

(2012) 04 CHH CK 0049
In the Chhattisgarh High Court
Case No : F.A. No. 225 of 2003

Awanti Co-Operative Housing Society Ltd. and Another	APPELLANT
Vs	
Manohar and Others	RESPONDENT

Date of Decision : 10-04-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 6, 96
Contract Act, 1872 — Section 25
Evidence Act, 1872 — Section 114
Specific Relief Act, 1963 — Section 19(b), 20

Citation : (2012) 2 CG.L.R.W. 354 : (2012) 3 CGLJ 618

Hon'ble Judges : Nawal Kishore Agarwal, J

Bench : Division Bench

Advocate : Sanjay Kumar Agrawal, for the Appellant; Kishore Bhaduri, Advocate for the Respondents No. 1, 2(A) to (D), 3, 5 and 6 and Shri G.D. Vaswani, G.A. for the State/Respondent No. 4, for the Respondent

Final Decision : Dismissed

Judgement

Hon'ble Shri N.K. Agarwal, J.—This is plaintiffs' first appeal u/s 96 of the CPC (for brevity "the C.P.C.") against the judgment and decree dated 25.11.2003 passed in Civil Suit No. 28-A/2002 by the 8th Additional District Judge (F.T.C.), Raipur, whereby and whereunder the plaintiffs' suit for specific performance of the contract has been dismissed. Facts of the case in brief are as under:-

(i) The appellants/plaintiffs filed a suit for specific performance of contract and for permanent injunction against the defendants. According to the plaintiffs, they entered into oral agreement of sale, in the month of June, 1992 to purchase suit land bearing Kh. No. 496/7 area 0.360 hectares situated at village Telibandha, Raipur, at the rate of Rs. 80,000/- per acre from the defendants No. 1 to 3 and have paid Rs. 77,200/- as part consideration till 11.10.1993. On 11.10.1993, a written agreement of sale was executed between plaintiff No. 2 and defendants No. 1 to 3, in which, they have admitted receipt of Rs. 77,200/-. The defendants have also handed over the possession of the suit land in part performance of the

contract.

(ii) In December, 1995, the plaintiffs came to know that the suit land was duly recorded in the name of defendants No. 1 to 3, therefore, plaintiffs asked the defendants to execute the sale deed in their favour, but they did not execute the sale deed.

(iii) On the other hand, they were trying to sell the suit land to any other person and ultimately they have sold the suit land to Respondents No. 5 to 6, during pendency of the suit for specific performance of contract for sale, vide sale deed Ex.P. 1 & Ex. P.2.

(iv) The plaintiffs have always been ready and willing to perform the essential terms of the contract, which are to be performed by them.

(v) By filing written statements, defendants No. 1 to 3 denied execution of alleged agreement of sale (Ex. P. 8), receipt of Rs. 77,200/- as part of sale consideration money and delivery of possession.

(vi) Defendants No. 5 to 6, while supporting the case of defendants No. 1 to 3, also pleaded, they are bona fide purchasers.

(vii) The trial Court framed the following issues :

(viii) The learned trial Court dismissed the suit, finding inter alia, the plaintiffs failed to prove agreement of sale and payment of part sale consideration of Rs. 77,200/-.

2. Shri Sanjay Kumar Agrawal, learned counsel for the appellants would submit: the judgment and decree passed by the trial Court suffers from illegality on the following grounds :

(i) the trial Court ignored the material admission of respondents No. 1 to 3 with respect to execution of agreement in para 5 of their written statement;

(ii) the defendants No. 1 to 3 did not enter into witness box;

(iii) the plaintiffs and defendants No. 1 to 3 were in contractual terms for fairly long time and agreement of sale (Ex. P. 8) was in continuation of earlier agreements and inspires confidence to hold that defendants No. 1 to 3 have entered into agreement of sale with the plaintiffs on 11.10.1993;

(iv) mutation in the revenue records does not confer any right, interest or title to the person. The execution of agreement of sale cannot be disputed merely on the ground that on the date of agreement of sale the land in dispute was not recorded in the name of respondents No. 1 to 3;

(v) the respondents No. 5 & 6 admittedly purchased the suit land after filing of the suit and in violation of ad-interim injunction granted on 22.12.1995 and consequently the respondents No. 5 & 6 cannot be said to be the bona fide purchasers for value without notice of original contract as provided in section

19(b) of the Specific Relief Act and the finding of the trial Court that defendants No. 5 & 6 are bona fide purchasers of the suit lands is perverse.

3. Per contra, Shri Kishore Bhaduri, learned counsel appearing for respondents No. 1, 2(A) to (D), 3, 5 & 6, contended that plaintiffs utterly failed to prove agreement of sale (Ex.P.8) and also failed to prove payment of earnest money; the agreement, on the face, appears to be forged and concocted and the trial Court has rightly dismissed the suit, which does not call for any interference.

4. I have heard learned counsel for the parties, perused the judgment and decree impugned including the record of the trial Court.

5. The core question which arises for determination of this Court is whether the plaintiffs entered into agreement of sale with respondents No. 1 to 3 vide Ex.P.8 as alleged by them in the plaint averments and whether they have paid any money towards part sale consideration to respondents No. 1 to 3?

6. According to the plaintiffs, plaintiff No. 1 entered into oral agreement of sale with respondents No. 1 to 3 in the month of June, 1992 and paid part sale consideration of Rs. 77,200/- on different dates. On 11.10.1993, the written agreement of sale (Ex.P.8) was executed between plaintiff No. 2 and respondents and respondents have also handed over the possession of the suit property in part performance of the contract. The contents of the agreement (Ex.P.8) runs counter to the plaint averments, inasmuch as, the case of the plaintiffs is that plaintiff No. 1 entered into oral agreement of sale with respondents No. 1 to 3 in June, 1992 and had paid Rs. 77,200/- on different dates till 11.10.1993 whereas the contents of the document (Ex.P.8) reveals, plaintiff No. 2 entered into agreement of sale with the respondents No. 1 to 3 on 11.10.1993 and had paid Rs. 77,200/- on that very date and not prior thereto.

7. Further, in the evidence, the plaintiffs did not examine the then President of Plaintiff No. 1/Society. The plaintiff No. 2 (P.W. 4) Dr. Ashok Khemkha specifically deposed in para - 2 of his statement

The above evidence also goes to show, the amount of Rs. 77,200/- was paid by plaintiff No. 2 in his personal capacity and not by plaintiff No. 1 vide Ex.P.9 on 11.10.1993 and not prior thereto, which again runs counter to the case pleaded by the plaintiffs. Above contradictory stand taken by the plaintiffs in the pleading and evidence also does not inspire confidence that the agreement of sale (Ex.P.8) was a genuine document. It is settled position of law, no amount of evidence can be looked into without pleadings. Further, from Ex.P.9, it cannot be inferred that Rs. 77,200/- has been paid by plaintiff No. 1 or by plaintiff No. 2 to respondents No. 1 to 3 as earnest money at the time of execution of agreement of sale (Ex.P.8). u/s 25 of the Indian Contract Act, agreement without consideration is void.

8. Moreover, the document (Ex.P.8) also appears to be highly suspicious. As per statement of plaintiff No. 2, Dr. Ashok Khemkha, the Society used to keep with it

typed agreements so that whenever any seller comes to its office, it can be filled and the Society, i.e., plaintiff No. 1 enters into agreement of sale with them. Here in the instant case, although the agreement (Ex.P.8) is typed but the name of purchaser and date of agreement are not typed but are hand written. The respondents' signatures appear on different portions of the said document and do not appear beneath each other. The words "himself and on behalf of Ghasni Bai" appeared beneath the signature of Dukalu, have been written by plaintiff No. 2, as admitted by him in para -15 of his statement. The old stamp paper dated 11.06.1993 has been used for the execution of alleged agreement of sale. The Supreme Court, in the case of Thiruvengada Pillai Vs. Navaneethammal and Another, , has held: the fact that very old stamp papers of different dates have been used, may certainly be a circumstance that can be used as a piece of evidence to cast doubt on the authenticity of the agreement. Considering the above facts, it is crystal clear, the plaintiffs utterly failed to prove, they entered into agreement of sale with the defendant No. 3 and/or have paid Rs. 77,200/- as part sale consideration to them.

9. So far as alleged admission of defendants in para - 5 of written statement is concerned, it is trite law, the pleadings have to be read as a whole in order to infer whether or not a party had admitted any fact within the meaning of Order 12 Rule 6 of the C.P.C. A bare perusal of written statement filed by respondents No. 2 & 3 would reveal: they specifically denied the factum of entering into agreement of sale with the plaintiffs; receipt of sale consideration of Rs. 77,200/- and delivery of possession of the suit land to the plaintiffs in part performance of the alleged agreement of sale. In fact, the averments in para 5 are explanatory in nature. The defendants No. 1 to 3 have described in para 5 that taking benefit of they are being rustic illiterate villagers, some signed blank stamp papers may have been used by the plaintiffs for the purpose of preparation of alleged agreement of sale (Ex.P.8). The defendants have yet not admitted, execution of agreement of sale or receipt of Rs. 77,200/-. Therefore, on the basis of so called admission in para 5 of written statement, it cannot be said that defendants No. 1 to 3 have admitted the factum of execution of agreement of sale in favour of the plaintiffs No. 1 and 2.

10. The matter can be looked from another angle also. The relief for specific performance is discretionary relief and is not given merely because it is legal but is governed by sound judicial principles. The circumstances referred to in sub-section (2) to (4) of section 20 of the Specific Relief Act, 1963, in regard to exercise of discretion for granting a decree for specific performance are not exhaustive. In a suit for specific performance, the evidence and proof of the agreement must be absolutely clear and certain. While normally it is permissible to grant relief on the basis of what emerges from evidence - even if not pleaded, provided there is no prejudice to the opposite party, such a principle is not applied in suits relating to specific performance (please see Ganesh Shet Vs. Dr. C.S.G.K. Setty and Others, This has been set by the Apex Court referring to a quotation from Pomeroy on Specific Performance of contracts (3rd Edn.) para

159) as follows :

greater amount or degree of certainty is required in the terms of an agreement, which is to be specifically executed in equity, than is necessary in a contract which is to be the basis of an action at law for damages. An action at law is founded upon the mere non-performance by the defendant, and this negative conclusion can often be established without determining all the terms of the agreement with exactness. The suit in equity is wholly an affirmative proceeding. The mere fact of non-performance is not enough; its object is to procure a performance by the defendant, and this demands a clear, definite, and precise understanding of all the terms; they must be exactly ascertained before their performance can be enforced. This quality of certainty can best be illustrated by examples selected from the decided cases...

11. In view of above, I do not find any merit in the submission of Shri Sanjay K. Agrawal, learned counsel for the appellants that agreement of sale (Ex.P. 8) has been admitted by the defendants No. 1 to 3.

12. In view of the fact that plaintiffs themselves have failed to establish existence of valid and legal agreement of sale, the contention of Shri Sanjay K. Agrawal that for non-examination of defendants No. 1 to 3 an adverse inference u/s 114 of the Evidence Act has to be drawn against them, is also devoid of merit.

13. True, respondents No. 5 & 6, being purchasers of the property from defendants No. 1 to 3 during pendency of the suit, cannot be termed as bona fide purchasers. However, once it is held, the plaintiffs have failed to establish existence of valid and legal agreement of sale in their favour and also have failed to prove payment of Rs. 77,200/- to defendants No. 1 to 3 as alleged by them, the suit is liable to be dismissed only on this count alone and the decision on all other issues would be irrelevant as that will not affect the ultimate result.

14. For the reasons mentioned hereinabove, the appeal being devoid of merit and substance, is liable to be and is hereby dismissed.

15. In the facts and circumstances of the case, there shall be no order as to costs. A decree be drawn accordingly.