

HIGH COURT OF CHHATTISGARH, BILASPUR

F. A. No. 133 of 2005

1. Ramesh Gandhi, son of Late Girdharilal Gandhi, aged about 42 years, resident of Kamptee Line, Rajnandgaon, Chhattisgarh.
2. Suresh Chand Gandhi, son of Girdharilal Gandhi (since dead) represented through
 - 2(a) Smt. Shanta Bai, wife of Late Suresh Gandhi, aged about 52 years,
 - 2(b) Ritesh Gandhi, son of Late Suresh Gandhi, aged 33 years.
 - 2(c) Ashish Gandhi, son of Late Suresh Gandhi, aged 28 years,
 - 2(d) Devesh Gandhi, son of Late Suresh Gandhi, aged about 26 years,
 - 2(e) Smt. Rajshree Gandhi, daughter of late Suresh Gandhi, aged about 31 years.

All residents of Kamptee Line Rajnandgaon (C.G).

3. Naresh Gandhi, son of late Girdharilal Gandhi (since dead) represented through
 - 3(a) Smt. Krishna Gandhi, wife of Late Naresh Gandhi, aged about 42 years
 - 3(b) Yogesh Gandhi, son of Late Naresh Gandhi, aged about 9 years
 - 3(c) Ku. Leena Gandhi, daughter of Late Naresh Gandhi, aged about 13 years

3(b) & 3(c) are represented through their mother Smt. Krishna Gandhi [3(a)]

All residents of Kamptee Line Rajnandgaon, Chhattisgarh

.... **Appellants**

Vs.

1. Krishnalal, son of Kartar Singh, aged about 42 years, Occupation Forest Contractor, Resident of Balod, Tahsil, Balod, District Durg (C.G) – (presently residing at Station Road near Gurdwara, Durg)

2. Inderchand, son of Joharmal (since dead)
- 2(a) Smt. Kamla Devi, wife of Late Inderchand Jain, aged about 52 years,
- 2(b) Shatilal, Son of Late Inderchand Jain, aged about 32 years
- 2(c) Ramesh Kumar, son of Late Inderchand Jain, aged about 29 years,
- 2(d) Mahaveer, son of Inderchand Jain, aged about 19 years,
- 2(e) Pushpa Bai, daughter of Inderchand Jain, aged about 27 years
- 2(f) Meena Bai, daughter of Inderchand Jain, aged about 22 years,
- 2(g) Premlata, daughter of Inderchand Jain, aged about 18 years

Respondents 2(d), 2(f) & 2(g) were represented by 2(b) before the trial Court.

All residents of Bhojpara, Durg (C.G.

3. Shri Madanlal Mundra, son of Unknown, aged about 62 years, Occupation, Grain Merchant, Resident of Tahsil Balod, District Durg (C.G)
4. Anandilal Mantri, son of unknown, aged about 51 years , Occupation Medical Shop, resident of Tahsil Balod, District Durg (C.G)
5. State of Madhya Pradesh (Now Chhattisgarh) through the Collector, District Durg (C.G)

For the Appellant	:	Mr.Anup Majumdar, Advocate
For Respondent No.1	:	Mr. H.B. Agrawal, Sr. Advocate with Mr. Pankaj Agrawal, Advocate.
For the State/Respondent	:	Ms. M. Asha, Panel Lawyer.

HON'BLE SHRI JUSTICE GOUTAM BHADURI

JUDGMENT/ORDER ON BOARD

01/10/2015

1. The appeal is against the judgment and decree dated 04.04.2005 passed in Civil Suit No.1-A/1998 by the Additional

District Judge, Durg, whereby the suit for specific performance was decreed.

2. As per the pleadings, the original plaintiff namely Kishanlal had entered into an agreement to sell the land bearing Kh. No. 614 admeasuring 16.95 decimal situated at village Balod with one Inderchand, who was arrayed as defendant No.4 in the plaint. It was pleaded that the land was owned by Ramesh Chand, son of Girdharilal Gandhi, defendant No.1, Suresh Chand Gandhi, defendant No.2 (since dead) and Naresh Gandhi, defendant No.3 (since dead), appellants herein. It was pleaded that the agreement of sale was entered with Respondent No.4 for the reason that a power of attorney was bestowed on Inderchand by the original owners namely Ramesh Gandhi, Suresh Chand Gandhi and Naresh Gandhi to sell the land. Consequent to power bestowed upon Inderchand, the agreement of sale was executed and it was agreed to purchase the land for a consideration @ Rs.1500/- per acre. Out of the total sale consideration of Rs.10,875/-, an amount of Rs.5001/- was paid to the said Inderchand in advance and thereafter, plaintiff Kishanlal was placed over possession of the part of land admeasuring 7.25 decimal through defendant No.4 Inderchand. It was further contended that original defendant No.4 Inderchand was in possession of the power of attorney which was signed by defendant No.1 Suresh Chandra. It was further pleaded that after receipt of the amount, the sale deed was not executed, but a suit for ejectment was filed by the original owners which was bearing No.3-A/1998. In such suit for ejectment, during the pendency of

suit, one of the plaintiffs had died, consequently, the suit was dismissed having abated. It was stated that in such suit for ejectment the existence of power of attorney in favour of Inderchand by original owners was admitted. So prayer was made for specific performance of sale deed.

3. The defendants filed their written statement and contended that the original defendant No.4 Inderchand was not bestowed with power to sell the land. It was further contended that the power of attorney holder did not have any right to sell the land or to execute an agreement of sale and he was only given the right to manage and look after the properties which necessarily did not include to sell. It was further contended that by force, the plaintiff had taken over the possession of the part of property and this fact was disclosed when the defendant visited the spot on or about 01.04.1971 and the defendants were never willing to sell the property. It was further contended that the defendants requested the plaintiff to vacate the premises but it failed. So as a result, in the written statement the counter claim and the amount for mesne profits were also claimed. It was, therefore, contended that the plaintiffs are not entitled for any decree for specific performance of sale.

4. Admittedly, during the pendency of the suit, one of the defendants namely Suresh Chand Gandhi, Defendant No.2 died and his legal heirs were brought on record as 2(a) to 2(e). Likewise, Naresh Gandhi, the original defendant No.3 also died and his legal heirs were brought on record from 3(a) to 3(c). Similarly, original defendant No.4 Inderchand who was said to be

power of attorney holder of the land owner and had executed the agreement of sale also died and his Legal heirs were brought on record from 4(a) to 4(g). These legal heirs of Inderchand did not contest the suit and subsequently proceeded ex-parte.

5. The learned trial Court on the basis of pleading and evidence decreed the suit for specific performance. Therefore, the instant appeal is by defendant No.1 Ramesh Gandhi and two others. Since the original defendants Suresh Chand Gandhi and Naresh Gandhi had breathed their last during the pendency of suit, they are represented through their legal representatives.

6. Shri Anup Majumdar, learned counsel appearing on behalf of the appellants would vehemently submits that the judgment and decree suffers from illegality inasmuch as the agreement dated 12.05.1971, which engrafts the fact that possession was handed over, is not registered and properly stamped, therefore, the agreement could not have been taken cognizance as it was inadmissible in evidence. He further submits that even otherwise, the agreement which speaks of power of attorney, the document of said power of attorney was not produced and proved since the agreement Ex.P-1 is not executed by the original owners and it is executed only by the power of attorney holder. In absence of proof of power of attorney, no presumption can be inferred. He further submits that admittedly the land had a joint ownership and even if for the sake of convenience the document Ex.P-3 which is a copy of the plaint of ejectment suit is taken into consideration, it will only reflect that only one of the co-owners had given the consent to manage the property without intention to sell and

therefore, even if the contents of Ex.P-3 are taken into consideration, it will not amount to a deemed consent by the other co-owners. Therefore, the decree for specific performance ought not to have been granted. He further submits that under the facts of the case, the discretion should be exercised in favour of the appellants.

7. Per contra, Shri H.B. Agrawal, learned Senior counsel appearing on behalf of respondent No.1 assisted by Shri Pankaj Agrawal, Advocate, would submit that the judgment and decree is well merited which do not call for any interference. He further submits that the agreement Ex. P-1, established the fact that the power of attorney was given to Inderchand (since deceased) and therefore, the argument cannot be sustained that the power of attorney holder did not have any power to sell the land.

8. I have heard learned counsel for the parties and have also perused the documents available on record.

9. A perusal of the case file would show that a suit was initially brought by Kishan Lal against Ramesh Chand Gandhi, Suresh Chand Gandhi and Naresh Gandhi and alongwith them, Inderchand was also made a party in the array of defendants. Subsequently due to death of few of the parties, the legal heirs were brought on record. The suit was brought for specific performance of agreement of sale dated 12.05.1971 (Ex.P-1). The agreement purports that the sellers have been described as Ramesh Kumar, Suresh Kumar and Naresh Kumar and it further records that they were acting through Inderchand. Further

reading of the agreement Ex.P-1 would show that the said agreement was executed on the basis of power of attorney dated 01.04.1971. It further records that after the sale consideration was made, the possession of property was handed over to purchaser i.e., Kishanlal, the plaintiff.

10. A perusal of the entire documents which are exhibited show that the power of attorney dated 01.04.1971 which has been referred in the agreement is not on record. On the contrary, the case file would indicate that an application u/s 65 of the Indian Evidence Act to lead secondary evidence was filed and in such application, it was contended that the power of attorney executed in favour of Inderchand was held by and was in possession Inderchand himself which was not produced by the legal heirs of Inderchand who were brought on record. Therefore, by such application under Section 65 of the Evidence Act, the prayer was made to lead secondary evidence. The said application under section 65 of the Evidence Act was numbered as I.A.No.8 and was dismissed by an order dated 17.11.2000. After such order rejecting the prayer to lead secondary evidence was passed on 17.11.2000, the record would show that it was not further subject of challenge before any appellate court or revisional court. Consequently, the said order whereby the prayer to lead secondary evidence was rejected, has attained its finality.

11. Further reading of the evidence and documents would show that copy of plaint has been produced by the plaintiff which is of a suit for ejectment filed by Ramesh Chandra, Suresh Chandra Gandhi and Naresh Chandra, the owners of land against

Kishanlal and others. This document is marked as Ex.P-3. In the said plaint at para 5, it is pleaded that while the plaintiff No.2 i.e., Suresh Chandra Gandhi was issuing the receipt for the lease of Mango grove, Inderchand persuaded him to write a line authorising him to negotiate for sale of land and therefore, a line was added in such receipt. However, it has been pleaded that the said writing on the receipt by one of the sharer was not intended to authorise Inderchand to sell the land. It explained the fact that in order to manage the property, one line was added and in any case, it categorically confirms the fact that other plaintiffs namely Ramesh Chandra and Naresh Chandra had not authorised Inderchand to negotiate for any sale. Even if it is accepted that one of the plaintiffs i.e. Suresh has given power to sell, it cannot be taken to be omnibus grant of delegation of power by other plaintiffs Ramesh Chandra and Naresh Chandra authorising Inderchand for sale of land.

12. Admittedly, in this case, the document i.e., power of attorney has not been placed on record. The plaintiff witness P.W.1 Shankarlal had stated that when he had gone to the office of Kishanlal, he stated that he was purchasing land of Gandhi and others and an agent was sitting there. This witness has further stated that Inderchand also stated that he was authorised to sell the land. P.W.1 has further stated that apart from the agreement one paper was also lying there. If by inference it is held that the said agreement was a power of attorney, in such a case, since the right to lead secondary evidence to prove the power of attorney was rejected, the plaintiff did not call for any witness i.e., legal

heirs of Inderchand, who were on record, through the intervention of the court to prove the possession and existence of power of attorney.

13. Under these circumstances, in absence of power of attorney it cannot be held that Inderchand was authorised by all the plaintiffs to sell the land in the capacity of power of attorney holder. In the result, the delegation of power to Inderchand to sell the land in favour of Kishanlal becomes doubtful.

14. Further reading of agreement of sale would show that it purports that the possession was handed over to the purchaser. During the course of evidence, when the agreement was marked as Ex.P-1, it was objected by the counsel and in response to such objection, the court recorded that the admissibility of the document would be decided at the time of final adjudication.

15. Therefore, certainly there was objection to the admissibility of the document for not being properly stamped, as such, the bar of Section 36 of Indian Stamp Act, 1899 contemplates that admission of instrument cannot be questioned if it has been admitted in evidence as necessarily the objection was made.

16. It is assumed that by agreement of sale, certain possession of part of land was given to Kishanlal, then necessarily provisions of Section 47-A of the Indian Stamp Act, 1899 would come into play. Section 47-A of the Indian Stamp Act speaks that agreement to sell would not be subject to payment of stamp duty which is payable on the sale deed. The explanation appended to

Article 23 of Schedule 1-A of the Stamp Act as substituted by the M.P.Act 19 of 1989 which governs the issue at the relevant time reads as under:

“Explanation.- For the purpose of this article, where in the case of agreement to sell immovable property, the possession of any immovable property is transferred to the purchaser before execution or after execution of such agreement without executing the conveyance in respect thereof, then such agreement to sell shall be deemed to be a conveyance and stamp duty thereon shall be leviable accordingly.

Provided that the provisions of Section 47-A shall apply *mutatis mutandis* to such agreement which is deemed to be a conveyance as aforesaid, as they apply to a conveyance under that section :

Provided further that where subsequently a conveyance is effected in pursuance of such agreement of sale, the stamp duty, if any, already paid and recovered on the agreement of sale, which is deemed to be a conveyance shall be adjusted towards the total duty leviable on the conveyance subject to a minimum of Rs.10.”

17. The said explanation has been inserted by M.P. Act 19 of 1989 with effect from 15.11.1989. By reason of the said provision, thus, a legal fiction has been created. Although ordinarily an agreement to sell would not be subject to payment of stamp duty which is payable on a sale deed, but having regard to the purpose and object it seeks to achieve, the legislature thought it necessary to levy stamp duty on an instrument

whereby possession has been transferred.

18. In the instant case, if the documents are examined, it would reveal that at the time of agreement, the possession was handed over. Therefore, if the possession was handed over, then in such a case, a perusal of Ex.P-1 would show that only revenue stamp of 20 Paise has been affixed which at any point of time cannot be said to be stamp paper on conveyance of sale of the subject land.

19. Here in the instant case, reading of evidence would show that the instrument Ex.P-1 was admitted with such objection to decide the validity of the said document at the time of final adjudication of the case. Necessarily, therefore, by application of law, since the part of possession of land was purported to be handed over, the agreement even if is taken into face value was required to be duly stamped and in absence of such stamp, the same cannot be accepted and admitted to evidence.

20. In the result, since the agreement Ex.P-1 itself could not been admitted by the Court, consequently, no relief for specific performance could have been granted on the basis of such agreement.

21. With respect to the counter claim, the order dated 14.02.2000 Ex.P-2 is on record whereby the suit for ejectment was dismissed, as abated, for which, as has been submitted at bar a separate appeal is pending. In the facts and circumstances of the case, as appears, the property has to pass through another

bout of litigation.

22. For the reasons stated hereinabove, the appeal is allowed. The judgment and decree of the court below dated 04.04.2005 passed in Civil Suit No.1-A/1998 cannot be sustained and it is hereby set aside.

23. Parties shall bear their own costs. A decree be drawn accordingly.

**Sd/-
GOUTAM BHADURI
JUDGE**

Rao