

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**FA No. 139 of 2001**

1. Salik Ram Malewar (Dead) through their Legal Representatives :

1 (A) Smt. Kanti Malewar W/o Late Salik Ram Malewar Aged About 67 Years R/o Near Muktidham Paras Nagar, Raipur District : Raipur, Chhattisgarh

1 (B) Smt. Anju Sahu W/o Shri Samit Kumar Sahu Aged About 39 Years D/o Late Salik Ram Malewar , R/o Village Nawagaon, Tehsil Simga District Bhatapara Chhattisgarh., District : Balodabazar-Bhathapara, Chhattisgarh

1 (C) Smt. Alpana Kumbalkar W/o Shri Dhilendra Kumbalkar Aged About 34 Years D/o Late Salik Ram Malewar , R/o Bangali Colony, Pt. Ravishankar Shukla Nagar, Amanaka, Raipur Tehsil & District Raipur Chh District : Raipur, Chhattisgarh

1 (D) Shri Ajay Kumar Malewar S/o Lage Salik Ram Malewar Aged About 37 Years R/o Near Muktidham Paras Nagar, Raipur Chhattisgarh., District : Raipur, Chhattisgarh
--- Appellants

Versus

Bhagwan Lal Maroo S/o Shri Hari Lal Maroo Aged About 52 Years R/o Nahar Para Raipur District : Raipur, Chhattisgarh ---

Respondent

For the appellant : Mr. B. P. Sharma with Mr. S. S. Baghel, Advocate

For the Respondent : Mr. Saurabh Sharma and Mr. Tarkeshwar Nande, Advocates

Hon'ble Shri Justice Goutam Bhaduri**Judgment/Order on Board****28.11.2018**

1. The present appeal is against the judgment and decree dated 10.01.2001 passed by the District Judge, Raipur whereby the suit for specific performance was decreed in favour of the plaintiff/respondent. Therefore, the instant

appeal by the judgment debtor.

2. The Case of the plaintiff was that defendant Salik Ram (since deceased) had a house bearing Municipal No.7/716 at Paras Nagar, Raipur which was comprised in Khasra No.210/1 ad-measuring 567 sqft. It was stated that the plaintiff Bhagwan Lal Maroo had entered into an agreement on 20.02.1990 to purchase the said house for a consideration of Rs.50,000/- and an amount of Rs.5000/- was paid as advance. The plaintiff pleaded that according to the agreement, the sale deed was to be executed by 20.07.1990 and at the time of execution of sale, the rest of the amount was agreed to be paid. Further it is stated that if the amount is not paid till 20th July 1990 the earnest money would be forfeited.
3. The plaintiff further stated that in order to get the remaining sale consideration of Rs.45,000/-, he obtained a loan from LIC and to get the sale deed registered on the stamp paper, the contents of sale was typed on the stamp paper but when he appeared along-with witness on 20.07.1990 before the Sub-Registrar, Raipur to get the sale registered the defendant did not come in time and when he came, he was without any tax receipts of the said house. For want of tax receipt the sale deed could not be executed. Subsequently the assurance was given that the sale deed would be executed on 23.07.1990, however, on that date, the defendant did not turn up. Eventually the notice was served through the Advocate to comply with the terms of agreement and lastly the suit for specific performance was filed.
4. The defendant in his reply stated that the suit map which was attached with the plaint was not properly shown. It was

stated that in the map apart from the existing superstructure, the kitchen, garden and boundary was existing in addition, which was in possession of the defendant but was not shown in the map. The defendants thereby stated that adjacent to the suit property on the north side, an area of 21ft./18ft. feet also exists which the plaintiff had agreed to purchase for more than a sum of Rs.20,000/- but subsequently refused. It was also stated that in order to approach such land, which though was encroached, one has to pass through the plaintiff's subject suit property and by sale of suit property the plaintiff would be benefited as extra enrichment of respective part of the possessory title held by the defendant as kitchen garden and a super structure . It is further stated that the suit property was a nazul land, therefore the State Government was a necessary party and the house which was built over the Nazul Land, was constructed by the wife of the defendant through her self earning but the lease was in favour of defendant husband. The defendant stated that at the time of agreement, certain dispute was going on between the husband and wife as such in order to cause damage to his wife an agreement was executed though he was not actually owner of the house. The defendant further submitted that on the assurance of the plaintiff that he would be paying the amount, he entered into an agreement with one Suraj Kumbhalkar to purchase a house at Georapara but since no amount was paid by the plaintiff as such consequently he could not purchase the subsequent property.

5. On the basis of the pleading of the parties, the learned trial

Court has framed 12 issues and decreed the suit for specific performance in favour of the plaintiff. Therefore the instant appeal.

6. Learned counsel for the appellant would submit that defendant Salik Ram (since deceased) did not have the right to enter into an agreement to sell the subject suit house. He referred to the document filed under Order 41 Rule 27 of the CPC before this appellate Court and would submit that the Municipal receipt will demonstrate the fact that the house in question was in the name of wife of appellant, therefore, the defendant having no title over the suit property, the sale deed could not have been executed in favour of the plaintiff by defendant Salik Ram. It is further contended that initially the lease was granted in the year 1981 as per the document of Nazul Patta which is filed before this appellate Court and it shows that the said lease was for the period from 1981 to 1989 and the condition of the said original grant did not empower the lessee to enter into an agreement of sale till 10 years as per Clause-1, therefore, when the agreement of sale was executed in the instant case as per the document Ex.P-10 on 20.02.1990 the condition continued and no sale could be made. Further it is stated that the defendant and his family members are in possessory title of the part of the land which was adjacent to the suit property and by sale of the suit property the right to enjoy such possessory title of the plot would have extinguished, consequently the discretion of exercising the decree for specific relief may not be executed in favour of the plaintiff. He further referred to the statement of P.W.1 the plaintiff and would submit that the

statement would show that the house in question was in the name of wife of defendant, therefore, the defendant did not have any exclusive right to sell the same as it would defeat section 17 of the Specific Relief Act. He placed reliance in *(2015) 14 SCC 341 Nanjappan v. Ramasamy and another & AIR 2016 S.C. 737 Satish Kumar v. Karan Singh and another* and submits that the property in fact was not transferable consequently the decree for specific performance cannot be sustained.

7. Per contra, learned counsel for the respondent submits that the judgment and decree of the Court below is well merited which do not call for any interference. It is contended that the receipts which has been filed before this Court under Order 47 Rule 27 CPC were of the year 2004 onwards and as per the statement of D.W.2 the wife of defendant the property in question was owned by Salik Ram and only the payment of tax was made by the wife, therefore, as on date when the case was decided, nothing was before the court below to show that the property was actually owned by the wife of appellant/defendant. He submits that the evidence of P.W.1 read with statement of other witnesses who went along-with Cheque to the office of sub-registrar on the date would show that the plaintiff was ready and willing to perform his part of contract, consequently the judgment and decree passed by the court below may not be disturbed. He further submits that the lease was further renewed in the month of January 1990, as per the fresh lease deed Ex.P-11 and according to clause 7 in case of assignment it is only after the transfer is made intimation is to be served and no

prior permission of sale is required, therefore, the impugned judgment and decree cannot be interfered.

8. Heard learned counsel for the parties at length and also perused the documents and record.
9. P.W.1 Bhagwan Lal stated that the agreement was entered between Salik Ram and the plaintiff on 20.02.1990 as per the document (Ex.P-10). A perusal of Ex.P-10 would show that an agreement was executed for sale of house for a consideration of Rs.50,000/- and the house was comprised over Khasra No.210/1 admeasuring 567 sqft., in plot no.4. The plaintiff at Para 6 of the statement averred that on 20.07.1990 when he was present in the Registrar's office along-with persons of Life Insurance Corporation, Salik Ram did not come with the Municipal Tax receipts of the house. Therefore for want of Municipal tax receipts, the sale deed could not be executed. Subsequently the assurance was given to get the sale deed executed on 23.7.1990, however, on that date also the defendant did not turn up and eventually on 24.07.1990 he refused to execute the sale deed. The plaintiff at para 10 contended that he only entered into an agreement for purchase of the area of 567 sqft and apart from that no agreement was entered in between the parties. He also stated that there was no agreement to purchase the kitchen, garden which exist at the backyard.
10. The witness P.W.1 further volunteered that behind the house the land of cremation ground exists. At para 15 of the statement in cross examination, he was asked about the actual area of the land, however, he was not able to depose

what was the actual area and stated that he has not measured the land. He was confronted with Ex.D-1 which was filed along-with the written statement. A perusal of Ex.D-1 reveals that apart from plaint map wherein only two bed rooms kitchen and bath rooms have been shown in document Ex.D-1, one existing room with country tiled shed and thereafter a kitchen garden has also been shown and thereafter burial ground has been shown. When the said map is compared to Ex.P-12 which was confronted to witness D.W.2 namely Smt. Kanti Malewar, wife of defendant Salik Ram, they admitted that the said map was prepared by the plaintiff for sanction of the loan. The said Ex.P-12 was confronted during the cross examination to the witness by the plaintiff as their document and came from their possession. The area which is shown in the plaint would reflect that the plot area was shown as 567 sqft and the construction area on the ground floor was shown as 342.25 sq.ft. Thereafter the additional ground floor area of 83.05 sq.ft, has been shown. Thereafter the open area has been shown as 224.75 sqft. Therefore if the entire construction area and the open area with additional ground floor area are taken together it works out to 650.05 sqft meaning thereby it is over and above the plot area of 567.00 sq.ft, for which the agreement was entered.

11. In view of the above context, if the defence and evidence of the appellant/defendant is considered it would show that D.W.1 Salik Ram has stated at para 8 that apart from the premises shown in existing map the plaintiff agreed to purchase the area in possession of defendant in ground floor

and agreed to pay an amount of Rs.20,000/- but he refused to pay the same. Subsequently he further maintained the fact that in order to approach kitchen, garden and the room situated in backyard one has to pass through the existing construction which was at the front of the road and if such passage is stopped then automatically the right to approach the kitchen garden and room would be closed. If such statement of D.W.1 is read together with Ex.P-12 it fortifies the fact that a part of agreed area to be sold some possessory right of defendant was agreed to be purchased. Therefore, the presumption of map Ex.D-1, which shows the existing room and a kitchen garden apart from the superstructure gets support. It appears that the plaint map do not show the kitchen guardian and the existing room and only lease hold area is shown agreed to be purchased. If specific performance of the contract is allowed then the part of the area which is in possession of the defendant will automatically go to the prospective purchaser which would otherwise amount to undue enrichment to envelop the possessory title and would also amount to depriving the appellant/defendant. On the other hand, it can be presumed that the defence raised by the appellant is correct that initially though the plaintiff agreed to give money for backyard of property which was encroached upon by defendant and Kitchen garden was prepared but subsequently after agreement of lease hold area changed his mind to get the said backyard of property for free of cost.

12. In *Zarina Siddiqui v. A. Ramalingam alias R. A. Amarnathan* (2015) 1 SCC 705, the supreme Court has

held in that the remedy for specific performance is an equitable remedy. The Court while granting decree of specific performance exercises its discretionary jurisdiction. Section 20 of the Specific Relief Act specifically provides that the Court's discretion to grant decree of specific performance is discretionary but not arbitrary. Discretion must be exercised in accordance with sound and reasonable judicial principles. It has also been laid down that the equitable discretion to grant or not to grant a relief for specific performance also depends upon conduct of the parties.

13. On evaluating the evidence led by the parties in this case it shows that there is a discrepancy of the area though initially the plaintiff has stated that it was an area of 567 sq.ft, but on examination of the witnesses and the statements and documents it would show that if such specific performance of the area is granted then automatically it would envelop an additional area of kitchen, garden and room which was existing in the backyard, over which the defendants stated that they had possessory title as per map Ex.P-12. Therefore, in the opinion of this Court, the discretionary jurisdiction in the facts and circumstances cannot be exercised to uphold the judgment of the court below.
14. In the result, the appeal is allowed. The judgment and decree of the court below is set aside. No order as to costs.

Sd/-
GOUTAM BHADURI
JUDGE