

HIGH COURT OF CHHATTISGARH, BILASPUR**FA No. 59 of 2007**

(Arising out of judgment dated 24-3-2017 passed by the 11th Additional District Judge, Fast Track Court, Raipur, in civil suit No.92-A/2004)

- Chandrashekar Tiwari (dead) through LRs.
- 1. Smt. Anita Tiwari, aged about 41 years, W/o Late Shri Chandrashekhar Tiwari, R/o Hari Santosh Bhawan, Sadar Bazaar, Raipur (C.G.)
- 2. Ku. Apoorva Tiwari, aged about 23 years, D/o late Shri Chandrashekhar Tiwari, R/o Hari Santosh Bhawan, Sadar Bazaar, Raipur (C.G.)
- 3. Ku. Ambara Tiwari, aged about 19 years, D/o late Shri Chandrashekhar Tiwari, R/o Hari Santosh Bhawan, Sadar Bazaar, Raipur (C.G.)
- 4. Ku. Shivangi Tiwari, aged about 13 years, through her mother Smt. Anita Tiwari, W/o Late Shri Chandrashekhar Tiwari, R/o Hari Santosh Bhawan, Sadar Bazaar, Raipur (C.G.)

---- Appellants

Versus

- 1. Mahendra Jain, S/o Late Shri Sevaram Jain, R/o Banjari Road, Raipur (C.G.)
- 2. Sanat Jain, S/o Late Shri Sevaram Jain, R/o Banjari Road, Raipur (C.G.)
- 3. Ashok Jain S/o Late Shri Sevaram Jain, Banjari Road, Raipur, Tahsil-Raipur, District-Raipur,
- 4. Anil Jain S/o Late Shri Sevaram Jain, Banjari Road, Raipur, Tahsil-Raipur, District-Raipur,Plaintiffs
- 5. Smt. Sushila Tiwari Wd/o Late Shri Narendra Tiwari, Rohinipuram, behind Ayurvedic College, Raipur (C.G.)

6. Suresh Tiwari S/o Late Shri Narendra Tiwari, Rohinipuram, behind Ayurvedic College, Raipur (C.G.)
7. Rakesh Tiwari S/o Late Shri Narendra Tiwari, Rohinipuram, behind Ayurvedic College, Raipur (C.G.)
8. Ajay Mishra S/o Late Biharilal Mishra, Byron Bazar, Fawara Chowk, Raipur (C.G.)
9. Sunand Vishwas, aged 36 years, S/o Satya Vishwas, Ravi Nagar, Raipur (C.G.)
10. Ajay Jain, aged 42 years, S/o Suresh Chandra Jain, Tagore Nagar, Raipur, (C.G.)
11. Rafeek Sethi, aged 59 yrs, S/o Abdul Sattar, Khetan Garage, Moudhapara, Raipur.
12. Ashok Kumar S/o Jhamandas Choithwani, at Gopal Jewellers Banjari Road, Raipur (C.G.)
13. Shyamlal S/o Late Lekhraj Choithwani, at Gopal Jewellers Banjari Road, Raipur (C.G.)
14. Anil Kumar S/o Late Lekhraj Choithwani, at Gopal Jewelers Banjari Road, Raipur, Tahsil-Raipur, District-Raipur,
15. Prabhuram Sahu, aged 66 yrs, S/o Shri Ram Singh Sahu, R/o House No.46/298, Banjari Road, Raipur (C.G.)
16. Pannalal Sahu, aged 46 yrs, S/o Goverdhan Sahu, House No.46/298 Banjari Road, Raipur (C.G.)....Defendants No. 1 to 3 and 5 to 13.

---- Respondents

For Appellants

Shri Kishore Bhaduri, Advocate with
Shri Pawan Kesharwani, Advocate

For Respondent No.1 to 4

Shri V.V.S. Murthy, Sr. Advocate with
Shri S.S. Rajput, Advocate

For Respondents No.5 to 16 None

Hon'ble Shri Justice Prashant Kumar Mishra
Hon'ble Shri Justice Arvind Singh Chandel

Judgment on Board

By

Prashant Kumar Mishra, J.

19/09/2017

1. The defendant No.4 (Chandrashekhar Tiwari) in the suit has preferred this appeal under Section 96 of the Code of Civil Procedure, 1908 (for short 'the CPC') assailing the legality and validity of the impugned judgment and decree passed by the trial Court directing the defendant No.4 Chandrashekhar Tiwari and defendant No.5 Ajay Mishra to execute the sale deed in favour of the defendants No. 6 Sunand Vishwas, No.7 Ajay Jain, No.8 Rafeek Sethi after receiving an amount of Rs. 8,77,500/- from them and handover vacant possession of the suit property. The decree, thereafter, directs the defendants No.6, 7 and 8 to obtain balance sale consideration from the defendant No.4/appellant and handover vacant possession to the plaintiffs. This part is vague, as it does not indicate as to whether the sale deed would or would not be executed in favour of the plaintiffs. A plain reading of para 39 of the impugned judgment indicates that the sale deed is to be executed in favour of the defendant No.4 after receiving the balance sale consideration from him pursuant to the agreement (Ex.P/2).

2. The suit for specific performance for sale of the suit property admeasuring 2275 sq.ft. situated at Banjari Mandir Road, Golbazar, Raipur bearing Municipal Corporation No.49/298, has been preferred by the plaintiffs namely; Mahendra Jain, Sanat Jain, Ashok Jain and Anil Jain.
3. The **first sale agreement** was between defendants No.1 Sushila Tiwari, No.2 Suresh Tiwari and No.3 Rakesh Tiwari with the defendants No.4 Chandrashekhar Tiwari and No.5 Ajay Mishra on 24.07.2002 (Ex.P/23). Thereafter, defendants No.4 & 5 executed **second sale agreement** with defendant No.6 Sunand Vishwas, No.7 Ajay Jain, No.8 Rafeek Sethi on 06.08.2002 (Ex.P/1). The **third sale agreement** was executed between defendant No. 6 Sunand Vishwas, No.7 Ajay Jain, No.8 Rafeek Sethi in favour of the present plaintiffs Mahendra Jain, Sanat Jain, Ashok Jain and Anil Jain on 12.09.2002 (Ex.P/2). The **fourth agreement** was executed by the tenants namely; Prabhuram Sahu (defendant No.12) and Pannalal Sahu (defendant No.13) as seller in favour of the defendant No.4 Chandrashekhar Tiwari and Plaintiff No.3 Ashok Jain on 16.09.2002 (Ex.P/3). In this document the defendants No.1 Sushila Tiwari, No.2 Suresh Tiwari and No.3 Rakesh Tiwari have signed as consenter.

4. According to the plaintiffs, since they have paid the amount to the defendants No.1 Sushila Tiwari, No.2 Suresh Tiwari and No.3 Rakesh Tiwari pursuant to the sale agreement dated 12.09.2002 (Ex.P/2) and have also paid the amount to the defendants No.4 Chandrashekhar Tiwari and No.5 Ajay Mishra through the defendants No.1 Sushila Tiwari, No.2 Suresh Tiwari and No.3 Rakesh Tiwari at the time of execution of agreement dated 06.08.2002 (Ex.P/1) as also for the reason that in the fourth agreement (Ex.P/3) the defendants No.1 to 5 have either signed as consenter or in some other capacity in favour of one of the plaintiff Ashok Jain, they are entitled for a decree for specific performance.
5. Out of 13 defendants, the defendants No.1 to 5 have filed their common written statement and contested the suit. The defendant No.7 Ajay Jain has filed his written statement, but has, thereafter, remained *ex parte*. The other defendants have not even filed their written statement. While the defendants No.1 to 5 have denied the suit allegations, the defendant No.7 has impliedly admitted the suit allegations.
6. The trial Court framed as many as 7 issues for adjudication. The issue No.1 was in respect of the agreement dated

06.08.2002 and receipt of advance by the defendants No.4 Chandrashekhar Tiwari and No.5 Ajay Mishra. The issue No.2 was also in respect of receipt of earnest money pursuant to the agreement dated 06.08.2002. Issue No.3 was in respect of agreement dated 12.09.2002 between the defendants No.6 to 8 and the plaintiffs . Issue No.4 was in respect of agreement between the defendants No.1 to 3 in favour of the defendants No.4 and 5 as well as the defendants No.6 to 8 has not been adjudicated in view of the subsequent development where the defendants No.1 to 3 have executed the sale deed in favour of the defendants No.4 and 5 during pendency of the suit.

7. The execution of agreement and receipt of earnest money involved in issues No.1 to 3 is practically admitted by the learned counsel appearing for the appellants in course of argument and issue No.4 having not been dealt with by the trial Court for the reason mentioned above, we shall confine our judgment on issue No.5 which was the core issue between the parties relating to plaintiffs entitlement to obtain a decree for specific performance against the defendants No.1 to 3 and 12 & 13. It is also important to notice that the trial Court has framed issue No.6 as to whether the defendants have colluded amongst themselves to execute a sale deed by defendants

No.9 Ashok Kumar, No.10 Shayam Lal and No.11 Anil Kumar to cause pecuniary damage to the plaintiffs, however, this has been decided against the plaintiffs.

8. Be that as it may, hereinafter, we shall dwell on the core issue No.5 to decide whether the trial Court's decree is sustainable in law.
9. Admittedly, there is no agreement in black & white between the plaintiffs and the present appellant, who has been directed by the trial Court to handover possession to the plaintiffs.
10. The entire marshaling of evidence and the findings arrived on the issue No.5 by the trial Court is based on assumption, presumption, conjecture and surmises. The trial Court has assumed that since there was an agreement between the defendants No.1 to 3 with the defendants No.4 and 5 vide Ex.P-23 on the basis of which the defendants No.4 & 5 subsequently executed an agreement on 06.08.2002 (Ex.P/1) in favour of the defendants No. 6 to 8, who, in turn, executed an agreement on 12.09.2002 (Ex.P/2) with the plaintiffs and for the reason that the amount received by the defendants No.4 and 5 from the defendants No. 6 to 8 pursuant to the agreement dated 06.08.2002 was, in fact, paid through cheque issued from

the account of the plaintiffs, by virtue of both these agreements as also for the subsequent agreement dated 16.09.2002 executed by the tenants in favour of Ashok Jain and the present appellant/defendant No.4, the plaintiffs are entitled for a decree because, according to the trial Court, in fact, there appears a deal between the plaintiffs and the defendants No.4 and 5, as the defendants No.4 and 5 have received the amount of advance from the defendants No.6 to 8 by way of cheque issued from the plaintiffs account.

11. We are afraid, the trial Court, in a suit for specific performance, is not entitled to infer existence of any such agreement contrary to or in deviation of the written agreement available on record. In a suit concerning agreement to sell involving immovable property the intent of the contracting parties has to be tangible and definite. It cannot be hidden or camouflaged because there can be no evidence of a hidden agreement or intent of the parties. Merely because the earnest money paid to the defendants No.4 and 5 for agreement dated 06.08.2002 was issued from the plaintiffs account, an agreement between the plaintiffs and the defendant No.4 cannot be assumed.

12. This assumption is otherwise contradicted and demolished from the endorsement made in the agreement Ex.P/1 where the defendants No.6 to 8 have got refund of the advance of Rs.12.00 lacs which they had paid to the defendants No.4 and 5. This document has been admitted in evidence and the plaintiffs have not challenged the authenticity of this document. Defendant No.7 has filed his written statement, but has not stated anything about this endorsement made in the document, therefore, in view of this clear endorsement, the trial Court's finding that the amount was paid by the plaintiffs to the defendants No.6 to 8 may not be true, even if a cheque was issued from their account. In any case it is not a safe proposition to cull out an agreement in view of multiple transactions between the parties.
13. There is another reason as to why the plaintiff is not entitled for a decree for specific performance at the threshold because during subsistence of previous agreement dated 12.09.2002 one of the plaintiff Ashok Jain has entered into an agreement with the tenants Prabhuram Sahu and Pannalal Sahu. In this agreement Prabhuram Sahu and Panna Lal Sahu have claimed title on the basis of will executed by the original owner in their favour. By agreeing to purchase the property from Prabhuram

Sahu and Pannalal Sahu one of the plaintiff namely Ashok Jain has created a doubt on the title of the defendants No.6 to 8 who are the legal heirs of the original owner.

14. It is a settled proposition of law that if a prospecting purchaser is desirous to purchase a property from the prospecting vendor by virtue of agreement to sell, he has to respect the title of his vendor. If during subsistence of the agreement the prospecting purchaser raises a doubt over the title of his vendor, it demonstrates his reluctance to purchase the property from the owner with whom he has already contracted. In such a situation, the prospecting purchaser can never be said to be ready and willing to perform his part of contract to purchase the property from the real owner.
15. It is further important to notice that in the suit the plaintiff has prayed for a direction to the defendants No.1 to 8 and 12 & 13 for execution of agreement and handing over possession. The plaintiff also prayed for a direction to the defendants No.1 to 8, and 12 & 13 to perform the agreement dated 24.07.2002 (Ex.P/23), 06.08.2002 (Ex.P/1) and 16.09.2002 (Ex.P/3) by paying the balance sale consideration to the person who is entitled for it and, thereafter, handover possession of the suit

property to the plaintiff. The plaintiffs have also prayed for issuance of permanent injunction to the defendants not to sale the property to any other person and an alternative prayer was also made for refund of the amount.

16. Despite such reliefs claimed in the plaint, the trial Court has framed the issue No.5 as to whether the plaintiffs are entitled for execution of the sale deed in their favour by the defendants No.1 to 3 and 12 & 13. The trial Court has not framed any issue as to whether the plaintiffs are entitled for execution of sale deed by the defendants No.4 & 5 nor there is any issue framed that the defendants No.4 & 5 are liable to handover possession to the plaintiffs. If issue No.5 is the only issue relating to the plaintiffs entitlement for issuance of a decree against the defendants No.1 to 3 and 12 & 13, the decree issued by the trial Court in para 39 of the judgment is such a decree for which neither the plaintiff has prayed for nor any issue was framed to that effect.

17. We are really surprised as to how the trial Court could have issued such a decree for which there is no prayer in the plaint nor any issue was framed. The trial Court has acted as if it has noticed the real intent behind the multiple transactions and has

passed a decree on such notions forgetting the pleadings, evidence and issues framed for trial.

18. Considering the entire facts situation of the case from all possible angles, the impugned judgment and decree is not sustainable in law. It deserves to be and is hereby set aside. Consequently, the suit preferred by the plaintiffs is dismissed with costs throughout. The plaintiffs shall bear the appellants' cost in the trial Court as well as in this appeal.

19. As a sequel, the appeal is allowed with cost(s).

Sd/-

Judge
Prashant Kumar Mishra

Sd/-

Judge
Arvind Singh Chandel

Gowri