

HIGH COURT OF CHHATTISGARH, BILASPUR**FA No. 346 of 1994****Reserved on : 14.08.2018****Delivered on : 19.09.2018**

Sadhna Tripathi, wife of Ramesh Tripathi, resident of Jabda Road,
Sarkanda, District Bilaspur (M.P.) (Now C.G.)

---- Appellant**Versus**

Shashi Tiwari Died Through Lrs.

1. (a) Smt. Meena Mishra, W/o Rajesh Mishra, Lecturer in polytech college, Damoh.
(b) Smt. Kiran Agnihotri, W/o Ajay Agnihotri, Food Corporation of India, Ratlam.
2. State of Madhya Pradesh (Now C.G.) through the Collector Bilaspur (C.G.)

---- Respondents

For Appellant : Dr. N.K. Shukla, Sr. Advocate with Mr. Vikram
Sharma, Advocate.

For Respondents : Mr. B.P. Sharma, Advocate & Mr. Hari Agrawal,
Advocate.

Hon'ble Shri Justice Ram Prasanna Sharma**CAV JUDGMENT**

1. This first appeal is preferred under Section 96 of the Code of Civil Procedure, 1908 against judgment/ decree dated 29.09.1994 passed by 2nd Additional District Judge, Bilaspur (M.P.) (Now C.G.) in Civil Suit No. 3-A/93, wherein the said court dismissed the suit filed by the appellant for specific performance of contract in relation to land bearing Khasra No. 484/03 admeasuring 0.07 dismil situated at

Sarkanda, Bilaspur (C.G.) and in alternate to get refund of earnest money to the tune of Rs. 60,000/-.

2. The suit was filed by the appellant before the trial court pleaded *inter alia* that the appellant and original respondents namely Bhagwandas & Shashi Tiwari were having good relations shown interest to sell their property as mentioned above. The appellant paid the full consideration amount of Rs. 60,000/- to the said persons before the witnesses and one agreement was executed between the parties as per Ex. P/2 on 06.07.1991. It is further case of the appellant that she was not having sufficient amount for registration charges of sale deed and it was agreed that the same will be executed later on. The said original respondents later on refused to sell the property that is why the suit was filed for execution of sale deed or return the amount with interest.
3. Learned counsel for the appellant submits as under:-
 - (i) Though, the said original respondents opposed the sale agreement and pleaded that they have not executed the agreement and have not been paid the said amount, but signature of the said respondents is proved by expert opinion.
 - (ii) The appellant has proved the agreement and payment of money and it was not rebutted by other side, therefore, the finding of the trial court is not proper.
 - (iii) The trial court has wrongly drawn the adverse inference against the appellant for non-examination of Shri D.K. Dwivedi, Advocate who drafted the said agreement.

- (iv) The trial court overlooked the letter (Ex. P/1) written by the respondents to the appellant showing their interest to sell the property.
4. On the other hand, learned counsel for the respondents submits that the finding of the trial court is based on proper appreciation of oral and documentary evidence and trial court had an advantage and opportunity of seeing the demeanour of witnesses, therefore, finding recorded by the trial court should not be disturbed. He placed reliance in the matter of **Jagdish Singh Vs. Madhuri Devi** reported in **(2008) 10 SCC 497**.
 5. First question for consideration is whether the original respondents entered into agreement after understanding terms and conditions of the contract. From evidence of the appellant (PW-1), document regarding the agreement which is Ex.P/2 is prepared by Shri D.K. Dwivedi, Advocate, but he has not examined by the appellant side before the trial court. When the appellant is asserting execution of agreement to sell by the original respondents and original respondents are denying any execution of agreement to sell, the persons who drafted the agreement ought to have been examined by the appellant side before the trial court. From evidence of the appellant (PW-1) (Para 9 & 11), draft of agreement was not prepared in presence of the original respondents.
 6. Though, Dashrath (PW-2) & Lal Bahadur (PW-3) were examined by the appellant for substantiating the factum of agreement, but the facts remains that agreement was not drafted by them. Looking to the entire evidence, the trial court opined that D.K. Dwivedi, Advocate was the

material witness to substantiate the factum of agreement and to prove it is authenticated by the original respondents. Material witness was not examined. In absence of evidence of material witness, the trial court opined that it is not satisfactorily proved by the appellant that the agreement was consented by the original respondents after understanding its consequences.

7. It was specifically denied by the original respondents that they received any sum from the appellant in relation to the agreement in question. The burden lies on appellant to prove the payment of consideration amount. From statement of the appellant (PW-1), she was not having fund for consideration amount of Rs. 60,000/-. At one point of time, she deposed (Para 2 & 3) that she demanded Rs. 50,000/- from her sister, but neither she named her sister nor her sister was examined before the trial court. At other point of time, she deposed (Para 23) that money was not received from her sister, but it is received from brother-in-law (Devars) of her sister namely Jainarayan and Santosh Kumar Tiwari to the tune of Rs. 50,000/-. Jaiprakash and Santosh Kumar Tiwari were not examined whether they have paid Rs. 50,000/- to the appellant.
8. The story put-forth by the appellant for receiving amount of Rs. 50,000/- from her sister or some Jainarayan and Santosh Kumar Tiwari was not established in absence of their evidence. Again, she based on the statement of Dashrath (PW-2) & Lal Bahadur (PW-3) for establishing the same. The trial court after elaborate discussion opined that the story put-forth by the appellant regarding receiving of

money from persons unknown to the record is not acceptable.

9. It is clear case of the appellant that she was not having fund for purchasing the property in question. The persons who provided her the money is material witness to establish that they provided fund to the appellant, but they were not examined before the trial court. When material witnesses were not examined before the trial court, the trial court opined that the receiving of money from unknown persons is not established and evidence of the other persons is not sufficient to prove factum of payment of consideration amount.
10. Other aspect of the matter is that as per version of the appellant, full consideration amount of Rs. 60,000/- was paid to the original respondents on the date of agreement. When the full amount of consideration was paid on the date of agreement, there was no occasion to defer the registration of sale deed for registration charges only.
11. Learned counsel for the appellant submits that one letter Ex. P/1 was written by the original respondents to the appellant showing their intention to sell the property, therefore, finding of the trial court is not correct. In view of this Court, the only presumption which can be raised by telegraphic messages as per Section 88 of the Indian Evidence Act, 1872 is that message forwarded from a telegraph office to the person to whom such message purports to be sent, but no presumption as to the persons by whom such message was delivered for transmission is raised. Telegraphic address is not connecting piece regarding any sender and therefore, Ex. P/1 is no help to the

appellant.

12. This Court has minutely gone into evidence and finding recorded by the trial court and after looking into the facts and circumstances, found no reason to record different finding against what is recorded by the trial court. The finding arrived at by the trial court is based on proper marshaling of oral and documentary evidence adduced before the trial court and the same is not liable to be interfered with invoking jurisdiction of the appeal.
13. Accordingly, the decree passed against the appellant and in favour of respondents No. 1 (a) & (b) on the following terms and conditions:
 - (i) The appeal is dismissed with cost.
 - (ii) The appellant shall bear cost of the respondents No. 1 (a) & (b) throughout.
 - (iii) Pleaders' fee, if certified be calculated as per certificate or as per schedule whichever is less.
 - (iv) A decree be drawn accordingly.

Sd/-
(Ram Prasanna Sharma)
Judge