

HIGH COURT OF CHHATTISGARH, BILASPUR

First Appeal No. 398 of 1996

Judgment reserved on : 13.11.2018

Judgment delivered on : 22.01.2019

1. Smt. Sharda Rani Chhabada Since Dead Through LRs.
 - 1(a) Munshi Ram Chhabda, H/o. Late Sharda Rani Chhabda, Aged About 77 Years, R/o. Jagat Agency, Telipara, Bilaspur, Chhattisgarh.
 - 1(b) Mangal Sen Chhabda, S/o. Late Sharda Rani Chhabda, Aged About 54 Years, R/o. Jagat Agency, Telipara, Bilaspur, Chhattisgarh
 - 1(c) Dr. Anil Kumar Chhabda, S/o. Late Sharda Rani Chhabda, Aged About 48 Years, R/o. Jagat Agency, Telipara, Bilaspur, Chhattisgarh
 - 1(d) Sushil Kumar Chhabda, S/o. Late Sharda Rani Chhabda, Aged About 46 Years, R/o. Jagat Agency, Telipara, Bilaspur, Chhattisgarh
 - 1(e) Yashpal Chhabda, S/o. Late Sharda Rani Chhabda, Aged About 44 Years, R/o. Jagat Agency, Telipara, Bilaspur, Chhattisgarh
 - 1(f) Harish Kumar Chhabda, S/o. Late Sharda Rani Chhabda, Aged About 42 Years, R/o. Jagat Agency, Telipara, Bilaspur, Chhattisgarh
 - 1(g) Smt. Usha Saluja, D/o. Late Sharda Rani Chhabda, Aged About 50 Years, W/o. Prem Saluja, C/o. Shri Anand Medical Store, Opposite Bhandhari Mill Gate, Snehlata Ganj, Indore M.P.
2. Anoop Kumar Chhabda, S/o. Shri Munshiram Chhabda, Aged About 30 Years, R/o. Telipara, Bilaspur, Tahsil & District Bilaspur (M.P.) Now Chhattisgarh

---- Appellants

Versus

1. Rajjan Prasad (Dead) Through LR's:
 - 1(a) Smt. Santibai Shukla, Wd/o. Late Rajjan Prasad, Aged About 60 Years.
 - 1(b) Vikash Shukla, S/o. Late Rajjan Prasad, Aged About 48 Years.
 - 1(c) Sanjay Shukla, S/o. Late Rajjan Prasad, Aged About 60 Years.
 - 1(d) Ajay Shukla, S/o. Late Rajjan Prasad, Aged About 60 Years.

All are R/o. Near Ganesh Trading Company, Telipara, District Bilaspur, Chhattisgarh
2. Devi Prasad Tiwari (Died) Through LR's :
 - 2(ii)A. Ravi Bhushan, S/o. Late Shri Jyoti Bhushan, Aged About 23 Years.
 - 2(ii)B. Sashi Bhushan, S/o. Late Shri Jyoti Bhushan, Aged About 26 Years
 - 2(ii)C. Smt. Pushpa, W/o. Late Shri Jyoti Bhushan, Aged About 38 Years.

All are R/o. Budhar Road Rama Bai Hospital Road, Tahsil
Suhagpur, District Shahdol (M.P.)

---- Respondents

For Appellants : Mr. Ashish Shrivastava, Advocate

For Respondent No.1 : Mr. B.P.Gupta, Advocate

Hon'ble Shri Justice Goutam Bhaduri

C.A.V. Judgment

22.01.2019

1. The instant appeal is against the judgment and decree dated 23.08.1996 passed in Civil Suit No.10/1991 by the District Judge, Bilaspur, whereby the judgment & decree for specific performance has been passed in favour of the plaintiff/ respondent No.1. The present appeal is by the purchasers of the suit property.
2. The facts of the case in brief is that, a suit was filed by Rajjan Prasad, S/o. Shambhu Dayal (since deceased) that on 04.03.1991 an agreement was executed in between Rajjan Prasad (since deceased) and Devi Prasad Tiwari (since deceased) whereby Devi Prasad Tiwari agreed to sell half part of the superstructure comprised Plot No.87 recorded at Sheet No.26 admeasuring half of 2485 sq.ft. for a sale consideration of Rs.2 Lakhs as Rajjan Prasad was in occupation of the suit house as tenant. Out of the total sale consideration, Rs.20,000/- was paid as an advance as earnest money and it was agreed that till 15.04.1991 sale deed would be executed in favour of the plaintiff. It is further pleaded that before the date of sale a notice was received by plaintiff on 13.03.1991 and allegations were clamped that the son of the then plaintiff Rajjan Prasad has obtained signature on the papers by fraud and further it was pleaded that thereafter the defendant

No.1, the seller, contacted for execution of the sale deed and it was stated that the plaintiff was ready and willing to execute the sale deed by payment of remaining amount of Rs.1,80,000/-. Subsequently, the plaintiff came to know that the defendant No.2 namely Sharda Rani Chhabda and defendant No.3 Anoop Kumar Chhabda have purchased the suit property. It was further contended that the agreement dated 04.03.1991 was within the knowledge of the subsequent purchasers and they were not the bonafide purchasers of the said suit property. The plaintiff further pleaded that he was further ready and willing to perform his part of contract, therefore, specific performance of decree was prayed for.

3. The defendant No.1, Devi Prasad Tiwari, the original owner/ seller of the property filed his written statement and stated that he never received the notice sent by the plaintiff. It was stated that neither any agreement nor any sale consideration of Rs.20,000/- advance was paid. It was stated that another sale deed was executed in favour of the defendant No.2 & 3 on 19.03.1991, which was within the knowledge of the plaintiff. It was stated that despite knowing those facts, the plaintiff being the tenant wanted to remain in the suit premises, therefore, such suit was filed. Further the defendant pleaded the plaintiff never wanted to purchase the suit property from the seller. Further it was pleaded that on 10.12.1989 another part of the land of the suit property wherein one Kamal Mohammad was a tenant, one Omprakash Juneja entered into an agreement for purchase of the said part of the land and accordingly on 05.05.1990 sale deed was executed in part of that suit property. It was further pleaded that the plaintiff had also entered into an agreement dated 18.12.1989 with Omprakash Juneja in respect of the part held by the plaintiff and part of sale

consideration Rs.25,000/- was paid. Further the subsequent agreement was executed on 05.05.1990 and thereafter on 17.01.1991 sale consideration was further paid and ultimately the sale was executed in favour of Smt. Sharda Rani Chhabda and Anoop Kumar Chhabda at the behest of Omprakash Juneja with whom the seller entered into the agreement. The sale deed was further stated to have been executed on 19.03.1991.

4. The defendant seller further pleaded that after purchase of the part of suit property, a suit for ejectment by the purchaser Rampyari was filed, which is pending adjudication. He stated that the plaintiff who was neighbour of Kamal Mohammad, the other tenant, hatched the conspiracy and accordingly send his son to the seller by saying that he has been sent by Omprakash Juneja with whom the seller had entered into an agreement of sale and the agreement which was earlier prepared, signature of seller was obtained by playing fraud, however, no advance was ever given for the sale. It was stated that subsequently when the defendant seller contacted the original purchaser Omprakash Juneja, the fraud came to the notice and thereafter immediately a notice was sent through their Advocate and on the basis of the forged document, the suit was filed. The seller further pleaded that since earlier the agreement of sale was existing, therefore, no question arises for entering into the further sale.
5. The defendant No.2 & 3 namely Sharda Rani Chhabda and Anoop Kumar Chhabda, the purchasers, stated that on 19.09.1991 they have purchased the property from the defendant No.1 namely Devi Prasad Tiwari for a sale consideration of Rs.2 Lakhs. The subsequent purchasers further pleaded that they do not had the

knowledge of any agreement dated 04.03.1991 and they were the bonafide purchasers of the suit property. It was further stated that after purchase of the property, the plaintiff become the tenant of them. The purchasers further pleaded that in between the seller Devi Prasad Tiwari & Omprakash Juneja an agreement was initially executed on 18.12.1989 in respect of the part of property wherein one Kamal Mohammad was a tenant of the same. The sale deed was executed in favour of Rampyari Juneja at the behest of Omprakash Juneja on 05.05.1990 whereas in respect of the suit property another agreement was executed in between Omprakash Juneja and the seller Devi Prasad Tiwari and part of sale consideration of Rs.25,000/- was paid. Subsequently, another part of sale consideration of Rs.25,000/- was paid on 17.01.1991 and it was stated that it was agreed in between Omprakash Juneja and Devi Prasad Tiwari, the seller that the sale deed would be executed in favour of the person to whom Omprakash Juneja wishes. Accordingly, after receiving the sale consideration of Rs.1,50,000/- the sale deed was executed in favour of the defendant on 19.03.1999.

6. On the basis of the pleading, the trial Court framed five issues and held that the subsequent purchaser had full knowledge of the earlier existing agreement and other agreements were forged by seller so as to defeat the agreement dated 04.03.1991 with plaintiff and decreed the suit for specific performance in favour of the plaintiff. The plaintiff on their behalf had examined Rajjan Prasad Shukla as PW-1, Raj Kumar Awasthi as PW-2 who are witness to the sale agreement and scribe of the document & Jokhu Lal Tiwari as PW-3. The defendant examined Devi Prasad

Tiwari as DW-1, Anoop Kumar Chhabda as DW-2, Omprakash Juneja as DW-3 & Munshi Ram Chhabda as DW-4.

7. Mr. Ashish Shrivastava, learned counsel appearing on behalf of the appellant Sharda Rani Chhabda (since deceased) and Anoop Kumar Chhabda, the purchasers, would submit that the initial agreement Ex.D-1 was executed on 18.12.1989 in between Devi Prasad Tiwari and Omprakash Juneja & Smt. Rampyari in respect of the entire property admeasuring 2485 sq.ft. alongwith superstructure. Subsequently, half portion of the property wherein Kamal Mohammad was tenant was sold by the seller Devi Prasad Tiwari by a registered sale deed on 05.05.1990 and Devi Prasad Tiwari thereafter entered into a fresh agreement of sale with Omprakash Juneja on 17.01.1991 by Ex.D-3. It is stated that the plaintiff claimed his relief on the basis of an agreement dated 04.03.1991 which was outcome of fraud as the agreement dated 04.03.1991 preceded by two other agreements. It is further contended that description of the property in the agreement dated 04.03.1991 is so vague as the prayer for specific performance could not be entertained. It was contended that as per the provisions of Order 7 Rule 3 of C.P.C. the particulars of the property should have been specifically described. Reliance was placed in (2008) 5 SCC 58, 2003 (3) MPLJ 76 & (2000) 6 SCC 685. He referred to Section 19 of the Specific Relief Act and would submit that the appellants who are purchasers did not have any knowledge of the fact that earlier some agreement was existing and the purchase were made for valuable consideration. It is contended that appellants would be the bonafide purchasers and would be saved by virtue of Section 19 of the Specific Relief Act. He would further submit that the decree of the specific

performance is always a discretionary relief and the reliance was placed in (2017) 5 SCC 178, (2016) 4 SCC 352, (2016) 1 SCC 653 and submits that the appellants having purchased the property in the year 1991, the equity lies in their favour. It is further stated that on the date of evidence, the age of the seller Devi Prasad Tiwari was 80 years. Therefore, some inconsistency appears in the statement, but was not fatal. It is submitted that the trial Court has given wrong finding of fact that the document Ex.D-1 do not bear the signature of Omprakash Juneja whereas it is factually negated. Therefore, the said finding of the Court below is based on wrong reading of the documents and the facts, consequently needs interference.

8. Per contra, Mr. B.P.Gupta, learned counsel for the respondent No.1 (the plaintiff) opposes the same. It is contended that this appeal is preferred not by the seller but it is by the purchasers claiming the benefit of Section 19 of the Specific Relief Act. It is stated that Order 7 Rule 3 of C.P.C. speaks about description which would enable the Court to identify the property. He referred to the plaint map and the description shown in the agreement and would submit that description itself are sufficient to identify the property, therefore, there is no ambiguity in respect of the property concerned. It is further contended that since the appeal is not preferred by the seller then they would not be entitled to raise other grounds except the defence available under Section 19 of the Specific Relief Act. Reliance was placed in 2007 AIR SCW 4809, AIR 1934 Privy Council 68 & (2000) 6 SCC 402 and would submit that under the circumstances the burden to discharge that the purchasers were the bonafide purchasers and appellants have failed to discharge the same. It is stated that the defence of ready

and willingness cannot be agitated by the appellants as the seller is not before the Court. He submits that the documents Ex.D-1, D-2 & D-3 said to have been executed in between Devi Prasad Tiwari & Omprakash Juneja and the purchasers Munshiram Chhabda, Anoop Kumar Chhabda & Sharda Rani Chhabda were never in the picture while such agreement was scribed. Referring to Ex.D-5 agreement in between the seller Devi Prasad Tiwari and Omprakash Juneja, the counsel would submit that in the agreement Chhabda were not a party as such the presumption of assignment cannot be interfered since subsequent sale deed was executed by Devi Prasad in favour of the appellant. It is further contended that the contradiction in the statement appears which demolishes the entire claim of the appellant and the finding of the Court below that despite the notice the appellant entered and purchase the suit property is finding of fact on merits, which cannot be interfered. He further submits that the decree, balance equity lies in favour of upholding the decree as the plaintiff is in possession of the suit property and is continuing his shop for his livelihood. It is stated the sale consideration which the appellant stated to have paid have not been established to show the actual sale consideration had ever passed to original seller. Consequently, if the sale is executed now the amount of sale consideration would be much more. It is contended the decree is well merited which do not call for any interference.

9. Heard learned counsel appearing for the parties at length and perused documents.
10. The principles as has been laid down in case of ***Jayakantham & Ors. v. Abaykumar*** reported in ***(2017) 5 SCC 178*** that while

evaluating whether the specific performance sought to have been decreed in a case certain principles are to be followed. It was held that the Court is not bound to grant the relief of specific performance merely because it is lawful to do so. Section 20(1) of the Specific Relief Act, 1963 indicates that the jurisdiction to decree specific performance is discretionary. However, the discretion of the Court is not to be used arbitrary but has to be used on sound and reasonable to be guided by judicial principles. It is further laid down that the exercise of discretion is capable of being corrected by a court of appeal. The Court further referred to sub Section 2 of Section 20 which contains a stipulation of those cases where the Court may exercise its discretion not to grant specific performance. The Court referred to the various law laid down and also laid down the principles, the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into can be evaluated.

11. Likewise in case of ***Satish Kumar v. Karan Singh & Anr.*** reported in **(2016) 4 SCC 352** the similar principles were reiterated which reads as under :

8. It is well settled that the jurisdiction to order specific performance of contract is based on the existence of a valid and enforceable contract. Where a valid and enforceable contract has not been made, the Court will not make a contract for them. Specific performance will not be ordered if the contract itself suffers from some defect which makes the contract invalid or unenforceable. The discretion of the Court will not be there even though the contract is otherwise valid and enforceable.

9. This Court in *Mayawanti vs. Kaushalya Devi* (1990) 3 SCC 1 held thus:-

"8. In a case of specific performance it is settled law, and indeed it cannot be doubted, that the jurisdiction to order specific performance of a contract is based on the existence of a valid and enforceable contract. The Law of Contract is based on the ideal of freedom of contract and it provides the limiting principles within which the parties are free to make their own contracts. Where a valid and enforceable contract has not been made, the court will not make a contract for them. Specific performance will not be ordered if the contract itself suffers from some defect which makes the contract invalid or unenforceable. The discretion of the court will be there even though the contract is otherwise valid and enforceable and it can pass a decree of specific performance even before there has been any breach of the contract. It is, therefore, necessary first to see whether there has been a valid and enforceable contract and then to see the nature and obligation arising out of it. The contract being the foundation of the obligation the order of specific performance is to enforce that obligation."

12. In view of the aforesaid principles, the evidence in this case is examined.
13. The defence made by Devi Prasad, the seller, would show he has pleaded at para 9 of the written statement that he had executed the prior agreement dated 18.12.1989 which is marked as Ex.D-1 in favour of one Omprakash Juneja to sell out the suit land and has received Rs.25,000/-. He further stated subsequently by another agreement Ex.D-2 dated 05.05.1990 one more agreement was executed and pursuant thereto Rs.25,000/- was received and pursuant there too the defendant has executed the sale deed. It is stated that the registered sale deed was executed on 19.03.1991 in favour of the appellants herein, the purchasers. Likewise to

demolish the agreement of plaintiff, at the same time, the defendant No.1 has raised a defence that fraud was played by plaintiff's son as he came to the house of defendant No.1 at Sahdol with an averment that he had negotiated with Omprakash Juneja with whom the property was agreed to be sold and stated that on instructions of Omprakash Juneja, he came to Sahdol and obtained the signatures. It is stated that the plaintiff got his signature on the agreement already prepared by him but he has not paid any earnest money on the pretext that the same would be paid by Omprakash Juneja.

14. The plaintiff Rajjan Prasad Shukla (PW-1) has deposed before the Court that the sale consideration and the negotiation of purchase of the suit property was finalized for Rs.2 Lakh. Thereafter, he went to Sahdol to get the agreement executed and paid Rs. 20,000/- as advance, which is supported by other witness Rajkumar Awasthi (PW-2) & Jokhu Lal Tiwari (PW-3). Rajjan Prasad Shukla (PW-1) at para 7 & 8 of his deposition has admitted that in response to the notice dated 13.03.1991 which was sent on 05.04.1991 by the counsel, it was not stated that he himself went to Sahdol. Therefore, at the first instance when circumstances were available to him, he did not disclose the fact that he went to Sahdol. When the document Ex.P-1, the agreement, wherein the plaintiff relied is examined, he deposed that from the word 'Ka to Ka' it was written that Rs. 2 Lakh would be paid at Sahdol is false and he had to pay only Rs.1,80,000/- as balance consideration. Therefore, the discrepancy about payment of the sale consideration creates doubt. If an amount of Rs.20,000/- was paid according to the plaintiff itself then why he should make another commitment to pay Rs.2 Lakh in totality. The agreement do not

say so that Rs.1,80,000/- would be paid as sale consideration balance. It is only an oral statement of the plaintiff, he deposed that Rs.1,80,000/- was remained as a balance.

15. From the perusal of the agreement Ex.P-1, it further shows that it do not bear the signature of the plaintiff which is quite uncommon as being purchaser in the year 1991 having paid Rs.20,000/- and if the agreement is executed a man of common prudence would have scribed his signature on the agreement. The averments of the agreement from 'Ka' to 'Ka' wherein further payment of Rs.2 Lakh was to be made has been tried to be altered by the oral evidence of the plaintiff by saying that he was liable to pay only Rs.1,80,000/-. As such, the oral evidence would be inadmissible as per Section 91 of the Indian Evidence Act, as the terms of the contract would not be varied when it is written in writing. The variation in the written agreement therefore raised a doubt.
16. The agreement Ex.D-1 is dated 18.12.1989, the agreement Ex.D-2 is dated 05.05.1990 and the agreement Ex.D-3 is dated 17.01.1991 are executed in between defendant No.1 and Om Prakash Juneja and the terms were there that the sale deed would be made in name of Omprakash Juneja or any other person as suggested by him. In view of such facts, the specific defence taken by the defendant No.2 Devi Prasad that the plaintiff's son came down at the house of defendant No.2 at Sahdol and stated that he had settled the matter with Omprakash Juneja in his favour and got his signature on the agreement Ex.P-1 appears to be more probable so as to superceed Ex.P-1 on which the plaintiff relied. The aforesaid facts are also fortified by the surrounding circumstances and the deposition as the plaintiff has deposed that

he himself went to Sahdol and got executed Ex.P-1. The said averments neither have been pleaded in the plaint nor has been responded by him to the defendant No.1 against notice dated 13.03.1991. The defence that the plaintiff's son had gone to Sahdol was within the knowledge of the plaintiff. As against this, he pleaded in the plaint that he received a notice dated 13.03.1991 wherein the defendant Devi Prasad, the original owner, has alleged about the fraud which remains unanswered.

17. In view of the aforesaid document and the statement available on record, the defence taken by the Devi Prasad appears to be more reasonable and probable than that of plaintiff. The learned trial Court at para 12 & 13 of its judgment has held that defendant No.1 has deposed against the pleading with respect to agreement executed by him, therefore, cannot be accepted being against the pleading. If the same is looked into from another angle, it would show when the deposition of Devi Prasad was made as DW-1, the said discrepancy may not be fatal considering the age of Devi Prasad DW-1, as it may amount to minor discrepancies in the deposition. In sum and substance, in the deposition, considering the age of the defendant, when he was examined and was deposing after five years such strict compliance cannot be adhered to and a primary minor deviation which is not fatal can always be considered in view of the past facts and conduct of the parties. The plaintiff himself has failed to plead that he went to Sahdol and the response of the legal notice if are considered together, it rather supersedes the pleading taken by plaintiff on the principles of preponderance of probability.

18. Another aspect which comes for consideration in this case that admittedly according to the plaintiff himself, the plaintiff pleaded that the suit property was sold to Smt. Sharda Rani Chhabda and Anoop Kumar Chhabda, the subsequent purchasers, through whom the appellant are claiming. In this context, the said facts if are considered to the principles laid down in ***B.Vijaya Bharathi v. P. Savitri & Ors.*** reported in ***AIR 2017 SC 3934*** by the Supreme Court that if once the conveyance is made and there is no challenge to set aside the same it would be fatal. The relevant extract of the facts and ratio of the law are quoted herein below :

“16. In the facts of the M.M.S. Investments case (*AIR 2007 SC 2663*), after the Trial Court decreed the suit, the property was conveyed to the plaintiff. It is only thereafter that the appellants in that case purchased the property. In the facts of the present case, the Defendants 2 and 3 purchased the property even before the suit for specific performance was filed. In the present case there is no conveyance in favour of the plaintiff after which the Defendants 2 and 3 purchased the property. The ratio of M.M.S. Investments would therefore be of no assistance to the appellant herein. On the other hand, the three Judge Bench decision in Ram Awadh would apply on all fours.

17. It must also be noted that though aware of two conveyances of the same property, the plaintiff did not ask for their cancellation. This again, would stand in the way of a decree of specific performance for unless the sale made by Defendant No.1 to Defendant No.2, and thereafter by Defendant No.2 to Defendant No.3 are set aside, no decree for specific performance could possibly follow.
...xxx....xxx...xxx...”

Section 31 of the Specific Relief Act also would be relevant, which is reproduced as under :

31. When cancellation may be ordered – (1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled. (2) If the instrument has been registered under the Indian Registration Act, 1908 (16 of 1908), the court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.

In this case, the plaintiff admittedly have not asked for any cancellation of the sale deed made in favour of the appellants. In view of this, the suit for specific performance could not have been decreed in favour of the plaintiff as one conveyance.

19. Taking into totality of the facts and closed scrutiny of the entire evidence on record, I am of the opinion that the judgment and decree passed by the learned Court below needs interference. Accordingly, the appeal is allowed. The judgment and decree dated 23.08.1996 is set aside. The parties shall bear their own cost. Decree be drawn up accordingly.

Sd/-
(Goutam Bhaduri)
Judge