

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.360 of 2003

Jagbandhu Patel (dead) through LRs:-

1. Suresh Kumar Patel, S/o Jagbandhu Patel, aged about 36 years.
2. Smt. Meera Patel, Wd/o Jagbandhu Patel, aged about 56 years.

Both are R/o Village Manikpur, Tahsil Sarangarh, District Raigarh (C.G.)

---- Appellants

Versus

1. Maniram Patel, S/o Bhagirathi Patel, age 50 years, R/o Village Bandhapali, Tahsil Sarangarh, District Raigarh (C.G.)
2. State of Chhattisgarh, through Collector, Raigarh, District Raigarh (C.G.)

---- Respondents

For Appellants:	Mr. H.B. Agrawal, Senior Advocate with Mrs. Meera Jaiswal, Advocate.
For Respondent No.1:	Mr. Shree Kumar Agrawal, Senior Advocate with Mr. Roop Naik, Advocate.
For Respondent No.2 / State: -	Mr. Adhiraj Surana, Deputy Govt. Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

13/12/2018

1. The appeal preferred by legal representatives of defendant No.1

has been admitted on the following substantial question of law: -

“Whether the lower appellate Court while reversing the findings of the trial Court was justified in decreeing discretionary relief of specific performance of contract based on an oral agreement to sale dated 3.8.1994?”

(Parties hereinafter will be referred as per their status shown and ranking given in the plaint before the trial Court.)

2. Respondent No.1 herein / plaintiff filed a suit for specific

performance of contract and permanent injunction stating inter alia that defendant No.1 entered into oral agreement to sale dated 3-8-1994 on a consideration of ₹ 30,000/- and obtained ₹ 25,000/- and agreed to execute the sale deed on payment of balance consideration of ₹ 5,000/- and also handed over the possession to the plaintiff, though the plaintiff is not ready and willing to perform his part of contract, and on 17-2-1995, he reached to defendant No.1, but defendant No.1 avoided execution of sale deed leading to service of notice on 7-4-1995 to defendant No.1 which was replied in negative except admitting the fact of oral agreement to sale leading to filing of suit for specific performance of contract.

3. Defendant No.1 denied the plaint allegations stating inter alia that no such oral agreement to sale was ever entered into between the plaintiff and defendant No.1 as such, the plaintiff was never ready and willing to perform his part of contract and he never received notice dated 7-4-1995 and never replied the notice.
4. During the course of trial, the plaintiff filed an application for examining Mr. Shivnarayan Patel, Advocate, who has replied the notice vide Ex.P-6 on behalf of defendant No.1, but that application was rejected by the trial Court by order dated 11-12-2000 which was challenged by the plaintiff in Civil Revision No.20/2001 (Mani Ram Patel v. Jag Bandhu Patel and another) before this Court and this Court dismissed the said civil revision reserving liberty to challenge the correctness, validity and propriety of the order dated 11-12-2000 before the appellate court, if an appeal against the final judgment & decree happens to be filed by either party.

5. After appreciating oral and documentary evidence on record, the trial Court dismissed the suit that oral agreement to sale is not established against which first appeal under Section 96 of the CPC was preferred. On 10-8-2000, after hearing the appeal on merits, the first appellate Court came to the conclusion that examination of Mr. Shivnarayan Patel, Advocate, is necessary and thereafter a limited remand was made to the trial Court to examine Mr. Shivnarayan Patel, Advocate, as a plaintiff witness and thereafter return the same to that Court (first appellate Court). The said witness – Mr. Patel, Advocate, was examined on behalf of the plaintiff and finding was returned to the said Court and the impugned judgment & decree was passed by which the first appellate Court set aside the judgment & decree of the trial Court and held that the oral agreement to sale is proved and the plaintiff is always ready and willing to perform his part of contract, and thereby granted the decree for specific performance of contract in favour of the plaintiff. Questioning that judgment & decree, second appeal has been preferred in which substantial question of law has been set out in the opening paragraph of this judgment.
6. Mr. H.B. Agrawal, learned Senior Advocate appearing for the defendant / appellant, would submit that the first appellate Court is absolutely unjustified in granting decree in favour of the plaintiff as such, no opportunity of hearing was given to the defendant to lead the rebuttal evidence upon the examination of Mr. Patel and therefore the statement of Mr. Shivnarayan Patel, Advocate – plaintiff witness could not be relied upon to grant decree in favour of

the plaintiff and as such, the impugned judgment & decree deserve to be set-aside.

7. Mr. Shree Kumar Agrawal, learned Senior Advocate appearing for the plaintiff / respondent No.1, would submit that since limited remand was made to examine Mr. Shivnarayan Patel, Advocate, and that order of limited remand was not challenged, therefore, the plaintiff is debarred from questioning the correctness of the order making limited remand by virtue of the provisions contained in Section 105(2) of the CPC, as such, the judgment & decree passed by the first appellate Court deserve to be affirmed by answering the substantial question of law against defendant No.1.
8. I have heard learned counsel for the parties and considered their rival submissions made herein-above and went through the record with utmost circumspection.
9. The suit filed by the plaintiff for specific performance of contract was based on the oral agreement to sale dated 3-8-1994 which defendant No.1 denied to have entered into any oral agreement to sale with him. The plaintiff relied upon Ex.P-6 which is reply to the legal notice sent by the Advocate Mr. Shivnarayan Patel on behalf of defendant No.1 admitting the fact of oral agreement, but the plaintiff was denied examination of Mr. Shivnarayan Patel by the trial Court and ultimately, in revision, the High Court kept it open to challenge that order before the appellate Court if eventuality so arises and ultimately, the suit was dismissed by the trial Court and in appeal, that ground was raised by the plaintiff and found favour by the first appellate Court directing limited remand to the extent of

examining Mr. Shivnarayan Patel on which he was examined and he was also cross-examined by the defendant at length without protest or demur and ultimately, relying upon the statement of Mr. Shivnarayan Patel, the first appellate Court decreed the suit holding that the oral agreement to sale is proved, as the defendant has admitted the fact of oral agreement to sale in reply to the legal notice Ex.P-6 in favour of the plaintiff. The question of limited remand is sought to be questioned in this second appeal which has to fail for two reasons – firstly, the question of limited remand was not open to be questioned by defendant No.1 by virtue of the provisions contained in Section 105(2) of the CPC and secondly, on that issue neither substantial question of law was proposed nor it was found involved and framed. The substantial question of law is only, whether the decree for specific performance of contract can be granted on the basis of oral agreement to sale.

10. Defendant No.1 has neither admitted the fact of oral agreement to sale in favour of the plaintiff nor took a defence that on the basis of oral agreement to sale discretionary relief in favour of the plaintiff is not grantable. It is not the case of defendant No.1 in pleading that discretionary relief under Section 20(2) of the Specific Relief Act, 1963 (for short, 'the Act of 1963') could not have been granted in favour of the plaintiff based on oral agreement to sale, which is taken before this Court as substantial question of law has been framed in this regard. There is no legal bar in granting specific performance based on oral agreement to sale.

11. Section 20(2)(a) & (b) of the Act of 1963 states as under: -

“20. Discretion as to decreeing specific performance.—(1) xxx xxx xxx

(2) The following are cases in which the court may properly exercise discretion not to decree specific performance:-

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or”

12. Discretion to direct specific performance of an agreement and that too after elapse of a long period of time, undoubtedly, has to be exercised on sound, reasonable, rational and acceptable principles and the power conferred by Section 20 of the Act is a discretionary power and it vests the court with a wide discretion either to decree the suit for specific performance or decline the same.
13. In a suit instituted for specific performance of contract by the plaintiff, the only and only defence set up by defendant No.1 was the case of total denial that there is no agreement to sale in favour of the plaintiff, whereas the plaintiff pleaded that in reply (Ex.P-6) to the legal notice, defendant No.1 has admitted the fact of oral agreement to sale with the plaintiff, which the trial Court did not accept, but the first appellate Court has accepted the said fact after examining the counsel of defendant No.1 who has replied the legal notice admitting the fact of oral agreement to sale. However, defendant No.1 did not take any alternative plea based on Section 20(2)(a) or (b) of the Act of 1963 in his written statement stating that

in case the Court reaches to the conclusion that there is an agreement to sale, then the decree of specific performance of contract is not grantable under Section 20(2)(a) or (b) of the Act of 1963 and, therefore, the trial Court rightly did not frame any issue in this regard and even before the first appellate Court, no such ground based on Section 20(2)(a) & (b) of the Act of 1963 appears to have been raised in this behalf.

14. In a suit for specific performance of contract, the only and only defence set up by defendant No.1 was the case of total denial of no agreement to sale, even oral. The defendants did not take any alternative plea based on Section 20(2)(a) of the Act of 1963 in their written statement and the trial Court rightly did not frame any issue in this regard.

15. Even if counsel for defendant No.1 Mr. Shivnarayan Patel has been examined, still it is the case that no such oral agreement to sale has been entered into between the parties. But the first appellate Court has clearly held that defendant No.1 has entered into oral agreement to sale with the plaintiff and as such, defendant No.1 did not take any alternative plea based on Section 20 of the Act of 1963 in the written statement that in case the court reaches to the conclusion that there is an agreement to sale, then the decree of specific performance of contract is not grantable under Section 20(2)(a) of the Act of 1963 being inequitable and that is the reason why the trial Court did not frame any issue in this regard and even before the first appellate Court no such point was pressed into service / no such ground based on Section 20(2)(a) of the Act of

1963 was taken.

16. The Supreme Court in the matter of **A. Maria Angelena (d) and others v. A.G. Balkis Bee**¹ emphasizing the need for pleading in suit for specific performance held as under :-

“4..... In any event of the matter, no hardship as now stated was pleaded in the written statement. Further, no issue was framed that plaintiff-respondent could be compensated in terms of money in lieu of the decree for specific performance. In the absence of such a plea and issue, we are not inclined to entertain the argument of the learned counsel for the appellants raised for the first time. We find that the plaintiff was always and is ready and willing to perform his part of the contract and a concurrent finding of fact to that effect has been recorded by the Court below and there is no reason to interfere with the said finding.”

17. Similarly, in the matter of **Prakash Chandra v. Narayan**², Their Lordships of the Supreme Court have held as under:-

“14. We have heard the learned counsel for the parties. The learned counsel appearing on either side elaborately took us through the findings of the trial Court, the first appellate court as well as the High Court in second appeal. From the materials on record and the agreement dated 18-4-1996 and from the judgment of the trial Court and the first appellate court, it is evident that no issue relating to the hardship of the respondent was framed. In a case of specific performance, hardship is a good defence provided such defence is taken by the defendant and evidence in support of such defence is brought on record, while in this case no such defence was taken by the respondent and no evidence was brought on record in its support.”

18. Likewise, in the matter of **Narinderjit Singh v. North Star Estate Promoters Limited**³, Their Lordships of the Supreme Court held as under :-

“26. In the present case, the appellant had neither pleaded hardship nor produced any evidence to show that it will be inequitable to order specific performance of

1 AIR 2002 SC 2385

2 (2012) 5 SCC 403

3 (2012) 5 SCC 712

the agreement. Rather, the important plea taken by the appellant was that the agreement was fictitious and fabricated and his father has neither executed the same nor received the earnest money and, as mentioned above, all the courts have found this plea to be wholly untenable.”

19. Reverting to the facts of the present case in light of the principles of law laid down by the Supreme Court in the afore-cited cases (supra), it is quite vivid that the defendants did not take any such alternative plea based on Section 20(2)(a) of the Act of 1963 that the plaintiffs have taken unfair advantage over the defendants and in absence of that, no issue was framed by the trial Court and even this question was also not raised before the first appellate Court by defendant No.1. In absence of plea and issue framed in that regard, the first appellate Court is absolutely justified in granting the decree of specific performance of contract in favour of the plaintiffs based on oral agreement to sale. The substantial question of law is answered accordingly.

20. As a fallout and consequence of the aforesaid discussion, the second appeal being devoid of merit is liable to be and is hereby dismissed leaving the parties to bear their own costs.

21. A decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge