

HIGH COURT OF CHHATTISGARH, BILASPUR**First Appeal No. 20 of 2009**

- Vijay Thadani, aged about 25 years S/o Preetam Das Thadani, R/o Main Road, Bilha, Tehsil- Bilha, Distt.-Bilaspur (C.G.)

---- Appellant/Plaintiff**Versus**

1. Itwari, aged 38 years, S/o Shri Pandit, Caste- Satnami, R/o Village Kesla, Tehsil Bilha, Distt. Bilaspur (C.G.).
2. State of Chhattisgarh through the Collector, Distt. Bilaspur (C.G.).
3. Manoj Agrawal, aged about 36 years, S/o Mahavir Prasad Agrawal, R/o Ward No. 13, Nagar Panchayat- Bilha, Tehsil Bilha, Distt. Bilaspur (C.G.).

---- Respondents/Defendants

For Appellant	:	Mr. Sudeep Verma, Advocate
For Respondent No.1	:	Mr. Anup Majumdar, Advocate.
For Respondents 2 & 3	:	None

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

Judgment On Board By
Justice Prashant Kumar Mishra

23/08/2017

1. This is plaintiff's appeal under Section 96 of the CPC challenging the judgment and decree passed by the Trial Court dismissing his suit for specific performance of agreement dated 25/11/2004 in respect of 1.28 acres of agricultural land situated at Village- Kesla, Tahsil- Bilha, District- Bilaspur (C.G.).
2. Facts of the case, briefly stated, are that defendant/respondent No.1 had executed the subject agreement for the suit land in favour of the

plaintiff at the rate of Rs. 3,00,000/- per acre, totaling to Rs. 3,84,000/-. Out of which, Rs. 11,000/- was paid in cash as earnest money on the date of agreement itself. The agreement also stipulated that the demarcation of the land shall be carried out by the seller and if the land is found less on the spot, the payment shall be made for the area actually available. When defendant No. 1 did not execute the sale deed by February, 2005, as stated in the agreement, the plaintiff served a legal notice dated 25/06/2005, which was received by defendant No. 1 on 02/07/2005. However, even before that period, defendant No. 1 had executed a sale deed of the suit land for total sale consideration of Rs. 50,000/- in favour of defendant No. 3 on 30/05/2005. According to the plaintiff, he was always ready and willing to perform his part of the contract, but defendant No. 1 did not take interest in performing his obligation as he did not make any effort to get the land demarcated and to execute the sale deed in favour of the plaintiff and instead thereof he sold the land to defendant No. 3, therefore, the plaintiff is entitled for a decree of specific performance as also for cancellation of the sale deed executed by defendant No. 1 in favour of defendant No. 3.

3. The suit was defended by defendant No. 1 on the averment that despite repeated requests, the plaintiff did not take interest in payment of balance sale consideration nor he remained present for demarcation of the land and since he was in need of funds to meet out the expenses of his daughter's marriage, he executed the sale deed in question in favour of defendant No.3.

4. Defendant No. 3 submitted his separate written statement stating that an agreement was entered between him and defendant No. 1 on 03/05/2005 in respect of the suit land for a sum of Rs. 3,84,000/-, out of which, Rs. 25,000/- was paid by him as earnest money to defendant No. 1 and thereafter the sale deed was executed on 30/05/2005.
5. In their examination-in-chief, both the parties reiterated their respective stand taken in the plaint or in the written statement. The plaintiff deposed that he was ready and willing to perform his part of the contract, but defendant No. 1 never proceeded to get the land demarcated nor paid heed to his request for demarcation or execution of the sale deed. He also stated that defendant No. 3, Manoj Agrawal was aware of the agreement between the plaintiff and defendant No. 1, therefore, he is not a *bona fide* purchaser. He denied that he was engaged in real estate business. He also denied the suggestion that he was avoiding to make payment of balance sale consideration because he was short of funds or he was not finding a purchaser in whose name the sale deed could be executed. He also denied the suggestion that defendant No. 1 approached him many times with a request to execute the sale deed.
6. Plaintiff's witness No. 2, Satish Railwani has corroborated the plaintiff's statement that he was willing to purchase the property, but defendant No. 1 did not get the land demarcated and execute the sale-deed. Plaintiff's witness No. 3, Gurubachan Singh has filed his affidavit under Order 18 Rule 4 CPC, but did not enter the witness box for cross-examination, therefore, his statement is not significant.

7. Defendant No. 1, Itwari was examined as D.W.1. In his cross-examination, he admitted that he was aware of the process for getting the land demarcated, but he never moved an application in the Tahsil Office for carrying out the demarcation and for this reason, the Patwari never visited the spot for demarcation of the suit land. According to him, he sold the suit property to defendant No. 3 for a sum of Rs. 3,00,000/-, but he had not executed any agreement in favour of defendant No. 3. He, later on, executed such agreement after receiving the amount from defendant No.3. He admitted receiving a sum of Rs. 15,000/- on the date of execution of agreement and the remaining sum of Rs. 2,85,000/- on the date of execution of sale deed. In the later part of his statement, he tried to correct himself by stating that he had received Rs. 25,000/- on the date of execution of agreement. Since the sale deed (Ex-D-2) in favour of defendant No. 3 was executed for a sale consideration of Rs. 50,000/-, this witness (D.W.1) was confronted with the amount mentioned in the sale deed, to which he replied that the said figure of Rs. 50,000/- is not correct. He stated of his own that if such amount is mentioned in Ex.D-2 then the sale deed is illegal. When he was again questioned as to whether he executed the sale deed for a higher amount than one for which the agreement was entered into with the plaintiff, he denied the suggestion and stated of his own that he has sold the land to defendant No. 3 for lesser amount, but immediately he admitted the figure of Rs. 3,84,000/- mentioned in the agreement. He, thereafter, retracted his statement in para 7 of his affidavit where it is mentioned that because of the plaintiff's failure to pay the balance amount, he had to sell the

suit property for a lesser amount.

8. Defendant's witness No. 2, Derha appears to be a relative of defendant No.1. He is employed with Indian Railways, however, he is also engaged in money lending. According to this witness, he had advanced a loan of Rs. 25,000/- to defendant No. 1 at the rate of 5% interest per month. He had allegedly visited the plaintiff's house along with defendant No. 1 when the plaintiff was requested for execution of the sale deed. However, he denied deriving information from defendant No. 1, Itwari about demarcation of the suit land. At the end of his statement, he stated that Itwari informed him that he had sold the suit land for Rs. 4,84,000/- to defendant No.3. Defendant's witness No.3, Sadhelal had also advanced a loan of Rs. 10,000/- to defendant No.1, Itwari. This witness was repaid Rs. 20,000/- by Itwari.
9. Defendant No.3, Manoj Agrawal has also examined himself as a witness. In para 10 of his statement, he admitted that he had got executed the sale deed for Rs. 50,000/-, however, he says that the balance amount was paid to defendant No. 1 at the time of his daughter's marriage and on other occasions which could not be mentioned in the sale deed. He admitted that such pleading was not made in the written statement for which he explained that he did not foresee a litigation, therefore, it was not informed to the lawyer.
10. Pleadings available and the state of evidence would reveal that soon after the agreement between the plaintiff and defendant No.1, the defendant No. 1 was required to get the suit land demarcated for which he did not take any step by moving any application before the

competent revenue authority. It is settled law that time is not essence of contract in transaction involving immovable property. See ***Chand Rani (Smt) (Dead) by Lrs v. Kamal Rani (Smt) (Dead) by Lrs***, (1993) 1 SCC 519, ***Balasaheb Dayandeo Naik (Dead) through Lrs and Others v. Appasaheb Dattatraya Pawar***, (2008) 4 SCC 464, ***Govind Prasad Chaturvedi v. Hari Dutt Shastri and Another***, (1977) 2 SCC 539, ***Smt. Indira Kaur and Others v. Sheo Lal Kapoor***, (1998) 2 SCC 488 and ***Silvey and Others v.s Arun Varghese and Another***, (2008) 11 SCC 45. Even if the agreement stipulated that the sale deed shall be executed by February, 2005 yet it did not stipulate that if the sale deed is not executed by the said date, the earnest money shall be forfeited. In any case, the time schedule of February, 2005 is closely connected with demarcation of the suit land because both the terms are mentioned in one sentence which means that the sale deed shall be executed by February, 2005 after demarcation of the suit land. If demarcation was not at all applied for, the time schedule of February, 2005 becomes insignificant. Therefore, on a plain reading of agreement itself, it would appear that the time was not the essence of contract.

11. If time was not the essence of contract in the present agreement, defendant No. 1 ought not to have executed the sale deed in favour of any other purchaser soon after expiry of period mentioned in the agreement. If defendant No. 1 was in need of fund, he could have served a legal notice to the plaintiff requiring him to pay the balance of sale consideration, however, no such notice was served by defendant No. 1. It is surprising that when the agreement between the plaintiff

and defendant No. 1 for the sale of suit land was for Rs. 3,84,000/-, why defendant No. 1 agreed to execute the sale deed in favour of defendant No. 3 for Rs. 50,000/- only. Even though agreement between defendant No.1 and defendant No.3 mentions that defendant No. 1 would execute the sale deed for a sum of Rs. 3,84,000/- out of which Rs. 25,000/- was paid as earnest money, but such recital is not mentioned in the sale deed. It is also not mentioned in the sale deed that earnest money of Rs. 25,000/- had already been received. In the sale deed, it is mentioned that the entire sale consideration of Rs. 50,000/- has been received in cash on the date of execution of sale deed, i.e. 30/05/2005. It is also mentioned in the sale deed that the expenses for execution of the sale deed is equally shared by the parties. In the sale deed, the total stamp fee of Rs. 39,900/- is shown to have been paid. If both the parties have shared the expenses equally then defendant No. 1 has again incurred expenditure of Rs. 20,000/- approximately. Therefore, effectively, a sum of Rs.30,000/- only reached in the hands of defendant No. 1 at the time of execution of sale deed. Absolutely contrary to this, defendant's witness No. 2, Derha has stated that Itwari had informed him that he had sold the property for Rs. 4,84,000/-. Thus, all the defence witnesses have made contrary statements before the Court. Statements made by defendant No. 3, Manoj Agrawal and defendant No. 1 are contrary to the terms of the agreement between them as well as the sale deed (Ex-D-2).

12. In view of the nature of evidence adduced by the defence, we are convinced that defendant No. 1 executed the sale deed in favour of defendant No. 3 only to defeat the agreement entered into between the

plaintiff and defendant No. 1. We have formed this view also for the reasons that defendant No. 3 would neither plead nor depose that he was not aware of the agreement between the plaintiff and defendant No.1, hence, he is a *bona fide* purchaser. If defendant No. 3 has not raised a plea of *bona fide* purchaser, it goes without saying that he was aware of the agreement yet he did not make any effort to ascertain as to why the agreement between the plaintiff and defendant No. 1 failed. Defendant No. 3 has also not issued any newspaper publication inviting objection to the agreement entered into between him and defendant No.1. The sale deed dated 30/05/2005, therefore, deserves to be declared a nullity and deserves to be cancelled.

13. The plaintiff is also entitled for a decree for execution of the sale deed by defendant No. 1 upon payment of balance of the sale consideration by the plaintiff within a period of 2 months from today. The plaintiff is further entitled for a declaration that the sale deed dated 30/05/2005 executed by defendant No. 1 in favour of defendant No. 3 is a nullity, hence cancelled, therefore, it is not binding on him.
14. Accordingly, F.A. No. 20/2009 is allowed in the aforesaid terms.
15. A decree be drawn accordingly.

Sd/-

Judge
Prashant Kumar Mishra

Sd/-

Judge
Arvind Singh Chandel