(2022) 12 CHH CK 0070

In the Chhattisgarh High Court

Case No : First Appeal No. 329 Of 2015

Jagdish Aadwani APPELLANT

Vs

D. R. Diwani RESPONDENT

Date of Decision : 02-12-2022

Acts Referred:

Citation : (2022) 12 CHH CK 0070

Hon'ble Judges : Goutam Bhaduri, J;Radhakishan Agrawal, J

Bench : Division Bench

Advocate : Y. C. Sharma, Chandini Batra, Hari Agrawal, Ankur Agrawal, Arpit Agrawal

Final Decision : Dismissed

Judgement

Radhakishan Agrawal, J

1. Challenge in this appeal by the appellants/plaintiffs is to the judgment and decree dated 15.10.2015 passed by the 9th Additional District Judge, Raipur, C.G. in Civil Suit No.7-A/2012 whereby the suit for specific performance of contract and permanent injunction filed by the plaintiffs was allowed in part.

2. Averments in the plaint, in brief, are that on 30.12.2009, plaintiffs entered into an agreement with the defendant for purchase of double storeyed cemented house constructed in 576 sq. ft. situated in plot No.4 part of Khasra No.117/1, Abhay Vihar Colony under Vinayaka Grih Nirman Sahkari Samiti Maryadit, Raipur (hereinafter referred to as 'disputed house') for Rs.13,00,000/-. The Plaintiffs paid an advance amount of Rs.4,50,000/- cash to the defendant. After execution of sale agreement, the defendant obtained Rs.1,00,000/- in July, 2011 and Rs.1,50,000/- in September, 2011 from the plaintiffs. It is also pleaded that on demanding the receipts of amounts from defendant, he told that they are already in possession, he has already received Rs.7 lacs and after getting remaining amount of Rs.6 lacs registry will be done. Thereafter, it came to the notice of plaintiffs through publication in Dainik Bhaskar newspaper dated 26.10.2011 that

the defendant has obtained loan mortgaging the disputed-house with State Bank of India and after auctioning the disputed-house, the Bank would recover the loan amount. Therefore, the plaintiffs met personally with defendant and requested him to make payment of loan amount and take NOC from bank but he failed to do so.

3. It is further pleaded that on 09.11.2011, the plaintiffs met the Bank officials, explained them the factual position and expressed their willingness to repay the remaining loan amount. The Bank officials received cheque of Rs.1,98,566/- from plaintiffs along with documents. However, the Bank returned the cheque amounting to Rs.1,98,566/- to the plaintiffs vide letter dated 13.12.2011 (Ex.P-3). The plaintiffs sent a registered legal notice to the defendant but even after receipt of the same, the defendant neither replied to the notice not did he obtain the NOC from the Bank. On 11.05.2012, on the request of the defendant for repayment of balance amount of his loan account, the plaintiff No.1 Jagdish Aadwani paid a total amount of Rs.2,10,320/- to the Bank towards the due in the loan account. However, the respondent on 21.05.2012, threatened the plaintiffs of vacating the house, for which a report was lodged on 25.05.2015 at Police Station Telibandha, Raipur. The defendant straight way refused to get the registry done and threatened them of vacating the disputed-house which necessitated filing of the present suit for specific performance of contract and permanent injunction against the defendant.

4. The defendant filed his reply denying the plaint averments and stated that plaintiffs entered in the disputed-house as a tenant and at present they are neither tenant nor owner of the disputed-house. The plaintiffs are residing in the house of defendant as encroacher. The defendant never proposed to sell the disputed-house for Rs.13 lacs nor he had ever given consent to sell the disputed-house. On the contrary, an agreement was executed only for advance of Rs.1.50 lacs on a 50/-rupees stamp. The said stamp paper was attested by notary but in this stamp paper, the defendant had not made his signature, the said document is forged on the basis of which plaintiffs has no right, except Rs.1.50 lacs on 30.12.2009 no other amount either Rs.1 lac or Rs.1.50 lacs was received by defendant from the plaintiffs. The amount of Rs.1.50 lacs obtained on 30.12.2009 which is not the part of the present suit, is not refundable to the plaintiffs due to their failure to get the registry of the disputed-house in accordance with the agreement. It is further stated that the defendant had never received Rs.7 lacs towards sale consideration. On the basis of false and fabricated facts, the plaintiffs have filed the suit, therefore, it deserves to be dismissed.

5. Before the court below the defendant remained absent. Thus, the learned trial Court after hearing the arguments of plaintiffs and on perusal of the documents, allowed the suit in part and passed the decree. Hence, plaintiffs preferred this appeal.

6. Learned counsel for the plaintiffs submits that trial Court has committed grave

error in denying the documents submitted by the plaintiffs because plaintiffs have paid total amount of Rs.9,10,320/-before the witnesses to the defendant and only Rs.3,89,680/- is to be paid to the defendant for which the plaintiffs were prepared to pay the same. He also submits that trial Court has erred in analyzing the evidence placed on record by the plaintiffs and has drawn wrong conclusion from the same whereas the agreement, part payments, loan realization and further willingness of the plaintiffs etc. were proved by the plaintiffs. He further submits that the trial Court has also drawn wrong conclusion that on the basis of documents as submitted by plaintiffs, it stands proved that Rs.4.50 lacs only has been given as advance to defendant. Therefore, the judgment and decree passed by the learned trial Court deserves to be quashed and a fresh decree deserves to be passed as per suit of the plaintiffs.

7. Learned counsel for the respondent submits that in fact, the plaintiffs were earlier tenant in the disputed-house but at present they are neither tenant nor owner of the disputed-house but are encroacher. He submits that an agreement was executed between the parties on 30.12.2009 for sale of the disputed-house and only Rs.1.50 lacs was obtained as advance out of total sale consideration of Rs.10 lacs. Since despite repeated requests by the defendant and even after sending legal notice to the plaintiffs, they did not pay any heed for registry of the disputed-house within the stipulated period of three months, the said advance amount of Rs.1.50 lacs is neither refundable to the plaintiffs nor are they entitled for getting the same. The plaintiffs have filed the suit on the basis of forged and fabricated documents and as such, they are not entitled for any relief from this Court in the instant appeal.

8. We have heard learned counsel appearing for the parties, perused the pleadings and the evidence available on record.

9. No counter appeal has been filed by the defendant in this case.

10. Record of the trial Court shows that plaintiffs examined themselves as PW-1 Jagdish Aadwani and PW-2 Sagar Aadwani and also examined PW-3 Ashok Kumar Khelwani. However, after filing of written statement by defendant, on 29.06.2015, defendant was absent and remained ex-parte before the trial Court. Defendant has not examined any witness in his defence.

11. PW-1 Jagdish Aadwani stated that they entered into an agreement with the defendant for sale of disputed-house for a sale consideration of Rs.13 lacs on 30.12.2019 and plaintiffs had paid Rs.4.50 lacs cash as earnest money to defendant. Thereafter, defendant had executed sale agreement in presence of witnesses. The said sale agreement is Ex.P-13 and attached with the record. He also stated that after execution of agreement, he had paid Rs.1 lac in July 2011 and Rs.1.50 lacs in September, 2011 to defendant but agreement Ex.P-13 shows receipt of only Rs.4.50 lacs cash as earnest money by defendant from plaintiffs. However, this witness has also not submitted any receipts from defendant. He further stated that he got information from the Danik Bhaskar newspaper on

26.10.2011 that disputed-house was mortgaged with the State Bank of India, Raipur and the Bank was willing to auction the same for recovery of loan amount. Ex.P-1 is the possession notice published in the newspaper dated 26.10.2011 by the State Bank of India, Raipur mentioning therein the amount due to the defendant with interest. It is stated in the said notice that on failure of the debtor in payment of the remaining amount, the property mortgaged by him has been taken into possession and, therefore, no transaction be made with respect to the same by anyone. He has also filed the document of Ex.P-4 i.e. the tender notice for sale of immovable property published by the State Bank of India in the newspaper for recovery of the outstanding amount of loan. As per the said notice, the disputed-house was going to be sold by inviting tender if the outstanding loan amount is not paid within the stipulated time.

12. PW-1 Jagdish Aadwani has contended that he gave Rs.1 lac and Rs.1.5 lacs to the defendant in the month of July and September, 2011 but no receipt of the same was given by the defendant. Upon coming to know through newspaper on 26.10.2011 that the disputed house is mortgaged with the State Bank of India and due to non-payment of the loan amount, the Bank is going to auction the said house, he requested the defendant for payment of the loan amount and obtaining NOC so that registry of the house could be done but the defendant kept on evading the same. On 09.11.2011, when this witness informed about the factual position to the Bank officials of State Bank of India and expressed his willingness for payment of the outstanding loan amount, he was made to write an application and issue a cheque of Rs.1,98,566/- towards payment of the loan amount. He has clarified in para 15 that since he was not having any receipt regarding payment of Rs.7 lacs to the defendant, at the instance of the Bank officials, he mentioned the amount of Rs.4.50 lacs only in the application whereas a total sum of Rs.7 lacs has been paid to the defendant. However, the cheque of Rs.1,98,566/- of the plaintiffs was returned by the Bank to him on the ground that for payment of the loan amount and closure of the loan account, consent of the defendant is necessary. Thereafter, the consent letter was executed by the defendant. According to him, on 11.05.2012, the defendant came to them (PW-1 & PW-2), entered into an agreement before witnesses wherein he consented for closure of his loan account after receipt of the outstanding loan amount from the account of plaintiff No.1 Jagdish Aadwani and requested the Bank for return of the documents. On the basis of the said consent letter, on 15.05.2015, the State Bank of India obtained a cheque of Rs.2,09,606/- of UCO Bank Raipur, Rs. 284/- and Rs.430/- through deposit slips i.e. a total sum of Rs.2,10,320/- from him. In support of his contention, he has submitted document of Ex.P-9 i.e. a letter written by the defendant to the Bank for closure of his loan account after getting the remaining amount of Rs.2,09,606/- from plaintiff No.1 through cheque. But the plaintiff has not produced any bank statement or related account for withdrawal of said amount and actually paid to Bank. PW-2 Sagar Aadwani and PW-3 Ashok Kumar Khelwani have been examined in support of evidence of PW-1 Jagdish Aadwani.

13. In para 4 of the agreement to sell Ex.P-13, it is mentioned that after getting the remaining amount of the sale consideration within three months from the plaintiffs, registry of the disputed-house would be done in favour of the plaintiffs. In para 5, it is mentioned that the said property is not mortgaged with anyone and is free from all encumbrances. On the contrary, as per Ex.P-9, the defendant has executed a consent letter, which is addressed to the Assistant General Manager of State Bank of India, Raipur and the said Bank published notices in the newspaper as Ex.P/1 and P/4, which go to show that the disputed property was mortgaged with the said Bank. Though PW-1 Jagdish Aadwani has contended that he paid Rs.1 lac and Rs.1.5 lacs to the defendant in July and September, 2011 but no documentary evidence in support of the above contention has been adduced by the plaintiffs. If the above amount was actually paid to the defendant, the plaintiffs should have taken receipt from the defendant because payment of earnest money of Rs.4.50 lacs to the defendant as stated, was mentioned in the agreement.

14. Though on 30.12.2009 an agreement was executed between the parties for a sale of the disputed-house by the defendant to the plaintiffs and as an advance amount, a sum of Rs.4.50 lacs was given to the defendant by the plaintiffs. But for want of any documentary evidence, the plaintiff failed to prove payment of any amount to the defendant beyond Rs.4.50 lacs. From the evidence on record, it is also clear that the disputed-house was mortgaged with State Bank of India, Raipur and as such it was not free from all encumbrances when the parties entered into the agreement. The trial Court has also held that no revenue document has been produced by the plaintiffs to show that the disputed house is owned and possessed by the defendant. Thus, on overall appreciation of the evidence and in the facts of the case, it would not be proper to pass a decree for specific performance of contract or permanent injunction in favour of the plaintiffs. This Court finds no illegality or perversity in the impugned judgment of the trial Court.

15. In the result, this Court finds no substance in this appeal. The impugned judgment and decree passed by the trial Court is hereby affirmed and consequently, the appeal stands dismissed.

16. A decree be drawn up accordingly.