NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment reserved on 5-7-2019

Judgment delivered on 24-7-2019

FA No. 208 of 2018

- Rafiq Khan S/o Nawab Khan Aged About 41 Years R/o Village And Post- Lutra, Tehsil Masturi, District- Bilaspur, Chhattisgarh.

---- Appellant/plaintiff

Versus

1. Nizamuddin S/o Late Alfazuddin Aged About 49 Years R/o Village And Post- Lutra, Tehsil- Masturi, District- Bilaspur, Chhattisgarh. (Defendant No. 1)
2. State of Chhattisgarh, Through Collector Bilaspur, District- Bilaspur, Chhattisgarh. .(Defendant No. 2)

---- Respondents

For appellant : Mr. G.L. Uike, Advocate.

For respondent No.1 : Mr. Faiz Kazi, Advocate.

For respondent No.2/ State. : Mr. Ravish Verma, Govt. 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/decree dated 24-2-2008 passed by 8th Additional District Judge, Bilaspur (CG) in Civil Suit No. 121-A/15 wherein the the said court dismissed the shit filed by the appellant/plaintiff for specific performance of contract and injunction and decreed the counter claim filed by the

respondent No.1/defendant for delivering the possession of land bearing survey No. 735/20 area 1200 sq.ft situated at village Lutra.

2. Appellant/plaintiff filed suit for specific performance of contract against respondent No.1/defendant No.1 for land bearing survey No. 655/6 area 0.02 decimal or 872 sq.ft (out of 0.14 decimal) situated at village Lutra, Patwari Halka No.13, Tahsil and District Bilaspur (CG). It is pleaded that respondent No.1 executed agreement for sale on 30-8-2012 (Ex.P/6) for a sum of Rs.1,20,000/- and appellant paid a sum of Rs. 60,000/- as earnest money. The remaining amount was to be paid at the time of execution of sale deed. The appellant was handed over the said property and he is in possession of the suit property. As respondent No.1 has not performed his part of contract, suit was filed. On the other hand, respondent No.1/defendant filed counter claim that appellant illegally possessed the land bearing survey No. 735/20 area 1200 sq.ft owned by respondent No.1 and after hearing the parties the trial Court dismissed the suit filed by the appellant while counter claim of respondent No.1 was decreed.

3. Learned counsel for the appellant would submit as under

i) Respondent No.1 has not performed his part of contract, therefore, decree ought to have

been passed in favour of appellant.

ii) The appellant was always ready and willing to pay remainder sum, therefore, no fault is committed by the appellant.

iii) The trial court recorded affirmative finding regarding agreement to sale and therefore, agreement is admitted between the parties.

iv) It is the respondent No.1 who did not perform his part of contract, therefore, decree ought to have been passed as per Section 16 of the Specific Relief Act, 1963.

4. On the other hand, learned counsel for the respondent No.1 would submit that on the date of agreement the property in question was undivided property and this respondent had limited interest, therefore, he was not competent to alienate his specific portion of land. The appellant was not ready and willing to perform his part of contract, therefore, it is not a case where decree of specific performance can be passed. He would further submit that the appellant has taken possession of other land of respondent which is proved by documents (Ex. D/1 to D/5) and the trial Court s right in granting decree in favour respondent No.1 in counter claim. The appellant did not issue notice from the date of agreement for getting sale deed executed which shows his unwillingness to perform the contract.

5. I have heard learned counsel for the parties and perused the record of the court below including the judgment and decree.

6. The first question for consideration of this court is whether the appellant was ready and willing to perform his part of contract. The agreement between the parties is Ex.P/6. As per agreement, sale deed was to be executed within three months from the date of agreement. The date of agreement is 30-8-2012. The sale deed was to be executed upto 30-11-2012. No notice was served by respondent No.1 to appellant for execution of sale deed after three months. It s the respondent No.1 who issued notice to appellant on 24-9-2013 as per Ex.P/7 for execution of sale deed which shows that appellant was not willing to perform his part of contract within three months and notice was served to him after one year and one month by respondent No.1, therefore, the trial Court is right in holding that appellant was not ready and willing to perform his part of contract. The trial court has elaborately discussed the entire issue and this court has no reason to record contrary finding.

7. The second question for consideration of this court is whether the land bearing survey No. 735/20 area 1200 sq.ft is owned by respondent No.1 and whether appellant illegally possessed the said land.

8. From the records Ex.P/14 and P/15 which is record of right and document of possession, it is established that respondent No. 1 is owner of survey No. 735/20 area 1200 sq.ft. It was demarcated by the revenue authorities and as per documents Ex.D/1, D/2 spot inspection report, Panchnama (Ex.D/3), map (Ex.D/4) and Khasra Entry (Ex.D/5), it is established that the appellant has illegally possessed the land of respondent No.1 as mentioned above. The evidence adduced on behalf of respondent No.1 in this regard is unrebutted and, therefore, the trial Court recorded finding that respondent No.1 is entitled for possession of the said land, therefore, this court has no reason to record contrary finding what is recorded by the trial Court on the basis of oral and documentary evidence adduced by both sides.

9. The third question for consideration of this court is whether the appellant is entitled to recover earnest money from respondent No.1. From the evidence of both sides, the trial court recorded finding that Rs.60,000/- was paid as earnest money for agreement to sale entered into between the parties on 3-8-2012. This finding is not challenged in this appeal and that attained finality. When sale deed is not executed in favour of appellant, he is entitled for earnest money advanced by him.

10. Accordingly, the decree is liable to be modified allowing the appeal partly as under:

i) Respondent No.1 to pay Rs. 60,000/- (Rupees sixty thousand) to appellant within 30 days failing which 6% interest shall be charged on the said amount.

ii) Appeal regarding specific performance by the appellant is dismissed with cost.

Iii) Appellant to handover the land bearing survey No.735/20 area 1200 sq.ft situated at village Lutra to respondent No.1.

iv) Injunction order passed in favour of respondent No.1 shall remain as it is.

v) Parties to bear their own costs.

vi) Pleader's fee, if certified, as per schedule or whichever is less.

vii) A decree be drawn up accordingly.

Sd/-

(**Ram Prasanna Sharma**)
JUDGE

Raju