

HIGH COURT OF CHHATTISGARH, BILASPUR

F.A.No. 72 of 2008

Virendra Kumar, son of Shri M.P.Kumar, aged about 34 years, Caste-Kanwar(Isai), resident of Borsi-bhata, Paradise Complex, Durg (C.G.)

---- Appellant

Versus

E.J. Shrivastava, son of Late B.J.Shrivastava, aged about 69 years, resident of 15, Adarsh Nagar, Durg(C.G.)

---- Respondent

For Appellant	:	Mr. B.P.Sharma, Advocate.
For Respondent	:	Mr. Prashant Jaiswal, Senior Advocate with Shri Pravesh Sharma, Advocate.

HON'BLE SHRI JUSTICE GOUTAM BHADURI

CAV ORDER

14/08/2015

1. This appeal is against the judgment and decree dated 31.03.2008 passed by the VII Additional District Judge (FTC), Durg in Civil Suit No. 3A/2008 whereby a decree for specific performance has been passed against the appellant /defendant.
2. Brief fact of case as pleaded by the plaintiff are that the plaintiff E.J.Shrivastava had entered into an agreement with defendant Virendra Kumar and thereby the land admeasuring Khasra No.89/218 and 89/378 admeasuring 0.92 and 0.008 hectares total 2,900 sq.ft. was agreed to be sold. Consequent thereto, both the parties entered into agreement for a sale consideration of Rs.2,33,800/- on 30.12.2005 and an amount of Rs.30,000/- was paid as earnest

money. It was further pleaded that the defendant agreed to sell the land after obtaining permission from the Collector within a period of one month and the rest of the sale consideration was to be paid at the time of registration of the sale-deed. Subsequently, it is stated by the plaintiff that the defendant applied for grant of permission from the Collector, Durg and the Collector Durg on 05.07.2006 granted permission under Section 165 (6) of the Chhattisgarh Land Revenue Code. The plaintiff had stated that he was ready and willing to purchase the said land but for some reason or the other the sale was deferred. It is further pleaded that when the defendant was further persuaded to execute the sale-deed, the same was denied on the ground that if further additional amount is paid then he is ready to execute the sale-deed and ultimately the execution of sale-deed was denied. In order to perform the part of contract, the legal notices were issued on 30.12.2005, 05.07.2007, 20.07.2006 & 05.09.2006. Thereafter, the suit for specific performance was filed.

3. In reply to the averments, it was stated that the defendant belongs to Kanwar community (Scheduled Tribe) and he was working at Mumbai. Since he proposed to purchase a house at Goregaon, Mumbai, therefore, he wanted to sell the subject land through a property dealer Animesh Das for sale-consideration of Rs.2,33,800/-. It is further pleaded that since the land could not have been sold without permission of the Collector, therefore, permission was sought for under the Land Revenue Code. Subsequently, in revenue case no. 108A/21 dated 05.07.2006, the Collector granted permission to sell the land to the defendant with a condition that after purchase of property at Mumbai, the sale-deed should be placed on record before the Collector. It is further pleaded that in the meanwhile, since the price of flats at Mumbai escalated and by such sale consideration

the defendant/appellant could not have purchased the property, consequently an application was filed by the defendant to cancel such permission and it was further stated that he was ready and willing to refund the amount of earnest money of Rs.30,000/- with interest.

4. The learned court below after evaluating facts and evidence, decreed the suit in favour of the plaintiff and passed a decree for specific performance in favour of the plaintiff. It was directed that sale-deed of the disputed land be executed in favour of the plaintiff by the defendant. The said judgment and decree is under challenge in this appeal.
5. (i) Shri B.P.Sharma learned counsel appearing for the appellant/defendant would submit that the defendant belongs to Scheduled Tribe community and the permission to sell the land was granted with a rider that after purchase of properties at Goregaon, Mumbai, the sale-deed has to be produced before the Collector confirming the purchase of house at Mumbai. Therefore, if the condition could not be complied, the entire permission to sell the land gets defeated. It was further contended that no issue to this fact that the plaintiff is ready and willing to perform his part of contract was framed by the court below as it was mandatory and in absence thereof, the suit could not have proceeded further. He further submits that once the permission for sale of land has been granted with such rider then in such a case the condition will continue and in absence of failure to perform the same, the permission would be deemed to be canceled. He further submits that during the course of hearing, a plea was raised by the plaintiff that the land has been diverted so as to come out of rigor of Section 165(6) of the Land Revenue Code. He pressed an application filed in this appeal under Order 41 Rule 27 of C.P.C. wherein it was stated that it was by fraud the land was got

diverted without knowledge of the defendant, which goes to show the bonafide of the plaintiff. He placed reliance on a case law reported in **(2013) 15 SCC page 27 – I.S. Sikandar (dead) by L.Rs. Vs. K. Subramani and others** and submit that the conduct of the plaintiff has to be appreciated prior to and after the decree.

(ii) He further submits that once the permission of the Collector which was necessary for execution of the sale-deed was obtained with a rider, therefore, the application of doctrine of judicial comity and amity is applicable and there cannot be a direction for sale of the land. He relied on case laws reported in **(2007) 5 SCC page 510 – India Household and Health Care Ltd. Vs. LG Household and Health Care Ltd** and **(2009) 9 SCC 435 paras 33 to 3 -Prabhjot Singh Mand and others Vs. Bhagwant Singh and others**. He further lastly relied on a case law reported in **CGLJ 2013 442** and would submit that since no issues were framed on readiness and willingness, therefore, as per the law laid down by the Division Bench of this Court the trial itself could not have been proceeded. He, therefore, submits that the judgment and decree in any case cannot be sustained and in the alternative prays for remand of the case in view of the fact that no issues were framed on readiness and willingness to perform contract by the court below.

6. (i) Per contra, Shri Prashant Jaiswal learned senior counsel assisted by Shri Pravesh Sharma, Advocate, would submit that the issues are framed on admission and denial. He further submits that though no issues were framed by the trial Court on readiness and willingness but both the parties proceeded for trial as it was admitted fact that the defendant has denied to execute the sale deed. He referred to Ex.P/2 notices wherein the plaintiff has averred about readiness and willingness and submits that the parties have not

objected the issues and the issues have been rightly framed. It is further submitted that the condition under Section 165 of the Land Revenue Code like in the nature cannot be part of the order and submits that the land was even diverted prior to agreement. It was further contended that the permission having been granted under section 165(6) of the Land Revenue Code, post sale proceedings cannot be controlled by such permission.

(ii) He further submits that the rise in price of the property has been projected which cannot be a valid ground for refusing specific performance of the contract. He placed reliance on **(2004) 8 SCC page 689 Swarnam Ramchandran (smt). & another Vs. Aravacode Chakungal Jayapalan** and on **(2007) 10 SCC page 231 P.S. Ranakrishna Reddy Vs. M.K. Bhagya Lakshmi & another** and submits that the Supreme Court in that like nature has considered that the defence of rise in price of the property cannot be a ground to refuse specific performance of the contract. Lastly he relied on a case law in **(2013) 8 SCC page 131 para 40 – Satya Jain Vs. Anis Ahmed Rushdie** and submits that sanctity of contract should be a paramount. He therefore contends that here in this case the defendant having executed the contract cannot back out of the same on mere surmises and conjectures. Therefore, the judgment and decree is well merited which do not require any interference.

6. I have learned counsel for the parties at length and have also perused the records of the court below.
7. In this appeal, the agreement of sale is filed and marked as Ex.P-5. It purports that the appellant agreed to sell the land bearing Khasra No.89 of 218 & 89/378 admeasuring 2900 sqft for a sale consideration of Rs.2,33,800/-. Out of the said sale consideration, Rs.30,000/- was paid in advance by way of earnest money. The agreement further

purports that after the permission to sell the land is received from the Collector, the sale deed would be executed within a week. On such application, a proceeding was initiated under Section 165 of the Land Revenue Code. The plaintiff has placed a document vide Ex.P-6 which is a notice issued by the Officer on Special Duty (Diversion of Land). It shows that the land in question was diverted by order dated 05.12.2005. Now reverting to grant of permission u/s 165(6) of the Land Revenue Code, reading of the revenue order sheets cumulatively filed as Ex.P-7 would go to show that the proceedings were carried out under Section 165(6) of the C.G. Land Revenue Code and reading of order sheet dated 05.07.2006 shows that permission to sell the said land was granted with a condition that since the defendant wanted to purchase a flat at Mumbai, permission was granted with a rider that after sale of the said land, the seller will purchase a house at Mumbai and produce the sale deed of the same before Collector. Therefore, in any case, after the sale is made it was for the appellant to perform his part of obligation to produce the copy of sale deed of purchase made at Mumbai before the Collector and pre-sale condition cannot be controlled and made dependent on post sale performance on the part of seller.

8. Here at this juncture, it would be relevant to observe that an application under Order 41 Rule 27 read with Section 151 has been preferred before this appellate Court alleging that diversion which is said to have been carried out in the year 2005 was done at the instance of the purchaser and not by seller. The documents filed along-with application the Order 41 rule 27 show that an application was filed on 28.4.2008 in revenue case to review the order of diversion on the ground that the order of diversion was obtained by false personification of Virendra Kumar. It purports that on the basis

of such submission the diversion order was cancelled. In the facts of the case, therefore, two positions come to fore – one is diversion order in respect of the land which is marked as Ex.P-6 and another is the cancellation order which is sought to be proved under Order 41 Rule 27 of CPC. The plaintiff has placed both the documents i.e., Ex.P-6 that is an order of diversion and Ex.P-7 the order granting permission under Section 165(6) of the Land Revenue Code. Therefore, necessary fall out of documents would be that if the lands were diverted on the date of agreement then in such eventuality permission u/s 165(6) of L.R. Code to sell the land was not necessary. On the other hand, if the documents are admitted under Order 41 Rule 27 in this appeal before this Court then the effect of Ex.P-6 would be rendered negated which would defeat the right of the plaintiff.

9. In the facts and circumstances of the case, in the opinion of this Court, if the documents are admitted without giving any opportunity of hearing, it would lead to denial of right of cross examination as the documents lead to contradictory facts with respect to the diversion of land. The Court cannot also lose sight of the fact that the agreement to sell Ex.P-5 was executed on 30.12.2005 while the diversion certificate Ex.P-6 is dated 05.12.2005 i.e., prior to agreement of sale. Therefore, necessarily one question further comes for adjudication that whether the diversion was actually made prior to the agreement of sale or not ?
10. The appellant/defendant has come out with the plea that by false personification and playing fraud the land was diverted. The documents have been filed before this Court. So if the documents are straight way admitted then it will defeat the right of the plaintiff as he is holding a decree for specific performance. Likewise, if the land was

really diverted as per Exhibit P-6 on 05.12.2005 prior to agreement of sale i.e., 30.12.2005 then in such case to obtain a permission u/s 165(6) of L.R. Code becomes redundant.

11. In a case of specific performance of sale, the discretion plays a vital role in allowing or refusing a decree as principles of fairness plays a vital role. In ***Satya Jain V. Anis Ahmed Rushdie (2013) 8 SCC 131***, Their Lordships of the Supreme Court observed as under :

“40. The discretion to direct specific performance of an agreement and that too after elapse of a long period of time, undoubtedly, has to be exercised on sound, reasonable, rational and acceptable principles. The parameters for the exercise of discretion vested by Section 20 of the Specific Relief Act, 1963 cannot be entrapped within any precise expression of language and the contours thereof will always depend on the facts and circumstances of each case. The ultimate guiding test would be the principles of fairness and reasonableness as may be dictated by the peculiar facts of any given case, which features the experienced judicial mind can perceive without any real difficulty. It must, however, be emphasized that efflux of time and escalation of price of property, by itself, cannot be a valid ground to deny the relief of specific performance. Such a view has been consistently adopted by this Court. By way of illustration opinions rendered in *P.S. Ranakrishna Reddy v. M.K. Bhagyalakshmi (2007) 10 SCC 231*, and more recently in *Narinderjit Singh v. North Star Estate Promoters Ltd., (2012) 5 SCC 712*, may be usefully recapitulated.”

13. Similarly in ***K. Prakash v. B.R. Sampath Kumar (2015) 1 SCC 597***, Their Lordships of the Supreme Court observed as under:

“16. The principles which can be enunciated are that where the plaintiff brings a suit for specific performance of contract for sale, the law insists a condition precedent to the grant of decree for specific performance that the plaintiff must show his continued readiness and willingness to

perform his part of the contract in accordance with its terms from the date of contract to the date of hearing. Normally, when the trial court exercises its discretion in one way or other after appreciation of entire evidence and material on record, the appellate court should not interfere unless it is established that the discretion has been exercised perversely, arbitrarily or against judicial principles. The appellate court should also not exercise its discretion against the grant of specific performance on extraneous considerations or sympathetic considerations. It is true, as contemplated under Section 20 of the Specific Relief Act, that a party is not entitled to get a decree for specific performance merely because it is lawful to do so. Nevertheless once an agreement to sell is legal and validly proved and further requirements for getting such a decree are established then the court has to exercise its discretion in favour of granting relief for specific performance."

(emphasis supplied)

14. The appellant in this case in appellate stage has placed on record the order sheets to show that the diversion of the said land was made by false personification. At the same time, had there been no ground of false personification, the substantial argument of the appellant goes away. Since in such eventuality the land having been diverted, permission u/s 165(6) of the L.R. Code would not be necessary. According to the Order 41 Rule 27 CPC, the additional evidence is not admitted in appeal unless sufficient cause is shown. If the documents in this case sought to be produced in this Court are seen, it will allow the Court to judge the fairness of either on part of the plaintiff or defendant. If the plaintiff has relied on the document of diversion vide Ex.P-6 and if the defendant comes forward and states that it was outcome of false personification then certainly the fairness of parties has to be judged. The Supreme Court in case of specific performance

has time and again repeated that fairness would hold the sway either for allowing or disallowing the suit. At the same time, if the document sought to be placed on record in appellate Court is correct then in such case, the fairness would sway in favour of the defendant appellant. Therefore, in order to remove the clouds of doubts over the case, where the document sought to be produced has a direct and important bearing on the main issue in the suit and where the interest of justice clearly renders it imperative that the document sought to be produced is allowed to be permitted on record, in the opinion of this Court, the documents sought to be produced before this Court under Order 41 Rule 27 are necessary for just decision of the case.

15. Therefore, considering the facts and evidence placed before this Court, in my opinion I deem it proper to evaluate the fairness of the parties and propose to remand back the case for adjudication of the document placed before this Court by way of application under Order 41 Rule 27 of CPC as against the order of diversion Ex.P-6 dated 05.12.2005. The trial Court shall further record its finding about the correctness/fairness of the document filed before this Court under Order 41 Rule 27 of CPC qua Ex.P-6 the certificate of diversion and shall proceed to adjudicate the issue keeping in principles of fairness while further adjudication to decide the rights of parties for grant of decree of specific performance or not.
16. Further, one more aspect needs consideration in this case that reading of the issues would go to show that the trial Court did not frame any question on the point of readiness and willingness of the plaintiff in performance of the contract, therefore, no finding has been recorded. The court though has framed that the defendant has committed breach of agreement since both readiness and willingness and breach of agreement go together in a case of specific

performance of the suit/contract but no finding has been arrived at by the trial Court which is a necessary part in case of specific performance of the suit.

17. The Division Bench of this Court in a case law reported in **2013 (1) CGLJ 442 - Bhagirathi Devangan Vs. Jhaduram and others** has held thus in paras 11, 12 & 13 :

“11. Law on the issue of specific performance is well settled. It is governed by the provisions of Specific Relief Act read with Form No.47 of Appendix-A appended to the Code of Civil Procedure. So far as requirement of readiness and willingness on the part of the plaintiff is concerned, it is provided in Section 16(c) of the Specific Relief Act, which reads as under:

16. personal bars to relief – Specific performance of a contract cannot be enforced in favour of a person.

(a) who would not be entitled to recover compensation for its breach; or

(b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or willfully acts at variance with, or in subversion of the relation intended to be established by the contract;

(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 according to its true construction.”

12. Likewise Form No.47 of Appendix A in C.P.C. Reads as under:

SPECIFIC PERFORMANCE (No.1)

(Title)

A.B., the above named plaintiff, states as follows :-

1. By an agreement dated the day of and signed by the defendant, he contracted to buy of [or sell to] the plaintiff certain immovable property therein described and referred to, for the sum of rupees.
2. The plaintiff has applied to the defendant specifically to perform the agreements on his part, but the defendant has not done so.
3. The plaintiff has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice.

[As in paras 4 and 5 of Form No.1]

6. The plaintiff claims that the Court will order the defendant specifically to perform the agreement and to do all acts necessary to put the plaintiff in full possession of the said property [or to accept a transfer and possession of the said property] and to pay the costs of the suit.”

13. It is, therefore, clear on mere perusal of Section 16(c) read with Form No.47 *sin quo non* for the plaintiff in case of claiming specific performance of a contract is to plead and prove that he has performed or has always been ready and willing to perform the essential terms of the contract on which he has filed a suit and which entitles him to claim decree for specific performance of a contract. In the absence of these material pleadings and evidence, issue and lastly the findings, the suit cannot either be dismissed or decreed or rather it cannot proceed.”

- 18.** Therefore, applying the aforesaid principles to the present case along-with the fact that certain documents have been placed on record before this Court at the appellate stage, in the opinion of this

Court, the matter requires to be remitted back to the trial Court for adjudication afresh. Therefore, the judgment and decree is set aside. Accordingly the matter is remitted back to the trial Court to decide the matter afresh by framing an issue of readiness and willingness on the part of plaintiff. The trial Court shall also afford proper opportunity to the parties i.e., plaintiff and defendant to adduce further evidence with respect to readiness and willingness and adjudicate the fairness of documents Ex. P-6 and document filed along-with the appeal and shall allow the parties to lead evidence and thereafter shall adjudicate the case afresh in terms of observations made at Paras 14 & 15 of this order.

19. In the facts and circumstances of the case, there shall be no order as to costs.

**Sd/-
(Goutam Bhaduri)
Judge**