

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment reserved on 16.04.2019****Judgment delivered on 25.6.2019****First Appeal No.114 of 2007**

Sitaram Agrawal, aged 62 years, Son of Late Begraj Agrawal, R/o. 70 Jal Vihar Colony, Raipur Tahsil and District Raipur (CG)

---- Appellant**Versus**

1. Smt. Dropati Bai, aged not known to the appellant, wife of Madhav Chand, R/o. Madhav Hotel, Near STD PCO, Tappa, Pithora, Tahsil and District Mahasamund (CG)
2. Om Prakash, aged anot known to the appellant, son of Late Madhav Chand R/o. Madhav Hotel, Near STD PCO, Tappa, Pithora, Tahsil and District Mahasamund (CG)

---Respondents

For the appellant	: Shri HB Agrawal, Sr. Advocate with Ku. Deepali Dubey, Advocate
For the respondents	: Shri Bharat Sharma, Advocate

Hon'ble Shri Justice Ram Prasanna Sharma**CAV Judgment**

1. This appeal is preferred against judgment and decree dated 05.7.2007 passed by Eight Additional District Judge (FTC), Raipur (CG) in a Civil Suit No.2A/2006 wherein the said Court dismissed the suit for specific performance of contract but awarded decree in favour of the appellant and against the respondents for refund of earnest money to the tune of Rs.20,000/- with interest.
2. Heard on application filed under Order 41 Rule 27 of Code of Civil Procedure.

3. By this application, the appellant seeks to file revenue record of the land in question which was not filed before the trial court. As the suit is filed for specific performance of contract and no record of right was produced before the trial Court, record of right is required for the Court to ascertain as to whether the persons entered into the agreement of sale were the owners of the property in question and they were competent to alienate the property in question.

4. In the facts and circumstances of the case, the application is allowed and record is taken to the file.

5. As the appellant entered into an agreement with the respondents for purchase of land situated at village Dongripali bearing Khasra No.648/2, 649 area 0.17& 0.27 hectare for case consideration of Rs.60,000/-. Rs. 20,000/- was paid by the appellant to the respondents as earnest money and even after request of several times the respondents did not execute the sale deed in favour of the appellant, therefore, the appellant filed suit for specific performance of contract. After hearing the parties, the trial Court dismissed the suit for specific performance of contract but granted decree of refund of earnest money.

6. Learned counsel for the appellant submits as under:

(i) Non examination of the respondents is sufficient for proving adverse inference against them under Section 114 of the Indian Evidence Act, 1872 and the suit should have decreed.

(ii) Plea of readiness and willingness of the appellant is not available to the respondent because the respondents have not

entered into witness box and have failed to prove that they were ready and willing to perform their part and the appellant was not ready and willing to perform his part.

(iii) Finding of the trial Court that the respondents are not the title holders of the property is not correct in the facts and circumstances of the case, therefore, finding of the trial Court is liable to be reversed.

7. On the other hand, learned counsel for the respondents submits that the finding arrived at by the trial Court is based on proper marshaling of evidence and it is not proved that the respondents have right to transfer the property, therefore, finding of the trial Court is not liable to be set aside. He placed reliance in the matter of *Dharamabiri Rana vs. Pramod Kumar Sharma* (dead) thr. Legal representatives and another reported in (2018) 11 SCC 554.

8. Admittedly, respondents Droupati and Om Prakash have entered into agreement with the appellant for sale of land bearing Survey No.648/2, 649 area 0.17 and 0.27 hectares. From the record of rights it appears that the land in question is recorded in the names of Droupati, Om Prakash, Kishore, Anusuyia, Anjali and Maheshwar. Kishore, Anusuyia, Anjali and Maheshwar did not enter into agreement of sale of land. When specific performance of contract is sought it has to be proved that the persons entered into the agreement are sole owners of the property and they have all the rights to alienate the property. In the present case Droupati and Omprakash both were co-owners

of the property, but they are not full owners of the property. The property is not partitioned, therefore, individual interest can be alienated but the whole property cannot be alienated by Dropati and Om Prakash and the trial Court is right in holding that both the respondents are not owners of the whole property, therefore, decree for specific performance cannot be granted. The trial Court after evaluating this aspect recorded finding that the appellant is entitled for earnest money which was given by him to the respondents. The finding of the trial Court is based on proper marshaling of evidence and this Court has no reason to record a contrary finding.

9. Accordingly, the appeal is liable to be dismissed and the decree is passed in favour of the appellant and against the respondents as under:

- (1) The appeal is dismissed with cost.
- (2) The parties to bear the cost of the suit throughout.
- (3) Pleader's fee, if certified be calculated as per certificate or as per schedule whichever is less.
- (4) A decree be drawn up accordingly.

Sd/-

(Ram Prasanna Sharma)

JUDGE