiff has not taken any interest in getting executed the sale deed within the stipulated period of 11 months despite defendants' repeated requests whereas the defendants are still ready to execute the sale deed, therefore, the plaintiff may intimate the defendants within 15 days as to the date, place & time for execution of the sale deed so that the defendants shall remain present at the indicated place & time. Instead of informing the defendants about the date, time & place for execution of the sale deed, the



plaintiff replied to the legal notice through his lawyer (Ex.P/4) raising a grievance that copy of the demarcation report and other revenue documents have not been supplied to the plaintiff and that there being cracks over the wall of the house situated on the suit land, the same has not been repaired despite instructions to the defendants, therefore, the defendants should produce all the documents and repair the house within a period of 15 days so that the sale deed can be executed.

12. The plaintiff published another newspaper proclamation on 5.4.2009 i.e. before filing of the suit alerting the prospective buyers that there is sale agreement executed by the defendants in his favour, therefore, any person having objection over the agreement may submit his objection in the office of the plaintiff's counsel. The suit was, thereafter, filed on 20.7.2009.

13. From the documents, it would be apparent that the plaintiff never requested the defendants in writing showing his willingness to perform his part of contract nor tendered the amount at any point of time within 11 months. The plaintiff did not do so even when the defendants served him a legal notice and requested for information about the date, time & place for execution of the sale deed by paying the balance sale consideration by the plaintiff. Newspaper publication (Ex.P/7) by way of proclamation before

filing of a suit also fails to show his readiness and willingness to perform the contract. As a matter of fact, this document is a notice to members of public inviting objections to the sale agreement between the parties. It no where directs the defendants to accept the balance sale consideration and execute the sale deed.

14. It is also to be noticed that the sale agreement does not contain any stipulation about the repair of house standing on the suit land, yet while replying to the defendants' legal notice, the plaintiff raised the plea of non repair of the house & non supply of demarcation report and other revenue papers. Even this was not a part of the agreement that the defendants shall supply copy of the demarcation report to the plaintiff before execution of sale deed.

15. If we now turn to the oral evidence, it is to be seen that the plaintiff's own witness Rajesh Sahu (PW-1) would state that the plaintiff is engaged in the business of sale & purchase of land meaning thereby that he is in the business of real estate. He also admits that at the time of demarcation on 6.3.2009 both the parties were present. Contrary to the admission of Rajesh Sahu (PW-1) about the plaintiff's nature of business, the plaintiff himself appeared as PW-2 and denied that he is in the business

of real estate. In his examination-in-chief by way of affidavit under Order 18 Rule 4 of the Code of Civil Procedure, 1908 (for short 'the CPC') the plaintiff has not stated that he had approached the defendants number of times along with Rajesh Sahu (PW-1) whereas Rajesh Sahu (PW-1) has stated that he had gone to the defendants' house along with the plaintiff.

16. On the other hand, the defendant has clearly stated in his cross-examination that the demarcation was already carried out, the report thereof was handed over to the plaintiff. He has denied that when the plaintiff offered the balance sale consideration, he refused to receive the same. This suggestion itself is an afterthought because no such plea has been raised by the plaintiff in his affidavit under Order 18 Rule 4 of the CPC. The defendant witness namely; Nohar Lal Sahu (DW-2) has also stated that since the plaintiff is engaged in real estate business, after execution of the agreement he was searching for buyers who can be sold the property on higher rates, however, since he was not finding the buyers in the market, he avoided to pay the balance sale consideration and get executed the sale deed. This witness was also present at the time of demarcation.

17. It is, thus, established from the statement of appellant's own witness Rajesh Sahu (PW-1) and defendant witness Nohar Lal

Sahu (DW-2) that the plaintiff/appellant is engaged in real estate business. The defendant has alleged and there is evidence also that the appellant was delaying tender of balance sale consideration because he was not finding potential buyers in the market.

18. The Supreme Court in **N.P. Thirugnanam (Dead) by LRs v. Dr. R. Jagan Mohan Rao and Others**⁷, has affirmed the judgment passed by the High Court observing that the very contract was speculative in nature and entered into by the plaintiff who has been dabbling in real estate transactions without the means to purchase a substantial immovable property like the suit property.
19. In other words, when the plaintiff is a broker or in real estate business and has failed to tender the balance sale consideration, as he was not finding potential buyers in the market, the decree for specific performance is not to be granted in favour of such plaintiff.
20. The evidence available on record, as discussed above, would suggest that the plaintiff has never approached the defendant for execution of the sale deed by tendering the balance sale consideration either before the expiry of stipulated time or after

⁷ (1995) 5 SCC 115

the said period was over when he received the notice by the defendant asking him to inform the date, time and place for execution of the sale deed. The Supreme Court in **Padmakumari and Others v. Dasayyan and Others**⁸, has held thus in paras 19 & 20 :

19. The said legal contention urged on behalf of defendant Nos.12 to 15 has been strongly rebutted by learned counsel on behalf of the plaintiff contending that the question of payment of balance consideration amount of Rs.63,000/- within nine months would have arisen after the terms and conditions of the contract agreed upon by defendant Nos.1 to 11 if they had measured the suit schedule property. They have not discharged their part of the contract stipulated in the agreement to sell, therefore, it is urged by him that time was not the essence of the contract as defendant Nos.1 to 11 themselves have failed to perform their part of the agreement.

20. The said contention urged on behalf of the plaintiff is unacceptable to us that the question of taking measurement would not arise before the plaintiff performed his part of the contract regarding the balance consideration within the period stipulated in the agreement. Undisputedly, that had not been done by the plaintiff in the instant case within the stipulated time and the notice was issued by the plaintiff only after one year, therefore, the plaintiff has not

adhered to the time which is stipulated to pay the balance consideration amount to defendant Nos.1 to 11 which is very important legal aspect which was required to be considered by the Courts below at the time of determining rights of the parties and passing the impugned judgment. The Courts below have ignored this important aspect of the matter while answering the contentious Issue Nos.1 and 2 in favour of the plaintiff and granted decree of specific performance in respect of the suit schedule property. The said finding of fact is contrary to the terms and conditions of the agreement, pleadings and the evidence on record. Accordingly, we answer the said issues in favour of defendant Nos.12 to 15 after setting aside the concurrent finding of fact recorded by the High Court.

(emphasis supplied)

21. It is settled by the Supreme Court in 'n' number of decisions rendered in **Chand Rani (Smt) (Dead) by LRs v. Kamal Rani (Smt) (Dead) by LRs⁹, Balasaheb Dayandeo Naik (Dead) through LRs and Others v. Appasaheb Dattatraya Pawar¹⁰, Govind Prasad Chaturvedi v. Hari Dutt Shastri and Another¹¹, Smt. Indira Kaur and Others v. Sheo Lal Kapoor¹², and Silvey and Others v. Arun Varghese and Another¹³** that in case of sale of immovable property time is not

⁹ (1993) 1 SCC 519

¹⁰ (2008) 4 SCC 464

¹¹ (1977) 2 SCC 539

¹² (1988) 2 SCC 488

¹³ (2008) 11 SCC 45

the essence of contract. However, even if the time was not the essence of contract, as the agreement stipulates that the time can be extended with the consent of the parties, the fact remains that while replying to the defendants' notice the plaintiff could have sought extension of time to execute the sale deed and at the same time could have informed the defendants about the date, time & place. Instead of performing his part of contract by paying the balance sale consideration to get executed the sale deed, the plaintiff raised an excuse in his reply to the defendants notice, informing them that he has not repaired the house nor submitted the demarcation report & revenue papers to him. Repair of the house was never a term of the agreement. Similarly, under the agreement, the defendant was only required to get the land demarcated, which was duly carried on as admitted by the plaintiff's witness Rajesh Sahu (PW-1), however, there was no stipulation that the demarcation report and revenue papers would be supplied to the plaintiff before execution of the sale deed.

22. In **Telikicherla Sesibhushan (Dead) by Legal Representatives v. Kalli Raja Rao (Dead) by Legal Representatives and Others**¹⁴, the Supreme Court has held that when the plaintiff failed to demonstrate his readiness and

14 (2014) 15 SCC 743

willingness to perform his part of contract, the suit deserves to be dismissed.

23. As an upshot, the appeal being, *sans substratum*, is liable to be is hereby dismissed, leaving the parties to bear their own costs.

Sd/-

Judge
Prashant Kumar Mishra

Sd/-

Judge
Arvind Singh Chandel

