

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Misc. Appeal No. 5 OF 2017**

1. Hemant Kumar Nebhani Aged About 29 Years S/o Late Ramesh Kumar Nebhani, R/o Shyam Nagar, Near Punjabi Gurudwara, Raipur, Town, Tahsil And District- Raipur, Chhattisgarh
2. Sunil Kumar Nebhani Aged About 28 Years S/o Late Ramesh Kumar Nebhani, R/o Shyam Nagar, Near Punjabi Gurudwara, Raipur, Town, Tahsil And District- Raipur, Chhattisgarh(Plaintiffs)

---- Appellants**Versus**

1. Suny Kumar Tolani aged about 30 years, S/o Shri Kaltar Tolani, R/o Shyam Nagar, Near Gurunanak Hall, Opposite Preet Flour Mill (Aata Chakki), Raipur, Town, Tahsil And District Raipur, Chhattisgarh(Defendant No.1)
2. State of Chhattisgarh, Through Collector, Raipur, Town, Tahsil and District Raipur, Chhattisgarh(Defendant No.2)

---- Respondents

For Appellants	:	Mr. Sachin Singh Rajput, Advocate
For Respondent No.1	:	Mr. Bhaskar Payashi, Advocate
For Respondent No.2/State	:	Mr. R. K. Jaiswal, Panel Lawyer

Hon'ble Shri Justice Sanjay Agrawal**Order On Board****10/11/2017**

1. This is a miscellaneous appeal preferred by the plaintiffs/appellants under Order 43 Rule 1(r) of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC') against the order dated 21.6.2016 passed by the Second Additional District Judge, Raipur, District Raipur (C.G.) in Civil Suit No. 14-A/2016, by which, the learned trial Court has rejected the plaintiffs' application filed under Order 39 Rule 1 & 2 of the CPC.
2. The undisputed facts of the case are that the plaintiffs have instituted a suit claiming specific performance of the contract based upon two agreements,

both executed on 28.12.2008 by submitting *inter alia*, that as per the alleged agreements, a sum of Rs.46,60,000/- (Forty Six Lacs Sixty Thousand only) and Rs.70,00,000/-, (Seventy Lacs only), total sum of Rs.1,16,60,000/- (One Crore Sixteen Lacs Sixty Thousand only) was paid to defendant No.1 in presence of the witnesses and despite of that, defendant No.1 is not executing the registered deed of sale in their favour in pursuance to the alleged agreements. It is pleaded further that when the registered deed of sale in pursuance to the alleged agreements was not executed, despite the issuance of notice, dated 23.08.2014, the plaintiffs have been constrained to file the suit in the instant nature for specific performance of the contract.

3. Alongwith the aforesaid claim, an application enumerated under Order 39 Rule 1 and 2 of the CPC for issuance of temporary injunction has also been made by the plaintiffs praying for restraining defendant No. 1 from creating any third party interest over the suit property.

4. Defendant No.1 has contested the aforesaid claim and denied very specifically with regard to the execution of the alleged agreements to sale and pleaded further that the suit as framed is apparently barred by time. While reiterating the averments made in the written statement, defendant No. 1 has submitted his reply to the plaintiffs' said application for issuance of temporary injunction and praying for its rejection.

5. The trial Court after considering the prima facie materials available on record and that by considering the complaint dated 26.09.2012 made by the plaintiffs has come to the conclusion that alleged performance was refused in the year 2012 itself and observed further that the alleged agreements initially did not bear the date till the filing of the said complaint though notarized subsequently on 28.12.2008 which creates a prima facie doubt with regard to the authenticity of the alleged agreements. In consequence, the trial Court has rejected the said

application as three essential ingredients required for issuance of temporary injunction are not in favour of the plaintiffs.

6. Being aggrieved, the plaintiffs have preferred this miscellaneous appeal. Mr. Sachin Singh Rajput, learned counsel for the appellants submits that the order impugned as passed by the trial Court rejecting the application filed under Order 39 Rule 1 and 2 of the CPC for issuance of temporary injunction without considering the deed of partnership as submitted and pleaded by the plaintiffs in its proper perspective, is apparently contrary to law. He submits further that in pursuance to the alleged agreements to sale, the entire sale consideration has already been paid by the plaintiffs, however, without considering this material fact, the trial Court has committed an illegality in rejecting the said application for issuance of temporary injunction. He lastly submits that even without considering the consent letter (Annexure A-5), the order impugned has been passed, therefore, the same deserves to be set aside.

7. I have heard learned counsel for the appellants and perused the entire relevant papers annexed with this appeal carefully.

8. The plaintiffs have instituted a suit for specific performance of contract on the basis of two agreements, both executed on 28.12.2008 and praying for issuance of temporary injunction by filing an application under Order 39 Rule 1 and 2 of the CPC. It is pleaded in the plaint that despite the payment of entire sale consideration, defendant No. 1 has failed to execute the registered deed of sale even upon service of notice issued in this regard on 23.08.2014. Therefore, under such circumstances, defendant No. 1 is required to be restrained from creating any third party interest pending decision of the suit, else the plaintiffs would not only suffer an irreparable loss but would be involved in multiplicity of the suit.

9. It is to keep in mind that by virtue of Section 20 of the Specific Relief Act, 1963, the decree for specific performance of contract is discretionary in nature and the Court is not bound to grant such a relief merely because it is lawful to do so. It means, that the burden is heavily upon the plaintiffs to establish the prima facie case that they were always ready and willing to get the sale deed registered in their favour in pursuance to the alleged agreements to sale as the same is *sine qua non* for obtaining such a relief. However, a bare perusal of the alleged agreements would show that the plaintiffs were unable to get the sale deed executed when the alleged agreements were executed as the fund for purchasing the stamp papers were not available to them. Meaning thereby, the sufficient funds were not available to the plaintiffs. Besides, the terms and conditions as stipulated in the alleged agreements would show further that the sale deed was required to be executed either in favour of the plaintiffs or in favour of their choice in the name of any other persons. In view of the said terms and conditions, it is difficult to hold at this stage that the plaintiffs were ever ready and willing to perform their part of the contract.

10. Pertinently to be noted further that while filing the suit for specific performance of contract, one material document like, the complaint dated 26.09.2012 was completely suppressed. The alleged complaint which was filed by defendant No.1 after obtaining the same under RTI would show that on the said date, i.e. 26.09.2012, the complaint was made by the plaintiffs before the concerned police authorities, wherein it was requested that since defendant No.1 is trying to execute the sale deed to someone else, therefore, he be restrained from alienating the suit property. The contention of the plaintiffs as made in the alleged complaint would show prima facie that the cause of action was very well available to them on 26.09.2012 itself. However, a first notice was issued by them to defendant No.1 on 23.08.2014 and the suit was thereafter filed on 18.12.2015. The conduct of the plaintiffs, therefore, can not be overlooked

which shows that they were never ready and willing to get the sale deed executed in pursuance to the alleged agreements.

11. Besides, the consent letter (Annexure A-5) in which the counsel for the appellants has placed his reliance heavily during the course of argument would also not be helpful, as it does not even bear the signature of defendant No. 1. Accordingly, the plaintiffs have failed to establish the three essential ingredients required for issuance of temporary injunction. In view of this fact, I do not find any infirmity in the order impugned as passed by the trial Court rejecting the application filed under Order 39 Rule 1 and 2 of the CPC for issuance of temporary injunction. Consequently, the appeal being devoid of merits is liable to be and is hereby dismissed at admission stage itself.

12. However, I make it clear that I have not applied my mind to the merits of the issues involved in the case and, hence the trial Court would decide the suit strictly in accordance with law on merits uninfluenced by any of the observations of mine, which I have refrained from making on merits. No order as to costs.

Sd/-
(Sanjay Agrawal)
Judge