NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

FA No. 8 of 2013

- Mohammad Ajaz Khan S/o Mohd. Jumman Aged About 44 Years R/o Sailani Nagar, Sanjay Nagar, P.S. Tikrapara, Tah. And Distt. Raipur, Chhattisgarh

---- Appellant

Versus

1. Smt. Shehnaz Begum, W/o Abrar Ahmed Aged About 38 Years R/o Indian Public School, Near Masjid, Sanjay Nagar, P.S. Tikrapara, Distt. Raipur, Chhattisgarh

2. Mohammed Amin Khan Aged About 37 Years R/o Kisan Rice Mill, Gariyabandh, P.S. Gariyabandh, Distt. Raipur C.G.

3. Mohammad Niyazuddin Qureshi S/o Mohsiajuddin Qureshi Aged About 43 Years R/o Bakra Market, Sanjay Nagar, P.S. Tikrapara, Distt. Raipur C.G.

---- Respondent

For Appellant : Shri Malay Kumar Bhaduri, Advocate.
For Respondents 1 & 2 : Shri R.K. Pali, Advocate.
For Respondent No. 3 : Shri Kshitij Sharma, Advocate.

Hon'ble Shri Prashant Kumar Mishra &
Hon'ble Smt. Vimla Singh Kapoor, JJ

Judgment On Board By Prashant Kumar Mishra, J

31/08/2018 :

1. This is plaintiff's appeal under Section 96 of the CPC challenging the judgment and decree of the trial Court rejecting his suit for

specific performance.

2. The subject property ad measuring 2000 sq. feet bearing plot No.128/138 is situated at Tikarapara, Raipur. There is no dispute about ownership of defendant No.1 over the suit property. On 17.12.2007, defendant No.1 executed agreement in favour of the plaintiff for alienating the property for a consideration of Rs.10,50,000/-, out of which Rs.3 lakhs was paid as advance to defendant No.1. The sale deed was to be executed by 25.1.2008. It was stated in the agreement that defendant No.1 has handed over all the papers relating to the property to the plaintiff and that the plaintiff shall get the sale deed executed before due date, failing which advance would be forfeited. According to the plaintiff, defendant No.1 avoided to execute the sale deed and started negotiating with other people which came to the plaintiff's notice, upon which legal notices (Ex.-P/2 & P/5) were served on defendant No.1. Defendant No.1 thereafter replied to the legal notice vide Ex.-P/4 stating that all the documents have already been handed over to the plaintiff but he is not taking steps for execution of the sale deed despite having fixed the dates on 30.1.2008, 6.2.2008 and 21.2.2008. It was also stated in the reply that the plaintiff demonstrated his inability to purchase the property for lack of funds. The defendant No.1 also stated that advance amount has

already been refunded.

3. The plaintiff preferred the suit on 10.3.2010.

4. In the suit also, defendant No.1 raised similar defence that the plaintiff was not ready and willing to perform his part of contract and did not offer balance sale consideration to get the sale deed executed within due date, therefore, he is not entitled for decree.

5. Even before filing of the suit, defendant No.1 Smt. Shehnaz Begum executed sale deed in favour of defendant No.2 Mohd. Amin Khan on 31.3.2008 and thereafter defendant No.2 Mohd. Amin Khan sold the property to defendant No.3 Mohd. Niyazuddin on 12.8.2009. Thus much before filing of the suit, both the sale deeds were executed, however, the plaintiff preferred the suit without impleading subsequent purchasers. Defendants No.2 & 3 i.e. Mohd. Amin Khan and Mohd. Niyazuddin, the subsequent purchasers, have been impleaded subsequently by way of amendment in the plaint. However, while amending the plaint, the plaintiff did not feel it necessary to plead that subsequent purchasers were aware of the agreement between the plaintiff and defendant No.1 nor there is any plea by way of amendment that defendants No.2 & 3 are not bonafide purchasers. Even if the plaintiff has not made such pleading at the time of impleading

defendants No.2 & 3, the fact remains that even after filing of the written statement by defendants No.2 & 3, the plaintiff did not make any consequential amendment in the plaint raising plea that assertion of defendants No.2 & 3 that they are the bona fide purchasers is not correct and that the plaintiff informed the defendant No.2 or defendant No.3 that they should stay away from the property as there exists an agreement between him and defendant No.1.

6. While the plaintiff examined himself as PW-1, his only witness, defendant No.1 also examined herself as her witness and similarly defendant No.3 Mohd. Niyazuddin also examined himself as his only witness. Defendant No.2 Mohd. Amin Khan has not examined any witness.

7. The trial Court has dismissed the suit by recording a finding that the plaintiff was not ready and willing to perform his part of contract, therefore, he is not entitled for decree of specific performance.

8. Shri M.K. Bhaduri, learned counsel for the appellant would submit that defendant No.1 did not supply the documents pertaining to the suit property, therefore, it was defendant No.1 who failed to perform her part of contract and as such, the trial Court has

wrongly held that it was plaintiff who failed to perform his part of contract. He would submit that in the teeth of finding in para-17 of the impugned judgment, the plaintiff is entitled for decree of refund of advance amount.

9. Shri Pali and Shri Sharma, learned counsel for the respondents/ defendants would take this Court through evidence available on record to argue that the finding recorded by the trial Court does not call for any interference.

10. To consider as to whether the plaintiff's assertion that defendant No.1 did not provide documents for execution of the sale deed, therefore, it was the defendant No.1, who was at fault for non-execution of the sale deed, we are required to refer to the terms of agreement (Ex.-P/1).

11. Para-3 of the agreement states that the defendant No.1 having received advance has made available necessary documents to the plaintiff so that the plaintiff does not face any problem in getting the sale deed executed. Contrary to this term of the agreement, the plaintiff is accusing defendant No.1 that because of her failure to provide documents, the plaintiff was unable to make preparation for execution of the sale deed. The plea raised by the plaintiff is contrary to the term of the agreement, therefore, this false plea

appears to be made only to avoid execution of the sale deed. In addition to this, the plaintiff has not submitted any evidence to the effect that on or before 25.1.2008 he approached defendant No.1 with funds available to execute the sale deed nor has shown that he had purchased Non Judicial Stamp for writing of the sale deed and had approached defendant No.1 but she did not attend the office of the Sub Registrar, therefore, for want of these important evidence, the trial Court has otherwise rightly held that the plaintiff has failed to prove his readiness and willingness to perform his part of contract.

12. Insofar as the issue concerning refund of advance amount is concerned, it is to be seen that such prayer for refund of advance or earnest money has to be made in the plaint and no relief for refund can be granted by the Court unless it has been specifically claimed. True it is that the Court can allow amendment in this regard, allowing the plaintiff to claim refund, but in the case at hand, the suit was filed in March, 2010 and as on date more than 8 years have gone past after filing of the suit, therefore, despite oral prayer made by learned counsel for the appellant to allow the plaintiff to amend the plaint, we are not inclined to accede to the request and adjourn hearing of the appeal, enabling the plaintiff to make such amendment.

13. For the above stated reasons, we have no hesitation in holding that the plaintiff has failed to prove his readiness and willingness to perform his part of contract and the trial Court has not committed any error while dismissing the plaintiff's suit.

14. The Appeal is bereft of any substance, the same deserves to be and is hereby dismissed.

Sd/-
Judge
(Prashant Kumar Mishra)

Sd/-
Judge
(Vimla Singh Kapoor)

Barve