

HIGH COURT OF CHHATTISGARH, BILASPUR**FA No. 6 of 2004**

- Suresh Kumar S/o Hira Nand Hariramani Aged About 25 Years R/o Hira Clot Stores, Tilda, Post- Neora, Distt. Raipur Chhattisgarh

---- Appellant**Versus**

1. Shri Manharandas S/o Late Jhumukdas
2. Shri Gajanand S/o Late Jhumukdas
3. Shri Devesh S/o Late Jhumukdas
4. Shri Raghwendra S/o Late Jhumukdas
5. Chainkumari D/o Late Jhumukdas
6. Sharda D/o Late Jhumukdas
7. Ambica D/o Late Jhumukdas
8. Premlata D/o Late Jhumukdas
9. Tarun S/o Late Jhumukdas
10. Tirish S/o Late Jhumukdas

all the legal representatives are residents of Village- Tulsi- Neora, District Raipur Chhattisgarh

11. State of Chhattisgarh Through- The Collector, Raipur C.G.

---- Respondents

For Appellant	:	Shri Amit Soni, Advocate
For Respondents No.1 to 10:	:	None
For Respondent-State	:	Shri D.R. Minj, Dy. GA for the State

Hon'ble Shri Justice Goutam Bhaduri**Order On Board****29/11/2018**

1. Heard.
2. The instant appeal has been filed against the judgment and decree dated 07.10.2003 passed in Civil Suit No.34-A/2002 by the 9th Additional District Judge (FTC), Raipur, whereby the suit filed for specific performance was dismissed and it was directed that the earnest money of Rs.10,000/- along with the damages of Rs.5000/- totaling to Rs.15000/- be returned to the seller.
3. A suit was filed by one Suresh Kumar, the appellant herein, that on 03.03.1994, the defendant Jhumukdas had agreed to sell a property bearing Khasra No.129/1, admeasuring 80 decimal, situated at village Tulsi, Tehsil Tilda for a sale consideration of Rs.2,50,000/- and in lieu of such sale agreement, Rs.10000/- was received as earnest money by Jhumukdas. It was stated that the sale deed was to be executed till 21.03.1994. Plaintiff further pleaded that he was ready and willing to purchase the land and was to perform his part of contract but the defendant instead of execution of the sale deed started demanding more amount, consequently, a notice was sent by the plaintiff on 19.03.1994 and 22.03.1994, but the defendant did not execute the sale deed, therefore, the suit for specific performance was filed in the year 1996.
4. The defendant No.1 contended that the land bearing Khasra No.129/1, admeasuring 0.380 hectares is an ancestral property, wherein apart from the defendant Jhumukdas, his wife Jampantin Bai and four sons Marharan Das, Gajanand, Dinesh and Raghvendra have equal shares, but name of defendant No.1 was only recorded in the revenue records because he was the head of the family. It was stated that the defendant used to visit the grocery shop of the plaintiff and as such the father of the defendant was in close proximity and

relation with the father of the plaintiff namely Heeranand. It was stated that the defendant Jhumukdas had always stated that he is not the absolute owner of the property, therefore, he could not sell the property in its entirety solely. It was stated that on 03.03.1994 in the morning Heeranand along with his servant Ganesh Yadu came to his house and offered to purchase the land of 80 decimal for an amount of Rs.2,50,000/-. The defendant contended that until his sons agree to such sale, he would not sale the property and before the agreement he would ask his son about the transaction, whether they agree or not and pleaded for some time. It was stated that Heeranand, however, gave the amount of earnest money and stated that if eventually the sons do not agree for the sale, he would destroy the agreement and got the sign of Jhumukdas over the sale agreement. Subsequently, the defendant stated that when he informed about the agreement to his sons, they did not agree to it and asked him to return the money of Rs.10,000/- and cancel the agreement. The defendant further stated that when they wanted to return the amount, the plaintiff did not agree to his earlier agreement and legal notice was served to them. The defendant stated that the fraud has been played and the agreement dated 03.09.1994 was obtained by playing fraud, therefore, the specific performance of decree cannot be granted.

5. On the basis of the pleading of the parties, the trial Court framed 5 issues and dismissed the suit for specific performance, however, decreed the suit for return of Rs.10,000/-, which was received as earnest money along with damages of Rs.5000/-. In this appeal, said judgment and decree is under challenge.
6. No representation is made on behalf of the respondents No.1 to 10 despite

pass overs and frequent calls.

7. I have perused the documents, pleading of the parties and the evidence on record.
8. The plaintiff Suresh Kumar, was examined as PW-1. He has proved the document Ex. P-10, which was an agreement of sale. Agreement of sale (Ex. P-10) would show that it was in between Jhumukdas S/o Kejavadas and the appellant wherein seller agreed to sale the land bearing Khasra No.129/1 admeasuring 80 decimal for consideration of Rs.2,50,000/-. The witness in the cross-examination has said that he was not present while the terms of the sale was settled in between his father and defendant's father and has referred that it was done by his father Heeranand alone. Therefore, the statement is a hearsay evidence and cannot be acted upon.
9. Heeranand, who is father of the plaintiff Suresh Kumar, is examined as PW-4, he has stated that he had entered into an agreement for sale as per Ex. P-10 and the oral statement was made by Jhumukdas that he is the absolute owner of the suit property. He further stated that at the time of the agreement he had paid an amount of Rs.10,000/- to Jhumukdas and the total sale consideration was of Rs.2,50,000/-, therefore, according to this witness only on the oral statement, the witness has entered into the agreement by taking presumption that Jhumukdas was the sole and exclusive owner of the property.
10. As against this Gajanand Vaishnav, who is the son of Jhumukdas, was examined as DW-1, he has stated that the land bearing Khasra No.129/1, admeasuring 0.380 hectares was their ancestral property and initially it was

recorded in the name of his grandfather Kejawadas and after his death because of the fact that Jhumukdas was the head of the family, his name was recorded. *Raiyyatwari* record of 1953-54 has been proved as Ex. D-4 and *Raiyyatwari* record of 1973-74 has been proved as Ex. D-5. The original Rin Pustika of Kejawadas is marked as Ex. D-6. Perusal of Ex. Nos. D-4, D-5 & D-6 would show that the land bearing Khasra No.129 along with the other land was recorded in name of Kejawadas. The statement of the defendant further goes to show that he has admitted the fact that his father Jhumukdas has entered into an agreement, however, when the father disclosed this fact that he has entered into an agreement, the sons did not agree to such sale. The documents Ex. D-4, Ex. D-5 and Ex. D-6, which are the revenue documents, have the presumptive value of correctness shows that the land in question was owned by Kejawadas, the grandfather of Gajanand Vaishnav (DW-1) therefore, on his death naturally as per the succession the property will devolved on all the legal heirs of Kejawadas not exclusively to Jhumukdas. Statement of Gajanand Vaishnav (DW-1) would show that agreement though have been admitted but this fact has been disputed that Jhumukdas had exclusive right to execute the sale deed. Therefore, if the agreement of sale is enforced only at the instance of Jhumukdas, wherein others have also vested right, it would give the unfair benefit to the defendant.

11. The Supreme Court in the case of ***Zarina Siddiqui Vs. A. Ramalingam*** ALIAS R. AMARNATHAN **{(2015) 1 SCC 705}** has held that the remedy of specific performance is an equitable remedy. The Court while granting decree of specific performance exercises its discretionary jurisdiction. Taking into the facts of this case, by holding that the Jhumukdas did not have the exclusive right to sale the

property, in the opinion of this Court, the decree for specific performance would lead to hardship to the defendant as compared to the plaintiff. In a result, the finding arrived at by the learned Court below whereby it is directed to return for the earnest money of Rs.10000/- along with the damages of Rs.5000/- do not appear to be wrong. In a result, the appeal has no merits, it is accordingly dismissed.

Sd/-

Goutam Bhaduri
Judge

Ashu