

**HIGH COURT OF CHHATTISGARH, BILASPUR****FA No. 22 of 2002**

Dharmasingh Gulati, son of Malaram Gulati, aged about 55 years, R/o village Abhanpur, Tahsil Abhanpur, Distt. Raipur (Chhattisgarh) ---  
**Appellant**

**Versus**

Vrahattakar Krishi Saksh Sahkari Sanstha Maryadit Panjiyan Kramnk No. 501, Abhanpur, Tahsil Abhanpur, Distt. Raipur, Chhattisgarh. ---  
**Respondent**

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| For the appellant  | : | Madam Sharmila Singhai, Advocate |
| For the Respondent | : | Mr. B. D. Guru, Advocate         |

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**Hon'ble Shri Justice Goutam Bhaduri**

**Order on Board**

**03.01.2019**

1. The instant appeal is against the judgment and decree dated 09.11.2001 passed by the 4th Additional District Judge, Raipur in Civil Suit No.84-A/2001 whereby the suit for specific performance of contract was dismissed. The appellant was plaintiff herein.
2. As per the plaint averments, the defendant is a registered Co-operative Society which is situated at Abhanpur, Distt. Raipur. The Society published a notice for sale of immovable property by auction on 08.02.1995 and accordingly on 28.02.1995, 35 acres of land was purchased by different persons and the sale deeds were executed after the payment of sale consideration. The plaintiff averred that on his behalf, one Kamlesh Thakur son of Ramadheen Thakur participated in the auction and bidding was done for the land bearing Khasra No.137/117 & 118 admeasuring 4 acres for value of

Rs.50,000/- and the land of Kh. No. 132/6, 8 & 9 admeasuring 5 acres & 1 decimal for Rs.53,000/- and according to the auction norms, 25% of the value of the land i.e., Rs.12,500/- and Rs.13,250/- was deposited. It was stated that one civil suit was pending at the behest of one Gopilal Rathi for declaration and permanent injunction and stay was operative, therefore, the sale deed was not executed in respect of the second land. The plaintiff averred that the defendant offered to set off the amount of Rs.13,250/- in lieu of sale consideration for Kh.No.137/17 & 18 and therefore, the set off was made and the plaintiff gave affidavit on 29.03.1995 that he would be purchasing the second land in respect of Kh.No. 132/6, 8, 9 after the dispute is settled. Subsequently the plaintiff came to know that compromise has been effected between Gopilal Rathi and defendant and the defendant has agreed to sell the land in favour of Gopilal Rathi. Since an agreement was existing to purchase the land as such a notice was served to the defendant that the plaintiff is ready and willing to perform his part of contract. Despite service of notice, execution of sale was not made and no sale deed was ever executed, therefore, the suit was filed for specific performance of sale of second land.

3. The defendant Society denied averments of the plaint and contended that the suit was not tenable and it was further stated that in respect of Kh.No.137/17 & 18 the transaction was entered by one Kamlesh Thakur and subsequently the amount of Rs.13,250/- which was deposited for purchase of land bearing Kh.No.132/6,8,9 was set off as against the purchase of land of Kh.No.137/17 & 18. Therefore, no

specific performance of sale can be ordered for. Further the defendant also raised the ground that the suit is not tenable before the Civil Court and prayed for dismissal of the suit.

4. On the basis of pleading of the parties, the trial Court framed 4 issues and held that the plaintiff is not entitled for a decree of specific performance in respect of land Kh.No.132/6, 8, 9 ad-measuring 5 acres and one decimal and dismissed the suit. Being aggrieved by such order, the present appeal.
5. Learned counsel for the appellant would submit that as per the order sheet dated 17.04.1999 since all the original documents were in possession of the defendant Society, an application was moved under Order 11 Rule 4 CPC wherein the Court has directed for production of the documents which were in possession of the defendant. It is further contended that subsequently documents were not produced and eventually again by order dated 11.07.2001 while the evidence was being adduced the defendant gave an undertaking before the Court to produce the documents which was sought to be called and having not been done so, the adverse inference has to be made. Learned counsel further referred to the photocopy of the affidavit dated 29.03.1995 and would submit that on the offer of the defendant Cooperative Society, such affidavit was given, therefore, it would constitute agreement *inter-se* between the parties and subsequently if the documents i.e., proceedings of the cooperative society are not produced before the Court in such a case the adverse inference should have been drawn to hold that agreement of sale was existing. He further contended that the affidavit dated

29.03.1995 furnished by the plaintiff would be that it is against an offer made, therefore, if the documents despite the order and undertaking of the defendant was not produced before the Court then it needs reconsideration. It is further submitted that the trial Court failed to appreciate its own order thereby the wrong finding of fact was rendered. Accordingly, it is prayed that the appeal be allowed or in the alternative the case may be remanded to the court below.

6. Learned counsel for the respondent vehemently opposes the arguments and would submit that no agreement has been proved to be existing for sale of land bearing kh.No.132/6,8 & 9. It is stated that one Kamlesh Thakur was negotiating on behalf of the plaintiff and no power of attorney was ever produced before the Court so as to show the nexus and the agreement between the plaintiff Dharm Singh Gulati and Kamlesh Thakur, consequently in absence of any power of attorney, the plaintiff himself has not been able to prove the existence of any agreement. It is further submitted that in order to get a decree for specific performance, the plaintiff must produce and prove the existence of agreement which is completely absent. Consequently, the finding arrived at by the court below is well merited which do not call for any interference.
7. Heard learned counsel for the parties. Perused the impugned judgment and records of the court below as also the evidence led by the parties.
8. Plaintiff Dharam Singh Gulati was examined as P.W.1. He stated that he had sent one Kamlesh Thakur authorizing to take part in auction and the authorisation was given on the

letter-pad which has been placed in the Court. The exhibited documents do not show that any such document was exhibited. The only question is about the purchase of land bearing Kh. No. 132/6,8 & 9. Admittedly for the land bearing Kh.No.137/17 & 18 an amount of Rs.12,500/- was deposited and for Kh.No.132/6,8 & 9, which is the subject suit land an amount of Rs.13,250/- was deposited being 25% of the sale consideration.

9. The sale deed of land bearing Kh.No.137/17 & 18 was executed, therefore, that is not in dispute. With respect to Kh.No.132/6, 8 & 9 which is of 5 acres and one decimal, the plaintiff contended that the President of the Co-operative Society has offered a proposal that since in respect of suit land the same litigation was pending, therefore, the amount of deposit of Rs.13,250/- may be set off in lieu of sale consideration for Kh.No.137/17 & 18 to which he agreed. The evidence further shows that a request of the President was placed by way of affidavit that when the stay which was operative in respect of the suit land is vacated, then in such a case, he would be ready and willing to purchase the said land. The plaintiff further averred that after he came to know that the stay has been vacated, he offered for purchase of land and gave a letter vide Ex.P-1 to the Society. In the cross examination of this witness, at para 12, he admitted the fact that amount of Rs.13,250/- paid for the subject land, for which the suit for specific performance was filed, was deposited by Kamlesh Thakur though stated that it was deposited on his behalf. He further submits that original of the authority letter dated 26.10.1997 was given to the

Society and carbon copy was given to the Advocate. However, the carbon copy of the authority letter dated 26.10.1997 is not on record or exhibited. Therefore, it is from the very beginning of the issue whether Kamlesh Thakur was working on behalf of the plaintiff Dharam Singh Gulati, a doubt has been created as it has not been clearly established by the plaintiff to prove the fact that Kamlesh Thakur was working on his behalf.

10. The plaintiff witness Harishankar Tiwari (P.W.2), who was the then President of Co-operative Society has averred in examination-in-chief that the registration of the second plot admeasuring 5 acres & 1 decimal could not be made because the stay was operative, therefore, the Society had offered to the plaintiff that the amount deposited at the time of auction for land of Kh.No.132/6,8,9 be set-off in lieu of sale consideration of another land bearing Kh.No.137/17 & 18 and after the stay is vacated, the sale would be executed. In the cross examination of this plaintiff witness, it is averred that after the plaintiff has received back the amount deposited for the suit land of 5 acres, another written agreement was executed between the plaintiff and the defendant/Society. The witness further stated that the agreement was to the effect that after the stay is vacated, the Society would be bound to sell the suit land to the plaintiff. He further stated that according to him, there would have been no proposal/ resolution in Society to execute agreement in favour of the plaintiff. He admitted the fact that the written agreement was scribed to sell the land to the plaintiff by Society and he has signed the same on behalf of the Society and one copy

was given to the plaintiff by him. However, this witness was not able to say that whether the said agreement was signed by the plaintiff or not. According to the witness, the written agreement of sale was existing and the copy was given to the plaintiff. Then if he was seeking for specific performance of the suit for the same agreement, that document should have been produced before the Court. In absence of the same, the presumption cannot be drawn that any agreement was existing for which suit for specific performance was filed and in absence of production of it, it will lead to adverse inference with regard to very existence of agreement.

11. Witness No.3 Kamlesh Thakur (P.W.3) who was working on behalf of the plaintiff averred in the similar line and stated in his cross examination that the Society people after obtaining an affidavit, set off of the amount of Rs.13,250/- which was margin money deposited in the earlier sale. He further stated that the said set off was not made according to their own will and wish as no consent was given and lastly he has stated that in respect of 5 acres of land for which the suit was filed, no fresh agreement was executed. Therefore, statements of P.W.3 Kamlesh Thakur and P.W.2 Harishankar are contradictory to each other. P.W.3 though has stated that the set off made is against the will but no document is produced or exhibited to prove the fact that any objection was made instead it is the case of the plaintiff that the amount of Rs.13,250/- was set off in the sale consideration of the earlier transaction of land bearing Kh.No. 137/17 & 18. In order to succeed a case for specific performance the

plaintiff has to prove beyond reasonable doubt that any agreement is existing for specific performance. The inference of the agreement cannot be drawn.

12. The Supreme Court in case of *Zarina Siddiqui v. A. Ramalingam alias R.A. Amarnathan* reported in (2015) 1 SCC 705 has held 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. Therefore, after evaluating the entire evidence of the parties and facts on record, I do not find any reason to hold that the agreement was existing. Though the plaintiff witnesses averred that the agreement was existing but the document of agreement has not been produced before the Court. Under the circumstances, I do not find any ground to interfere in the impugned order. Accordingly, the appeal is dismissed.

Sd/-  
GOUTAM BHADURI  
JUDGE