
(2008) 10 CHH CK 0008
In the Chhattisgarh High Court

Anil Singh

APPELLANT

Vs

Smt. Kholbaharin Bai and State of Chhattisgarh

RESPONDENT

Date of Decision : 14-10-2008

Acts Referred:

Specific Relief Act, 1963 — Section 20

Citation : AIR 2009 Chh 6

Hon'ble Judges : Dilip Raosaheb Deshmukh, J;Dhirendra Mishra, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

Dilip Raosaheb Deshmukh, J.—The unsuccessful plaintiff in a suit for specific performance of contract is the appellant before us.

2. The appellant/plaintiff instituted Civil Suit No. 4-A/2005 in the Court of VIIIth Additional District Judge, Bilaspur for specific performance of contract dated 22-09-2004 executed by respondent No. 1/defendant whereby she had agreed to sell her undivided 1/3rd share in the lands in area 9.22 acres situated in Village Ghuru and Ameri, Patwari Halka No. 24, Revenue Circle Sakri, Tahsil Takhatpur, District Bilaspur to the appellant after final adjudication of the civil suit pending before the VIIth Civil Judge Class II, Bilaspur and the proceedings pending before the Revenue Courts, for a consideration of Rs. 8 Lakhs and had received advance of Rs. 7 Lakhs from the appellant/plaintiff in cash on the date of agreement. The said agreement Ex.P-1 bore thumb impression of respondent No. 1 and signature of the appellant/plaintiff and was attested by Kishun Singh, P.W.2 and Vikas Shukla, P.W.3. Readiness and willingness to perform his part of the contract was pleaded. It was also averred that after the culmination of the civil suit in favour of the respondent No. 1 her 1/3rd share in the lands at village Ghuru and Village Ameri got separated and name of the respondent No. 1 was thus mutated on Khasra No. 117/3 and 117/9 total area 2.04 acres of Village Ghuru and Khasra No. 72/1, 72/5 and 73/5, total area 1 acre in Village Ameri (henceforth "he suit land"). Upon refusal by the respondent No. 1, despite

repeated requests by the appellant, a registered notice was sent on 31-01-2005 to the respondent No. 1/defendant and publication was also made on the same day in a local newspaper. Upon refusal by the respondent No. 1 to accept the registered notice, a suit praying for the relief of specific performance of contract and a permanent injunction to restrain the respondent No. 1/defendant from alienating the suit land in favour of any other person, was instituted.

3. Respondent No. 1/defendant specifically denied having entered into an agreement to sell her undivided 1/3rd share in the lands in area 9.22 acres in Village Ghuru and Ameri to the appellant/plaintiff and also specifically denied that a sum of Rs. 7 Lakhs was received by her as advance. It was specifically pleaded that taking advantage of her being an illiterate old lady with a weak eyesight and her belonging to the scheduled caste, the appellant/plaintiff had prepared a forged Ekrarnama.

4. The following facts are not disputed in this appeal:

(A) On the back of the Ekrarnama Ex.P-1 dated 22-09-2004, there is an endorsement by the stamp vendor about the Ekrarnama having been purchased by Lalla son of respondent No. 1 on 22-06-2004 for the purpose of execution of an agreement to sell by respondent No. 1 in favour of the appellant/plaintiff.

(B) Ashish Shukla, Advocate who had prepared the draft agreement dated 22-09-2004 did not testify before the trial Court.

(C) Lalla, D.W.4, the son of respondent No. 1 works as a servant of and resides on the plot of the appellant/plaintiff.

(D) The respondent No. 1 is an illiterate lady aged 70 years.

(E) On 22-09-2004, the respondent No. 1 had only an undivided share in the lands in Village Ghuru and Ameri total area 9.22 acres.

(F) On 22-09-2004, a civil suit for partition of the abovementioned lands before the VIIth Civil Judge Class II, Bilaspur and proceedings before the Revenue Courts were pending.

5. Besides examining himself, the appellant/plaintiff examined Kishun Singh, P.W.2, Vikas Shukla, P.W.3, Finger Print Expert Dr. Ms. Sunanda Dhenge, P.W.4 and Shyam Kumar, P.W.5. The respondent No. 1 examined herself and adduced evidence of Balram, D.W.2, Punnilal, D.W.3, Lalla Prasad, D.W.4 and Budhari Ram, D.W.5. The learned VIIIth Additional District Judge, Bilaspur on appreciation of evidence recorded a reasoned finding that execution of agreement to sell the suit land for a consideration of Rs. 8 Lakhs after receiving advance of Rs. 7 Lakhs by the respondent No. 1 in favour of the appellant/plaintiff was not proved as it was highly improbable that the appellant/plaintiff would have agreed to purchase the undivided share of the respondent No. 1 in the lands at Village Ghuru and would have shelled out the huge part consideration of Rs. 7 Lakhs in cash. On this premise, it declined to grant relief

for specific performance to the appellant/plaintiff and dismissed the suit.

6. In this appeal, the impugned judgment and decree is assailed on the following grounds:

(i) that the trial Court acted illegally or with material irregularity in refusing to grant specific performance despite holding that the plaintiff was ready and willing to purchase the suit land.

(ii) that the trial Court erred in holding that execution of agreement to sell on 22-09-2004 has not been established by omitting to consider that the respondent No. 1/defendant had questioned the authenticity of the agreement only on the ground that she did not affix her thumb impression on the agreement, and lastly.

(iii) that the burden was heavily on the respondent No. 1/defendant to prove that the agreement to sell, Ex.P-1 was a forged document.

7. We have heard submissions of Shri Sanjay S. Agrawal, learned Counsel for the appellant/plaintiff, Shri Sanjay K. Agrawal, learned Counsel for the respondent No. 1/defendant and Shri P. R. Patankar, learned Panel Lawyer for respondent No. 2/defendant at length and also perused the record.

8. Admittedly, the stamp on which the agreement Ex.P.1 was executed was purchased on 22-06-2004 whereas the agreement was executed on 22-09-2004. The appellant/plaintiff has admitted in para 15 that for the first time, the respondent No. 1/defendant had, about two months prior to the date of agreement expressed her desire to sell her lands in Village Ghuru. It is thus clear that on 22-06-2004 when the stamp Ex.P-1 was purchased by the appellant/plaintiff through Lalla, D.W.4, he could not have any idea that the respondent No. 1 was willing to sell her undivided share in the lands at Village Ghuru and Ameri. No explanation is forthcoming in the testimony of the appellant/plaintiff as to how the stamp came to be purchased much prior to the initiation of talks with the respondent No. 1, i.e., three months prior to the date of agreement which goes to show that the appellant/plaintiff had, with an ulterior motive got the stamp purchased through Lalla, D.W.4, son of respondent No. 1/defendant, who was working as his servant. It is also admitted by the appellant/plaintiff in para 19 that although the respondent No. 1/defendant lived with her sons in Village Ameri, he never spoke to her sons about purchasing the lands.

9. So far as the execution of the agreement Ex.P-1 is concerned, attesting witness Kishun Singh, P.W-2 admitted in para 6 that the document Ex.P-1 was not written in his presence and he had absolutely no knowledge as to who wrote the document and where. This further creates a serious dent in the case of the appellant/plaintiff who would not have agreed to buy the undivided share of the respondent No. 1 on 22-09-2004 when it was unknown as to which lands would fall to her share and when would the litigation in the Civil Court and the proceedings before the Revenue Courts culminate. It is also difficult to believe

that the appellant/plaintiff had Rs. 7 Lakhs in cash with him at his residence. No such evidence is forthcoming to show that even the respondent No. 1/defendant, who was an illiterate lady, had deposited the amount with some bank. Had the amount of Rs. 7 Lakhs being paid to the respondent No. 1, she being an old illiterate lady, aged 70 years, would not have kept such a huge amount at her home. There is also nothing to show that after the agreement, the respondent No. 1/defendant had purchased any valuable property worth Rs. 7 Lakhs.

10. Kishun Singh, P.W.2 the father-in-law of the appellant/plaintiff is a highly interested witness. In para 8 of his testimony, he admitted that he had no knowledge about any talk between the appellant/plaintiff and the respondent No. 1/defendant regarding the sale of land or the area of land which was to be purchased by his son-in-law. In para 9, he further admitted that he did not know as to who brought the stamp for execution of the agreement Ex.P-1.

11. Testimony of attesting witness Vikas Shukla, P.W- 3 shows that after he reached the house of the appellant/plaintiff, the appellant had gone to bring the stamp. Later on, he stated that Lalla, D.W.4 had gone alone to bring the stamp and had returned within 15-20 minutes. From his testimony an impression is created that Lalla had gone to buy the stamp on 22-09-2004. In para 6, he has stated that one Ashish Shukla, Advocate had, in the District Court Premises prepared a draft agreement which they took to the Typing Institute near the Post Office. Ashish Shukla has not been examined by the appellant/plaintiff. Vikas Shukla, P.W.3 has further admitted that he did not know as to who typed the agreement. In para 5, Vikas Shukla, P.W.3 has admitted that he and the appellant/plaintiff had passed Law together and had cordial relationship and he did not remember the date or year in which he had signed the agreement as a witness.

12. It is also pertinent to note that in para 2 of the plaint, it was specifically pleaded by the appellant/plaintiff that the respondent No. 1/defendant had agreed to execute the registered sale deed in his favour only after the decision of the pending suit before the VIIth Civil Judge Class II, Bilaspur and the culmination of proceedings before the Revenue Courts. Thus, execution of the sale deed was dependent on the happening of a future event i.e., the decision in a civil suit pending before the VIIth Civil Judge Class II, Bilaspur in favour of the respondent No. 1 and the culmination of the proceedings before the Revenue Courts in favour of the respondent No. 1. The appellant/plaintiff could not have any idea as to whether the suit and the proceedings would culminate in favour of respondent No. 1 and when. Therefore, it was highly improbable, nay, impossible that the appellant/plaintiff would have parted with a huge part consideration of Rs. 7 Lakhs and that too in cash on the date of agreement. Evidence led by the parties clearly goes to show that the agreement Ex.P-1 smacks of foul play. The possibility that taking the benefit of fiduciary relationship with Lalla, son of respondent No. 1, the appellant/plaintiff got the stamp purchased through Lalla and got the thumb impression of the respondent No. 1/defendant affixed on the

agreement. Therefore, although Dr. Ms. Sunanda Dhenge, P.W.4 has proved the thumb impression of the respondent No. 1 on the agreement Ex.P-1, the learned trial Court was right in holding that there was no consensus- ad-idem between the parties to the agreement.

13. It is also not in dispute that the said agreement Ex.P-1 was executed in the house of the appellant/plaintiff. Lalla, D.W.4 has stated in his affidavit under Order 22 Rule 4 that the appellant/plaintiff had on 22-06-2004 purchased the stamp in his name and on that day a civil suit was pending before the Civil Court. He has further deposed that the respondent No. 1/defendant was an illiterate lady, who could not even properly count Rs. 100/- and the amount of Rs. 7 Lakhs was never paid by the appellant/plaintiff to his mother and the respondent No. 1 had never agreed to sell the suit land to the appellant/plaintiff. The appellant/plaintiff has not been able to create any dent in his testimony during cross-examination. The possibility that the appellant/plaintiff, who had a fiduciary relationship with Lalla, D.W.4, who was working as his servant, had with an ulterior motive got the thumb impression of respondent No. 1/defendant-Kholbaharin Bai on the agreement Ex.P-1 can not be ruled out. The finding recorded by the trial Court that the appellant/plaintiff had failed to establish that the respondent No. 1/defendant had agreed to sell her undivided share in the lands in Village Ghuru and Ameri is thus impeccable.

14. Section 20 of the Specific Relief Act, 1963 reads as under:

20. Discretion as to decreeing specific performance.-

(1) The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal.

(2) The following are cases in which the Court may properly exercise discretion not to decree specific performance:

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation 1.- Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be

deemed to constitute an unfair advantage within the meaning of Clause (a) or hardship within the meaning of Clause (b).

Explanation 2: The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause(b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

(3) The Court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The Court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the party.

15. In *A.C. Arulappan v. Smt. Ahalya Naik* reported in AIR 2001 S.C.W. 3046, the Apex Court observed as under:

7. The jurisdiction to decree specific relief is discretionary and the Court can consider various circumstances to decide whether such relief is to be granted. Merely because it is lawful to grant specific relief, the Court need not grant the order for specific relief; but this discretion shall not be exercised in an arbitrary or unreasonable manner. Certain circumstances have been mentioned in Section 20(2) of the Specific Relief Act, 1963 as to under what circumstances the Court shall exercise such discretion. If under the terms of the contract the plaintiff gets an unfair advantage over the defendant, the Court may not exercise its discretion in favour of the plaintiff. So also, specific relief may not be granted if the defendant would be put to undue hardship which he did not foresee at the time of agreement. If it is inequitable to grant specific relief, then also the Court would desist from granting a decree to the plaintiff.

In *A.C. Arulappan v. Smt. Ahalya Naik* (supra), the Supreme Court further observed as under:

15. Granting of specific performance is an equitable relief, though the same is now governed by the statutory provisions of the Specific Relief Act, 1963. These equitable principles are nicely incorporated in Section 20 of the Act. While granting a decree for specific performance, these salutary guidelines shall be in the forefront of the mind of the Court. The trial Court, which had the added advantage of recording the evidence and seeing the demeanour of the witnesses considered the relevant facts and reached a conclusion. The appellate Court should not have reversed that decision disregarding these facts and, in our view, the appellate Court seriously flawed in its decision. Therefore, we hold that the respondent is not entitled to a decree of specific performance of the contract.

16. We are also conscious of the principle laid down by the Apex Court in *Santosh Hazari Vs. Purushottam Tiwai (Dead)* by Lrs., that the First Appellate

Court must remain conscious of the fact that the findings of fact based on conflicting evidence arrived at by the trial Court must weigh with the appellate Court, more so when the findings are based on oral evidence recorded by the same Presiding Judge who authors the judgment and unless appraisal of the evidence by the trial Court suffers from material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate Court should not interfere with the finding of fact. Therefore, the appellant, in order to succeed in the appeal, is required to demonstrate from the record that the appraisal of the evidence by the trial Court suffers from material irregularity or is based on inadmissible evidence or on conjectures and surmises. In our considered opinion, learned Counsel for the appellant has not been able to do so. On appraisal of evidence, oral as well as documentary, we are convinced that the refusal to grant specific performance of contract by the trial Court is a sound exercise of discretion vested in it by law.

17. We thus find no merit in this appeal which is accordingly dismissed. There shall be no order as to costs.