

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment reserved on 5-2-2019

Judgment delivered on 28-02-2019

First Appeal No. 143 of 2003

- Yogen Rathod s/o. Narayan Dharam Rathod, aged 37 years, Gujrati, Jagmal Chowk, Bilaspur, Tahsil and Dist. Bilaspur (CG).

---- Appellant/plaintiff

Versus

1. Smt. Padma Ben Bhanushali, aged 45 years, wife of Kanji Bhai Bhanushali.
2. Kanji Bhai Bhanjushali s/o. Shri Heerji Bhai aged 52 years, Hindu Gujrati.
3. Bharat Kuamr s/o. Shankar Lal Gujrati, aged 42 years.
4. Pratap Kumar s/o. Nanji Bhai Gujrati, aged 43 years.

All residents of Jagmal Chowk, Bilaspur, Tahsil and District Bilaspur (CG).

---- Respondents/defendants

For appellant : Mr. Shreekumar Agrawal, Sr.
Advocate with Shri Virendra Verma,
Advocate.

For respondents : Mr. Somnath Verma, Advocate.

SB: Hon'ble Shri Justice Ram Prasanna Sharma

CAV JUDGMENT

- 1) This appeal is preferred under Section 96 of the Code of Civil Procedure, 1908 against the judgment/decreed dated 17-5-2003 passed by 3rd Additional District Judge, Bilaspur, District

Bilaspur in Civil Suit No. 95-A/2002 wherein the said court dismissed the suit filed by the appellant/plaintiff for specific performance of the contract in relation to agreement to sale of the house which is shown in the map with plot situated at Jagmal Block, Tikarapara, Juna Bilaspur, MP now CG, but decreed the suit for refund of advance sum to the tune of Rs.5100/- with interest.

2. As per version of the appellant, respondent No.1/defendant namely Padma Ben Bhanushali entered into agreement as per Ex.P/1 for sale the suit house and land for cash consideration of Rs.2,75,151/- and agreement was written on 20-9-1996 on receiving advance sum of Rs.5100/-. It was stipulated in the agreement that the appellant/plaintiff will pay 65% of the sale price upto 19-10-1996 and balance 35% (including advance sum) of the sale price will be paid upto 19-11-1996. After execution of the said agreement respondent No.1 left for Pipariya from Bilaspur and she was not ready and willing to perform her part of agreement. The appellant was always ready and willing to perform his part of contract. On 2-11-1996 respondent sent a notice through her counsel asking for payment of 65% of the sale price with 24% per annum interest on it within three days, otherwise agreement will be deemed to be forfeited. In the said notice it is mentioned that time was essence of the agreement. By

service of notice the said respondent herself committed breach of contract by asking for payment of interest though payment of interest was never agreed between the parties. After receiving notice appellant sent a telegram to perform agreement after receiving balance price. In telegram dated 3-3-1997 (Ex.P/7) respondent No.1 directed the appellant to contact Shri Nanji Bhai in the matter of execution of sale deed because respondent No.1 herself was not residing at Bilaspur, but she is residing at Pipariya. Appellant met Nanji Bhai, but he denied for any conversion with the appellant. On 4-3-1997 appellant sent a notice to counsel of respondent No.1 to receive balance sale price and execute registered sale deed in his favour. This notice was received on 5-3-1997 by the advocate of respondent No.1. Appellant produced demand draft of the balance sale price dated 29-2-2000 before the Hon'ble Apex court in SLP (C) No. 23575/97 to show his readiness and willingness because respondent No.1 was not available to receive money at Bilaspur. Appellant then filed a suit for specific performance of contract on 2-4-1997 i.e., only after seven months of the agreement to sell the suit land. On 23-11-1996 respondent No.1 executed a subsequent agreement to sell the suit land and house for the same price to respondents Bharat Kumar and Pratap Kumar as per Ex.D/15 which proves that she had no intention to perform

agreement to sell dated 20-9-1996 executed in favour of the appellant. Even after execution of second agreement, respondent No.1 sent a false notice (Ex.D/7) dated 3-3-1997 directing the appellant to meet her son Nilesch Kumar at Bilaspur and get executed sale deed in between 3-3-1997 to 5-3-1997. The said notice was replied by the appellant vide Ex.D/8.

3. Learned counsel for the appellant would submit as under;

- i) The trial Court held (para 25 of the judgment) that time was not essence of the contract, but held that time was made essence of the agreement by sending notice by respondent No.1 which is not sustainable.
- ii) The respondent did not enter into witness box and did not examine another important witness Nanji Bhai, therefore, adverse inference should have been drawn by the trial Court against the respondent.
- iii) The trial Court erroneously held that the appellant has not given evidence of availability of fund which is not correct. The appellant had always requisite fund and he produced and filed photo copy of demand

draft dated 29-2-2000 for entire sale price.

- iv) The trial Court wrongly held that appellant failed to avail one more opportunity in March 1997 to get executed the sale deed from respondent No.1.
- v) The trial Court failed to consider the effect of execution of another subsequent agreement in favour of respondents Bharat Kumar and Pratap Kumar which is breach of agreement.
- vi) The finding of the trial court is not in the fitness of factual matrix and legal aspect of the matter, therefore, same is liable to be set aside.

He relied upon the decisions of Hon'ble Supreme Court in the matter of **Govind Prasad Chaturvedi vs. Hari Dutt Shastri, AIR 1977 SC 1005, Sukhbir Singh vs. Brij Pal Singh, 1996 Part II, MPWN 234, Janki Vashdeo Bhojwani and another vs. Indusind Bank Ltd and others, 2004 AIR SCW 7064 and Vidhyadhar vs. Mankikrao**

and another, AIR 1999 SC 1441.

4 On the other hand, learned counsel for the respondents would submit that the finding of the trial court is based on proper marshalling of the evidence and legal aspect of the matter, therefore, same is not liable to be interfered while invoking jurisdiction of the appeal.

5. I have heard learned counsel for the parties and perused the record of the trial court in which judgment /decree is passed.

6. The first question for consideration of this court is whether the appellant was ready and willing to perform his part of contract. Admittedly, he entered into agreement (Ex.P/1) in which the total consideration was Rs.2,75,151/-. Only Rs.5100/- was paid to respondent No.1 and 65% of the sale amount was to be paid on 9-10-1996 and remaining part of the amount was paid on 9-11-1996.. From notice (Ex.P/5) which is sent by respondent No.1 to appellant, it is clear that 65% of the sale amount was not paid on 20-10-1996 that is why notice was served to appellant for paying 65% of the sale amount.

7. It is contended on behalf of the appellant that interest @ 24% per annum was also demanded by said notice but the fact remains that 65% of the sale price was to be paid upto 20-10-1996 which was not tendered or paid by the appellant. Even after notice (Ex,. P/5), 65% of the sale price was not tendered or paid

by the appellant. It means, no amount was paid after agreement of sale and amount which was paid was meagre amount looking to the sale price. The appellant did not reply to the notice (Ex.P/5) and no explanation was given by him as to why he has not replied to said notice in affirmative that he is willing to pay the entire sale price.

8. From the evidence it is clear that no amount was tendered or paid by the appellant upto filing of the suit dated 2-4-1997. From the document Ex.D/7 it is clear that one more opportunity was given to the appellant to pay the balance sum and get the sale deed registered upto 5-3-1997. This document shows that before filing of the suit, other opportunity was also provided to the appellant. Looking to the oral and documentary evidence adduced by both sides, the trial Court opined that the appellant was not ready and willing to perform his part of contract by paying the balance sum upto 20-11-1996. The agreement was to be performed after full payment of consideration on 20-11-1996 but appellant did not pay any sum after date of agreement that is why the trial court recorded a finding that readiness and willingness on behalf of the appellant is lacking.

9. Learned counsel for the appellant submits that time was not essence of contract, therefore, finding of the trial Court is not sustainable.

10. In view of this court, every party of contract has to perform his/her part of contract if date is fixed for doing any act unless dispensed with. In the present case, respondent No.1 never refused to perform her part of contract, but contrary he served notice to respondent No.1 for performing the contract, therefore, respondent No.1 cannot be faulted with for non-performance of the contract. As per Section 37 of the Indian Contract Act, 1872 only respondent No.1 was responsible to perform her part of contract and she was willing to perform her part of contract. It is not a case that the trial Court opined that time was essence of the contract, but the trial Court recorded finding that the appellant has not performed his part of contract and therefore, he was not ready and willing to perform his contract. If party under contract is not willing to perform his/her part of contract, he/she cannot claim specific performance of contract because it is discretionary relief and discretionary relief cannot be granted to a party who himself or herself is not performing his/her part of contract.

11. Looking to the entire material placed on record, this court is of the opinion that the case laws cited on behalf of the appellant are distinguishable from facts of the present case and do not help to the appellant. After re-assessing the entire evidence this court has no reason to substitute contrary finding.

12) As a fallout and consequence of the aforesaid discussion, the appeal is held to be devoid of merit and same is liable to be dismissed. Accordingly, decree is passed in favour of respondents and against the appellant as under:

- (i) The appeal is dismissed with cost.
- (ii) Parties to bear their own costs.
- (iii) Pleader's fee., if certified, be calculated as per Schedule or as per certificate whichever is less.
- (iv) A decree be drawn up accordingly.

Sd/-

(Ram Prasanna Sharma)
JUDGE

Raju