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HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment reserved on 14-09-2018****Judgment delivered on 11-01-2019****FA No. 278 of 2015**

1. Anil Mishra S/o M.L. Mishra, Aged About 44 Years R/o Bengalipara, Sarkanda, Bilaspur, Police Station And Post Sarkanda, Civil And Revenue District Bilaspur, Chhattisgarh

---- Appellant**Versus**

1. Rampal Borkar S/o Late Kurkuria Borkar, Aged About 42 Years R/o Behind Magarpara School, Police Station And Post Civil Lines Bilaspur, Civil And Revenue District Bilaspur, Chhattisgarh

At Present R/o Champa Durdarshan Kendra, Champa, Police Station And Post Champa, Civil And Revenue District Janjgir-Champa, Chhattisgarh

2. Anand Ram S/o Late Kurkuria Borkar, Aged About 50 Years R/o Behind Magarpara School, Police Station And Post Civil Lines Bilaspur, Civil And Revenue District Bilaspur, Chhattisgarh
3. Smt. Ramkali D/o Late Kurkuria Borkar, Aged About 43 Years R/o Behind Magarpara School, Police Station And Post Civil Lines Bilaspur, Civil And Revenue District Bilaspur, Chhattisgarh
4. State Of Chhattisgarh, Through Collector, Bilaspur, District Bilaspur, Chhattisgarh

---- Respondents

For Appellant

Shri Prasoon Agrawal, Advocate

For Respondents 1 to 3

Shri Hemant Gupta, Advocate

For Respondent No.4/State

Shri Shashank Thakur, Govt. Adv.

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

The following judgment of the Court was delivered by
Prashant Kumar Mishra, J.

1. Trial Court has dismissed the appellant/plaintiff's suit for specific performance of agreement dated 1-10-2008 for an area admeasuring 0.79 acre out of total area of 0.968 hectares (2.38 acres) bearing khasra No.1355/1 situated at village Tifra, PH No.23, Tahsil & District Bilaspur.
2. The property belonging to the ancestors of the defendants No.1 to 3 devolved on them upon death of their mother namely; Smt. Padmini Bai. Their names are recorded as joint owners in the revenue record, but, according to the plaintiff, the partition has already taken place amongst the defendants in which the defendant No.1 was allotted 1/3rd share admeasuring 0.79 acre. The defendant No.1 approached the plaintiff for sale of his share i.e. 0.79 acre at the rate of Rs.42,00,000/- per acre. The negotiation was finalised in the presence of witnesses Bharti & Rajesh and the defendant No.1 received two cheques to the tune of Rs.1,70,000/- & Rs.80,000/-, in total Rs.2,50,000/- as advance and executed the agreement on 1-10-2008. As the execution of sale deed

might have taken some time, the defendant No.1 requested that for the purpose of payment of stamp duty he desires to mention the market value of the property at the rate of Rs.11,00,000/- per acre albeit he will accept the sale consideration at the rate of Rs.42,00,000/- per acre. After this agreement between the parties another registered agreement was executed by the defendant No.1 on 7-3-2009. The plaintiff further averred that the defendant No.1 moved an application for separation of his holding before the Tashildar, Bilaspur, but during pendency of the suit the defendants No.1 to 3 joined hands and withdrew the application so as to avoid execution of sale deed in favour of the plaintiff.

3. The defendant No.1 filed his own written statement whereas the defendants No.2 & 3 jointly filed a separate written statement. According to the defendants, the land was purchased by their mother Smt. Padmini Bai and after her death all the legal heirs have inherited equal share in the property though only the defendant No.1 is in possession of the land. It was also stated that the mental condition of the defendant No.1 was not proper, therefore, the plaintiff took advantage of the situation and got executed the agreement as also the revenue proceedings. It was further stated that the defendant No.1 has not got any share up to 0.79 acre as no

partition has ever taken place amongst legal heirs. It was specifically pleaded in para 4 of the written statement that the appellant is a property dealer.

4. The plaintiff examined himself as PW-1 and his witness S.L. Bharti (PW-2) whereas the defendant No.1 examined himself as DW-1 and his witnesses Shiv Shankar Humne (DW-2) and Ramkali Nagdone (DW-3). Defendant No.2 examined himself as the only witness.
5. The trial Court has dismissed the suit on the ground that an agreement to sell the property could not have been executed nor any such decree of joint property can be passed unless the other shareholders agree. It is also found by the trial Court that the plaintiff has failed to demonstrate his readiness and willingness to purchase the property.
6. Challenging the decree, it is argued that the trial Court's finding about the impermissibility of an agreement to sell a joint property is not in accordance with law and further that the plaintiff has proved his readiness and willingness.
7. Admittedly, the suit property is recorded jointly in the name of the defendants No.1 to 3 as is reflected in the documents Ex. P/3 & Ex.P/4 as also Ex.D/2 to Ex.D/5.

8. The law as to when the contract to sell or let property by one who has no title is not specifically enforceable as contained in Section 17 of the Specific Relief Act, 1963 (for short 'the Act'). While dealing with the said provisions the Supreme Court in **Pemmada Prabhakar and Others v Youngmen's Vysya Association and Others**¹ held thus in paras 27, 28 & 29 :

27. With reference to the abovesaid rival contentions, the following points would arise for our consideration:

27.1. (i) Whether the plaintiffs are entitled for the decree for specific performance of the agreement of sale (Ext. A-1) when agreement of sale entered between the plaintiffs and Defendants 1 and 2 who do not have absolute title to the property?

27.2. (ii) Whether in the absence of execution of the agreement of sale, Ext. A-1 by the other defendants/co-sharers is it valid, even assuming that agreement of sale is valid, there is breach of terms and conditions of the contract on the part of the plaintiffs in not paying the sale consideration amount of Rs 1,70,000 within 10 days from the day of vacating the tenants, Rs 50,000 on 30-11-1993 and an amount of Rs 1,50,000 on or before 30-3-1994 to the defendants and the plaintiffs are entitled for the decree of specific performance of the agreement of sale?

27.3. (iii) Whether the plaintiffs are entitled for discretionary relief of specific performance under Section 20(2) of the Specific Relief Act when it has not approached the court with clean hands?

¹ (2015) 5 SCC 355

27.4. (iv) What relief?

Answer to Point (i)

28. It is an undisputed fact that the suit schedule property is self-acquired property by late Pemmada Venkateswara Rao as he had purchased the said property vide sale deed Document No. 5174 of 1970 dated 24-11-1970 from his vendors. It is also an undisputed fact that the said property is intestate property. He is survived by his wife, three sons and three daughters. The said property devolved upon them in view of Section 8 of Chapter II of the Hindu Succession Act as the defendants are Class I legal heirs in the suit schedule property. Undisputedly, the agreement of sale, Ext. A-1 is executed only by Defendants 1 and 2. The third son, mother and three sisters who have got equal shares in the property have not executed the agreement of sale. In view of the matter, the agreement of sale executed by Defendants 1 and 2 who have no absolute right to property in question cannot confer any right whatsoever upon the plaintiffs for grant of decree of specific performance of agreement of sale in their favour. The said agreement is not enforceable in law in view of Section 17 of the Specific Relief Act in view of the right accrued in favour of Defendants 3 to 6 under Section 8 of the Hindu Succession Act.

29. The provisions of Section 17 of the Specific Relief Act in categorical terms expressly state that a contract to sell or let any immovable property cannot be specifically enforced in favour of a vendor or lessor who does not have an absolute title and right upon the property. It is worthwhile to extract Section 17 of the Specific Relief Act, 1963 here:

“17. Contract to sell or let property by one who has no title, not specifically enforceable.—(1) A contract to sell or let

any immovable property cannot be specifically enforced in favour of a vendor or lessor—

(a) who, knowing not to have any title to the property, has contracted to sell or let the property;

(b) who, though he entered into the contract believing that he had a good title to the property, cannot at the time fixed by the parties or by the court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt.”

In view of the aforesaid provisions of the Specific Relief Act, the agreement of sale entered into between the plaintiffs and some of the co-sharers who do not have the absolute title to the suit schedule property is not enforceable in law. This aspect of the matter has not been properly appreciated and considered by both the first appellate court and the second appellate court. Therefore, the impugned judgment is vitiated in law.

9. The law is, thus, well settled that a person who has only a share in the undivided property has got no absolute title or good title to the property so as to make it enforceable for passing a decree for specific performance in view of the express provisions contained under Section 17 of the Act.
10. It is also to be noticed that in the agreement (Ex.P/1) it is mentioned in para 6 that the sale deed shall be executed by the defendant No.1 within 10 months in favour of the plaintiff or in favour of any other person indicated by the plaintiff,

therefore, the agreement was not benefiting the plaintiff only, but it could have been in favour of any other person to whom the plaintiff wants to sale the property. Such term in the contract is usually inserted when either the plaintiff has no means to purchase the property at the time of agreement or he subsequently intends to get the sale deed executed in favour of a person of his choice and in such condition plaintiff works as a middle man or property dealer. The plaintiff having admitted in para 16 of his cross-examination that he is in the business of property dealing and construction, the observation by the Supreme Court in **N.P. Thirugnanam (Dead) by LRs. v Dr. R. Jagan Mohan Rao and others**² that when the very contract is speculative in nature, the plaintiff, who has entered into the contract and has been dabbling in real estate transactions without the means to purchase a substantial immovable property like the suit property, is not entitled for decree of specific performance.

11. This Court in **Topendar Singh v Bodhram Bharte & Another**³ and other connected matter, has relied on the above judgment of Supreme Court to dismiss the plaintiff's suit on the ground that the plaintiff is engaged in property dealing.

² (1995) 5 SCC 115

³ FA No.177 of 2013 (decided on 30-11-2018)

12. It is also important to mention here that the plaintiff has not filed any document nor there is any explanation as to why the value of the property was earlier shown as Rs.42,00,000/- per acre and later on it was reduced to Rs.11,00,000/- per acre and further that the plaintiff has failed to prove availability of funds for purchasing the property. If the intention to show less value of the property was to avoid stamp duty it is again such conduct of the plaintiff, which disentitles him to the discretionary relief of specific performance contract.
13. For the above stated reasons, we are of the considered view that agreement to sale undivided share in the property is not enforceable in view of the Section 17 of the Act and further the plaintiff being a property dealer, his failure to submit proof of availability of fund disentitles him for a decree for specific performance.
14. In the result, the appeal, *sans* merit, is liable to be and is hereby dismissed.

Sd/-

Judge
Prashant Kumar Mishra

Sd/-

Judge
Vimla Singh Kapoor

Gowri