

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**FA No. 134 of 2015**

- Deepak Agrawal S/o Late Shri G.L. Agrawal Aged About 45 Years R/o Bajrang Nagar Raipur Tahsil And District Raipur Civil And Rev. Distt. Raipur Chhattisgarh

---- Appellant

Versus

- Smt. Gulab Bai W/o Chhabilal Satnami R/o Village Chhachhanpairi, Abhanpur, Tahsil And District Raipur Civil And Rev. Distt. Raipur Chhattisgarh

---- Respondent

For Appellant : Shri G.D.Vaswani, Advocate

Hon'ble Shri Justice Manindra Mohan Shrivastava**Hon'ble Smt. Justice Vimla Singh Kapoor****Order On Board****02/08/2018****Per Manindra Mohan Shrivastava, J.-**

This appeal is directed against impugned judgment and decree dated 10/03/2015 passed by the learned Trial Court, by which, the appellant's suit has been dismissed.

2. The appellant filed a suit seeking a decree of specific performance on the pleadings that the plaintiff and defendant entered into an agreement under which the defendant agreed to sell the land admeasuring 2 acres situated in two different khasra numbers of Village – Chhachhanpairi, patwari halka no.-3, Revenue Circle – Abhanpur, Tahsil - Abhanpur, District – Raipur on 13/06/2012. It was pleaded that under the said agreement, the defendant agreed to sell the land in dispute @

Rs.24,50,000/- per acre and obtained Rs.5 lakhs in advance. It was further pleaded that thereafter, on 05/10/2012, the son of the defendant received another Rs.1 lakh as advance and thus, a total of Rs. 6 lakhs was paid.

It was pleaded that despite having executed an agreement, the defendant avoided to execute the sale deed. According to the plaintiff, under the agreement, it was an obligation of the defendant to get demarcation and measurement done. When the defendant avoided to execute the sale deed, the plaintiff got notice published in the news paper giving legal notice to the defendant and thereafter, filed a suit.

3. The defendant, despite service of summons, did not appear before the Trial Court and therefore, proceeded ex-parte. Learned Trial Court recorded evidence of the plaintiff as the sole witness and thereafter, vide impugned judgment dismissed the suit holding that the agreement is doubtful.

4. Learned counsel for the appellant argued that the learned Trial Court committed grave error of law in holding that the plaintiff failed to prove execution of agreement of sale between the parties. He would submit that at the first place, plaintiff's suit remained uncontested. The plaintiff produced before the Court, original agreement dated 13/06/2012 executed between the parties, duly signed / thumb impression affixed by the parties. The plaintiff himself appeared as witness and in his affidavit under Order 18 Rule 4 CPC clearly deposed that the agreement was executed between the parties and total advance of Rs.6 lakhs was paid. Various attempts were made and ultimately, when sale deed was not executed, suit was filed. He would submit that the Trial Court committed error in holding that burden to prove that the thumb impression was of the defendant, was on the plaintiff even when there was no denial of the defendant and did not appear upon summons of the case. He submits that in an appropriate case, where doubt is raised and

particularly, a denial is made of having signed the document or affixed thumb impression, an occasion may arise for obtaining report of hand writing expert either by the Court or by the other party, to prove the thumb impression by producing expert's evidence. In the absence of any denial whatsoever, the plaintiff, could not be put on disadvantage on the ground that the plaintiff has not proved thumb impression of the defendant. It is next submitted that the Trial Court's approach that without examination of any of the attesting witness, the transaction itself is doubtful, is erroneous in law, inasmuch as, there is no legal requirement, as in the case of will, that an agreement to sell, should necessarily be proved by the evidence of attesting witnesses. In the absence of there being any contest to the matter by the defendant, the evidence of the plaintiff and production of original document, particularly, that the plaintiff himself was signatory to the agreement, the Trial Court held the agreement executed between the parties. Lastly, it is submitted that certain correction in the revenue records, by itself, without any doubt raised by the other party, could not be taken as a basis to prove the very execution and existence of the agreement of sale.

5. We have heard learned counsel for the appellant. There is no appearance on behalf of the respondent despite service of notice.

6. After having gone through the impugned judgment and decree and having perused the records of the case, we are of the view that the Trial Court has committed error of law in recording of finding that the agreement is doubtful. The reasons of such opinion are as follows -

a) The plaintiff came out with an emphatic plea that the agreement was executed between the parties on 13/06/2012 for sale of the land in dispute.

According to the plaint averments, plaintiff paid a total amount of Rs.6 lakhs to the defendant and her son. Despite service of summons, the defendant did not appear before the Trial Court to deny averment of the plaintiff. In this background, where plaintiff's case remained uncontested, if the affidavit filed under Order 18 Rule 4 CPC of the plaintiff is read, it is clear that the plaintiff proved the execution of the documents of agreement to sell dated 13/06/2012. He has not only emphatically pleaded regarding execution of documents but has proved by his own evidence that on 13/06/2012, the parties entered into an agreement for sale of the property in dispute. The plaint averment is with regard to the identity of the party and the rate on which, the sale was agreed to have been coherently stated in the affidavit and the evidence of the plaintiff himself. There is no discrepancy either in the rate as pleaded in the plaint or in the affidavit nor is there any discrepancy in the description, extent or location of the property in respect of which the agreement is alleged to have been entered into between the parties.

b). The plaintiff has proved his own signature on the agreement (Ex.P/1) dated 13/06/2012. There was no one to dispute the emphatic evidence of the plaintiff. The matter remained uncontested.

There is no requirement of law that an agreement of sale, for its proof, necessarily requires evidence of attesting witnesses. It was only an agreement to sell the property. In the absence of there being any dispute raised by the defendant, the evidence of the plaintiff, which is coherent with the pleadings as also with the contents of the document of agreement dated 13/06/2012, could not be held doubtful only on the ground that the attesting witnesses have not been examined.

c). We also find that one of the ground on which the Trial Court has doubted the transaction is that the plaintiff failed to prove the thumb impression of the defendant.

This approach was erroneous in law. Whether the signature or thumb impression of the parties to the document are doubtful or not, depends upon the facts and circumstances of every case. In an appropriate case, where there is denial of a party that he / she has not signed or put thumb impression on a document placed before the Court, or where the Court itself finds it necessary, in view of the dispute raised with regard to genuineness of the document, an occasion may arise to obtain the report of hand writing expert but in a case like the present one, where the defendant has remained ex-parte and has chosen not to contest the matter and the plaintiff having proved his own signature and also having deposed specifically that in his presence, the defendant put her thumb impression, the plaintiff cannot be put to disadvantage on the ground that the thumb impression has not been proved. It was open for the defendant to deny that she had not executed any agreement or that she did not affix her thumb impression on the documents in question. Unless the party specifically deny thumb impression, we are of the opinion that the plaintiff's evidence was good enough to prove execution of the document.

d). Lastly, one of the reason why the Trial Court found the agreement doubtful was that it contained certain corrections and recitals relating to the name of the defendant. Again, for the reasons stated herein above, it should not have been the reason to doubt the correctness of the documents. Agreement (Ex.P/1) is an original stamp document which bears the signature and thumb impression. The appellant proved his signature on the said document. Therefore, in the absence of there being any contest to the matter, we are of the firm opinion that the learned Trial Court committed illegality and reasons assigned by the Trial Court were not sufficient to doubt the execution / existence of the agreement. The Trial Court had ample power to call for appropriate reports or for evidence. Certainly, the plaintiff could not be put to disadvantage because the defendant did not appear before the

Court.

7. We, however, find that though the present being a suit for grant of decree of specific performance, learned Trial Court did not frame any point for determination with regard to readiness and willingness on the part of the plaintiff to perform his part of contract which is one of the essential statutory requirement and sine quo non to entitle the plaintiff to decree of specific performance of contract in the light of statutory mandate of Section 16 (c) of the Specific Relief Act, 1963. Therefore, in these circumstances, we consider it to be an appropriate case to set aside the impugned judgment and decree and remand the case for re-trial. It would be in the interest of justice that an appropriate trial is necessary to decide all the relevant aspects, some which have been framed and some which have not been framed by the Trial Court.

8. In the result, the appeal is allowed. The case is remanded for re-trial. Let decree be drawn.

Considering that the case has been remanded to the Trial Court, we are inclined to hold that the appellant would be entitled to refund of fee paid on memorandum of appeal and certificate in trial under Section 14 of the Court Fees Act, 1870 be issued in his favour to authorise him to receive back from the Collector, the full amount of fee paid in the appeal.

Sd/-
(Manindra Mohan Shrivastava)
Judge

Sd/-
(Vimla Singh Kapoor)
Judge