

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No. 498 of 2005**

Ram Chandra, aged about 47 years, S/o Shri Pohumal Sindhi, R/o Matadevalaya, Bhatapara, Distt. Raipur

---- Appellant/plaintiff

Versus

1. Kranti Lal, S/o Laxmichand Agrawal through Power of Attorney Holder Vyasnarayan, R/o Gandhi Mandir Ward, Bhatapara, Distt. Raipur (C.G.)
2. Vyasnarayan Agrawal, S/o Laxmichandra Agrawal, power of attorney holder of Kranti Lal, S/o Laxmichand Agrawal, R/o Gandhi Mandir Ward, Bhatapara, Distt. Raipur (C.G.)
3. Mahendra Kumar, S/o Ganga Bisen Nougouri, R/o Bhatapara, Distt. Raipur (C.G.)

---- Respondents/defendants

For Appellants/plaintiffs	: Mr. Parag Kotecha, Advocate.
For Respondents No. 1 & 2	: Mr. Ravindra Agrawal, Advocate.
For Respondent No. 3	: Mr. Vineet Kumar Pandey, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

15/07/2019

(1) The substantial questions of law involved, formulated and to be answered in this plaintiff's second appeal state as under:

- "1. Whether in the absence of any appeal by the defendants challenging the decree of refund of earnest money, the first Appellate Court was justified in setting aside that part of the decree ?
2. Whether the judgment and decree refusing specific performance of the agreement between the parties is

legally sustainable in view of the evidence available on record ?

(For the sake of convenience, parties would be referred hereinafter as per their status shown and ranking given in the suit before the trial Court).

(2) The plaintiff brought a suit for specific performance of the contract stating inter alia that he has entered into agreement to sell with the defendant No. 2, who is power of attorney holder of defendant No. 1 with regard the suit land bearing Khasra No. 70/1, area 1.75 acres and Khasra No. 70/4, area 0.65 acres, total 2.40 acres of the land; and in alternative also prayed for refund of earnest money of Rs.3,000/- paid by plaintiff to defendants No. 2.

(3) The trial Court, by its judgment & decree dated 12.05.2003, dismissed the suit holding that the defendants No. 1 & 2 had already entered into agreement to sell with defendant No. 3 on 16.03.1989, which they have already executed a sale deed on 21.06.1991 but granted decree for refund of earnest money of Rs.3,000/- in favour of the plaintiff. Feeling aggrieved against that judgment & decree, the plaintiff preferred first appeal before the first appellate Court. The said Court dismissed the appeal filed by the plaintiff but also set aside the decree of earnest money granted in favour of the plaintiff. Now, this second appeal under Section 100 of the CPC has been preferred by the appellant/plaintiff, in which, substantial question of law has been formulated and set-out in the opening paragraph of this judgment.

(4) Shri Parag Kotecha, learned counsel appearing for the appellant/plaintiff would submit that both the courts below have erred in dismissing the suit filed by the plaintiff and, therefore, the suit may be decreed in favour of the plaintiff by setting aside the judgment & decree passed by both the courts below.

(5) On the other hand, counsel for the respondents would support the impugned judgment and decree.

(6) I have heard learned counsel appearing for the parties and considered their rival submissions made hereinabove and went through the record with utmost circumspection.

(7) Firstly, I will take up the second substantial question of law for determination; as to whether both the courts below were justified in holding that plaintiff is not entitled for the decree of specific performance of the contract.

(8) The plaintiff is said to have entered into agreement to sell with defendant No. 2, who is power of attorney holder of defendant No. 1, on 7.6.1991 for purchase of the suit land and obtained Rs. 3,000/- on 7.6.1991 but later on, on 11.06.1991 (Ex.P-6) the plaintiff served notice to defendant No. 2 for getting the sale deed registered in his favour, which the defendant No. 2 replied stating inter alia that the suit land has already been agreed to be sold in favour of defendant No. 3 and which was informed to him (plaintiff), in which he promised that he will discuss the matter with defendant No. 3 and come to a amicable settlement and defendant No. 1 has asserted the alleged agreement to sell was of Rs. 19,000/- per acre, which the plaintiff refused while serving notice (Ex.P-3) and asserted the rate of suit land to be Rs.9,000/- per acre but the plaintiff again vide Ex. P-5 held that he has already replied vide Ex.P-4 and, as such, there is no specific contract with him and, thereafter on 21.06.1991, the sale deed was executed in favour of defendant No. 3 .

(9) The trial Court after appreciating the oral and documentary evidence available on record, has reached to the conclusion that since there was prior agreement to sell

executed with defendant No. 3 on 16.03.1989 vide Ex.D-1 and sale deed has already been executed on 21.06.1991 vide Ex.D-2 and, therefore, the plaintiff is not entitled to claim specific performance of the contract. The said finding has been accepted by the first appellate Court while passing the impugned judgment & decree.

(10) The finding recorded by both the courts below that defendant No. 2 has already executed a prior agreement to sell with the defendant No. 3 and it was informed to the plaintiff while entering into contract Ex.D-1 that there is already agreement to sell with the defendant No. 3, in my considered opinion, that the trial Court is absolutely justified in holding that the plaintiff is not entitled for the decree of specific performance of the contract, which the first appellate Court has rightly agreed upon.

(11) It is well settled law that relief of specific performance of the contract is absolutely discretionary relief and the trial Court and first appellate Court has for the valid and sufficient reasons declined to grant discretionary relief of specific performance in favour of the plaintiff, in which I do not find any illegality or perversity warranting interference in the jurisdiction under Section 100 of CPC. Accordingly, the second question of law is answered in favour of defendants No. 1 & 2 and against the plaintiff.

(12) Now, coming to the first question as to whether the first appellate Court was justified in setting aside the decree for refund of earnest money without any challenge on the part of defendants No. 1 & 2 by filing cross appeal or cross-objection.

(13) At this stage, learned counsel appearing for the appellants/plaintiffs would submit that the first appellate Court was absolutely unjustified in setting aside the decree granting earnest money. To which, Shri Ravindra Agrawal, learned counsel appearing for respondents No. 1 & 2 would submit that in view of provisions contained in Order 41

Rule 33 of the CPC, the defendants No. 1 & 2 were entitled to question the adverse finding recorded by the first appellate Court though they did not file any cross-objection / cross appeal before the first appellate court questioning the aforesaid findings and, therefore, the first appellate Court was justified in setting aside the decree granting earnest money, which does not call for any interference.

(14) The object of Order 41 Rule 33 of the CPC of the CPC is to avoid contradictory and inconsistent decisions on the same questions in the same suit. This Rule does not confer an unrestricted right to re-open decrees which have become final and it should be exercised in exceptional and rare cases.

(15) The Supreme Court in the matter of Hardevinder Singh Vs. Paramjit Singh and others¹, Their Lordships of the Supreme Court have considered the earlier judgments of the Supreme Court on maintainability of cross-objection/cross-appeal against the finding and it has been clearly held that after the 1976 Amendment of Order 41 Rule 22, it is permissible to file a cross-objection against a finding. It gives him the right to take cross-objection to a finding recorded against him either while answering an issue or while dealing with an issue. It was observed in para 21 as under:-

“21. After the 1976 Amendment of Order 41 Rule 22, the insertion made in sub-rule (1) makes it permissible to file a cross-objection against a finding. The difference is basically that a respondent may defend himself without taking recourse to file a cross-objection to the extent the decree stands in his favour, but if he intends to assail any part of the decree, it is obligatory on his part to file the cross-objection. In *Banarsi v. Ram Pal*², it has been observed that the amendment inserted in 1976 is clarificatory and three situations have been adverted to therein. Category 1 deals with the

¹ (2013) 9 SCC 261

² (2003) 9 SCC 606

impugned decree which is partly in favour of the appellant and partly in favour of the respondent. Dealing with such a situation, the Bench observed that in such a case, it is necessary for the respondent to file an appeal or take cross-objection against that part of the decree which is against him if he seeks to get rid of the same though he is entitled to support that part of the decree which is in his favour without taking any cross-objection. In respect of two other categories which deal with a decree entirely in favour of the respondent though an issue had been decided against him or a decree entirely in favour of the respondent where all the issues had been answered in his favour but there is a finding in the judgment which goes against him, in the pre-amendment stage, he could not take any cross-objection as he was not a person aggrieved by the decree. But post-amendment, read in the light of the Explanation to sub-rule (1), though it is still not necessary for the respondent to take any cross-objection laying challenge to any finding adverse to him as the decree is entirely in his favour, yet he may support the decree without cross-objection. It gives him the right to take cross-objection to a finding recorded against him either while answering an issue or while dealing with an issue. It is apt to note that after the amendment in the Code, if the appeal stands withdrawn or dismissed for default, the cross-objection taken to a finding by the respondent would still be adjudicated upon on merits which remedy was not available to the respondent under the unamended Code.”

- (16) In light of the principles of law laid down by the Supreme Court in the aforesaid case, if the facts of the present case are examined, it is quite vivid that the defendants No. 1 & 2 while defending the appeal preferred by the plaintiff before the First Appellate Court did not prefer either cross-appeal or cross-objection to question the decree – qua – refund of earnest money granted in favour of the plaintiff and that part of decree had

become final and, therefore, in absence of the express challenge to the decree of refund of earnest money, the first appellate Court was unjustified in setting aside the decree granting earnest money in favour of the plaintiff. The said finding being perverse and contrary to the record is liable to be and is hereby set aside.

(17) Consequently, the appeal is allowed in part. Judgment and decree of the first appellate Court to the extent of refusing decree of specific performance is affirmed whereas decree of the first appellate Court setting aside the refund of earnest money is liable to be and is hereby set aside and the judgment & decree of the trial Court directing the defendants No. 1 & 2 to refund of earnest money to the plaintiff is restored. Defendants No. 1 & 2 are directed to pay Rs.3,000/- to the plaintiff and the plaintiff will entitle for cost so far as refund of earnest money from the defendants No. 1 & 2 is concerned. No cost(s).

(18) Decree be drawn up accordingly.

Sd/-

(Sanjay K. Agrawal)
Judge

D/-

