

HIGH COURT OF CHHATTISGARH, BILASPUR**FA No. 81 of 2014**

1. Savita Agrawal, W/o Madanlal Agrawal Aged About 48 Years R/o Link Road, Bilaspur, Tahsil and District Bilaspur C.G.
2. Ramkumar Dubey S/o Bhushan Kumar Dubey Aged About 50 Years R/o Village Chichirda, Tahsil Takhatpur, District Bilaspur C.G.,

---- Appellant**Versus**

- Radhamal S/o Hasmatmal Aged About 67 Years R/o Chakarbhatha, Bodri, Tahsil Bilha, Distt. Bilaspur C.G.

---- Respondent

For Appellants : Shri KA Ansari, Sr. Advocate with Shri Devesh G. Kela, Adv.
 For Respondent : Shri HB Agrawal, Sr. Advocate with Ms. Deepali Dubey, Advocate.

Hon'ble Shri Prashant Kumar Mishra &
Hon'ble Smt. Vimla Singh Kapoor, JJ

Judgment On Board By Prashant Kumar Mishra, J

14/02/2019 :

1. This is the plaintiffs' First Appeal under Section 96 of the CPC challenging the impugned judgment and decree whereby the trial Court has dismissed their suit for specific performance.
2. The plaintiffs preferred a suit on 31.8.2009 for specific performance of agreement dated 26.5.2007 pertaining to the lands bearing Khasra No.40, area 95 decimal and Khasra No.0.47, area 2.69 acres, total area

3.64 acres, which was agreed to be sold by the defendant for a sum of Rs.16 lakhs. The agreement recites that the defendant accepted advance amount of Rs.10 lakhs cash prior to the date of agreement and received further amount of Rs.5 lakhs cash on the date of agreement i.e. 26.5.2007 and handed over possession of 2.84 acres of land to plaintiff No.1 Savita Agrawal and 80 decimal land to plaintiff No.2 Ram Kumar Dubey. The defendant thereafter executed letter of acknowledgment on 15.6.2007 vide Ex.-P/2. In the original agreement (Ex.-P/1), the defendant agreed to demarcate/measure the land and hand over 22 points registry papers to the plaintiffs and shall execute the sale deed within 15 days from the date of handing over 22 points documents, failing which the advance amount shall be forfeited and the land would be returned back to the seller/defendant.

3. According to the plaintiffs, the defendant did not demarcate the land nor hand over 22 points registry papers and instead served a notice on the plaintiffs that they have illegally occupied the defendant's land. The notice was duly replied but the defendant again served a notice that the agreement is forged. The defendant thereafter initiated proceeding under Section 250 of the CG Land Revenue Code, 1959 (for short 'the Code') for recovery of possession, which was allowed by the Tehsildar, Belha on 31.5.2008, against which the plaintiffs' appeal was allowed by the SDO (Revenue), Bilaspur on the ground that there exists an agreement to sell between the parties.

4. The defendant contested the suit on submission in his written statement that the agreement is forged as he has not executed any such agreement in favour of the plaintiffs on 26.5.2007. It was specifically pleaded that the defendant's *Samdhi* was seriously ill at Bargad (Orissa), therefore, the defendant had gone to Bargad on 23.5.2007 and stayed there. His *Samdhi* eventually died on 26.5.2007, therefore, the defendant stayed at Bargad till 16.6.2007 and returned back to Chakarbhata (Bilaspur) on 17.6.2007. He also stated that he is a literate person and he usually signs over the documents, but the agreement contains his thumb impression.
5. The trial Court framed 8 material issues for trial and on the basis of evidence, it has held that execution of agreement and payment of advance amount of Rs.15 lakhs are not proved nor the defendant has handed over possession of the land to the plaintiffs. The trial Court has also held that the suit is not barred under Order 2 Rule 2 CPC. However, it again found that the plaintiffs have failed to prove their readiness and willingness to perform their part of the agreement. It is also found proved by the trial Court that the defendant has not executed any letter of acknowledgment (Ex.-P/2).
6. Shri Ansari, learned Senior Counsel for the appellants would argue that the finding of non-execution of agreement is perverse. He would refer to the opinion of the handwriting expert and thumb impression expert, PW-5 Dr. Sunanda Dhenge and PW-6 Ashok Swarnakar, respectively.

He would also refer to the statements of attesting witnesses.

7. Shri HB Agrawal, learned Senior Counsel for the respondent would argue that about 98 decimal land has already been acquired by the State Government, therefore, the suit has been rendered infructuous, as no decree for specific performance can be passed. It is also argued that the plaintiffs have failed to prove their readiness and willingness. Referring to the statements of Dr. Sunanda Dhenge (PW-5) and Ashok Swarnakar (PW-6), it is argued that at the end of opinion, both the experts have concluded that no definite opinion can be given. Therefore, the trial Court has rightly found that execution of agreement and acknowledgment are not proved.
8. Before proceeding to deal with the arguments raised by learned counsel for the parties, it is necessary to refer to purely legal issue, which comes in way of the plaintiffs to prove agreement to maintain the suit for specific performance.
9. Admittedly, agreement (Ex.-P/1) recites that possession of the entire suit land was handed over to the plaintiffs on the date of agreement. The plaintiffs also contended in para-3 of the plaint the possession was in fact delivered to them on the said date. When the agreement for sale recites that possession of immovable property, which is the subject matter of the agreement, is handed over to the purchaser, the law laid down by the Supreme Court in the matters of **Omprakash Vs. Laxminarayan and Others** {(2014) 1 SCC 618} and **Avinash Kumar**

Chauhan Vs. Vijay Krishna Mishra {(2009) 2 SCC 532} would be instantly attracted. In the said judgments, the Supreme Court has held that a possession was handed over to the purchaser on the date of agreement and the document would be treated as “conveyance” under Section 2(10) of the Indian Stamp Act, 1899 along with Article 23 of Schedule 1-A as amended in the State of Madhya Pradesh (Chhattisgarh) and stamp duty thereon shall be leviable on an instrument whereby possession has been delivered.

10. In **Omprakash** (Supra), the Supreme Court would refer to its earlier decision in **Avinash Kumar Chauhan** (Supra) wherein it is held that if a document required to be registered, but it is not so registered, then it is not admissible in evidence even for collateral purpose.

11. In the matter at hand, the subject agreement was neither duly stamped nor was registered, therefore, it cannot be read in evidence for any purpose. Even if the trial Court has not considered this issue, as no such defence was raised by the defendant, this Court cannot ignore the settled position of law. Therefore, we are of the considered view that the suit must fail on this ground. We accordingly hold so.

12. Reverting back to the issues decided by the trial Court, it is to be seen that both the experts i.e. PW-5 and PW-6, who have examined the signatures and thumb impression of the defendant respectively, have clearly opined at the concluding part of their opinion that no definite opinion can be given. When this opinion of the experts is read along

with the defendant's plea that his *Samdhi* was seriously ill at Bargad (Orissa) from 23.5.2007 and from the said date, he had gone to Bargad and returned to Chakarbhata (Bilaspur) on 17.6.2007, as during this period, his *Samdhi* died on 26.5.2007, it appears, the trial Court's finding that the plaintiffs have failed to prove execution of agreement is borne out from the material available on record and the same is not perverse. It is also to be seen that in the first agreement (Ex.-P/1), the defendant has put his thumb impression whereas in the second document, which is an acknowledgment (Ex.-P/2), the defendant has not only put his thumb impression but has also signed. It is strange as to why a person would put his thumb impression only in one document and thereafter would put his thumb impression as well as signature in the second document.

13. It is also worth notice that when the plaintiffs illegally possessed by encroaching the defendant's land, it was the defendant who had served notice on the plaintiffs first in point of time. When the defendant moved an application under Section 250 of the Code, the plaintiffs, instead of filing a suit for specific performance, preferred a Civil Suit No.76-A/2008, for permanent injunction, which was dismissed on 12.12.2008. If the plaintiffs were always ready and willing to perform their part of agreement, there is absolutely no justification for them to have instituted a suit for injunction rather than preferring a suit for specific performance after receiving notice by the defendant vide Ex.-

P/3.

14.It will not be out of place to notice that the plaintiffs illegally encroached part of the suit land for which the defendant initiated proceedings under Section 250 of the Code. When such plea is raised, it reflects on the conduct of the plaintiffs which needs consideration in view of the observations made by the Supreme Court in the matter of **P. Meenakshisundaram Vs. P. Vijayakumar & Another** {2018 LawSuit (SC) 283}, wherein the following has been held at para-11:-

“11. The case put up by respondent No.1 that he was put in possession pursuant to an arrangement arrived at on or around 29.07.2002 is not free from doubt. In a matter where Rs.19.5 lakhs were still outstanding, it is not possible to accept that the vendor may put the purchaser in possession when the original agreement did not contemplate handing over of the possession even before execution of the sale deed. The contemporaneous facts including the aspects that the appellant had initiated criminal proceedings and made complaints to various authorities about forcible possession having been taken by respondent No.1, also indicate falsity in the claim of respondent No.1. Be that as it may the basic issue is whether respondent No.1 was ready and willing to perform his part of the contract which in our considered view has to be answered against him. We are conscious that two Courts have arrived at a finding of fact but in our view such finding is completely opposed to and contrary to the facts on record and is completely unsustainable.”

15.For all the above stated reasons including the legal impediment for the plaintiffs to secure specific performance of an unregistered agreement through which possession was delivered, we are not in a position to take any different view of the matter than the one taken by the trial Court to dismiss the plaintiffs' suit.

16. We accordingly dismiss the Appeal and affirm the judgment and decree passed by the trial Court.

17. A decree be drawn accordingly.

Sd/-
Judge
(Prashant Kumar Mishra)

Barve

Sd/-
Judge
(Vimla Singh Kapoor)