

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**FA No. 79 of 2013**

- M/s Kirti Complex (Private) Limited Reg.No. 1831, Regd. Off. Saddani Building, Sadar Bazar, Raipur C.G., Thru- Managing Director Kamlesh Jain S/o G.C. Jain, R/o Panchsheel Nagar, Raipur C.G.

---- Appellant**Versus**

- The United Church Of Northern India Trust Association Reg.No. 2912/1938-39, Regd.Off. Omega Building, 19 August Kranti Marg, Mumbai,400007, Thru-Its Trustees (i). Rt.Rev. B.F.Gavit And (ii). Rev. Dr. T.M.Joesph, Maharashtra

---- Respondent

For Appellant : Shri B.P.Sharma with Shri Hari Agrawal, Advocates

For Respondent : None.

D.B.:- Hon'ble Shri Justice Manindra Mohan Shrivastava

Hon'ble Smt. Justice Vimla Singh Kapoor

CAV Judgment**Per Manindra Mohan Shrivastava, J.****20/12/2019**

This appeal is directed against impugned judgment and decree dated 11/02/2013 passed by the 4th Additional District Judge, Raipur in Civil Suit No.47-A/11, by which, appellant / plaintiff's suit for grant of decree of specific performance of contract has been dismissed.

2. The appellant / plaintiff filed a suit seeking a decree of specific performance of contract on the pleadings *inter alia* that on 09/04/03, defendant, through its trustees – B.F. Gavit and Dr. T.M. Joseph had entered into an agreement for sale of property in dispute admeasuring 93,408 sq.ft. situated at Raipur for a consideration

of Rs.1,64,39,805/-. Further pleading was that the plaintiff paid to the defendant as advance, huge sum of Rs.32,87,961/- by drafts and pay orders as mentioned in the schedule mentioned in the agreement between the parties. The plaintiff further pleaded that this agreement was in supersession of previous agreement dated 27/11/1981 for grant of sale executed by the defendant in favour of plaintiff's promoter by taking advance of Rs.2 lakhs. According to plaintiff's pleadings, it was also agreed that the aforesaid advance of Rs.2 lakhs along with interest from 1981 to 2003 amounting to Rs.16 lakhs would be adjusted and thus, the plaintiff was required to pay Rs.1,18,51,844/-. It was plaintiff's plea that as per the agreement, sale deed was to be executed on or before 31/08/2003 within a maximum period of 60 days but the defendants did not take any steps towards execution of sale deed. Further pleading was that the plaintiff requested defendants continuously by way of letter, phone and personal meeting till 31/08/2003, to come to Raipur and receive balance amount and execute sale deed but the defendant kept on avoiding. Finally, a legal notice was sent on 31/05/2004 to the two trustees. But even then, as the defendants did not execute sale deed, the plaintiff was required to file suit seeking specific performance of contract.

3. In the aforesaid suit, though respondents were served and initially they were represented through their counsel, later on, the counsel for the defendant pleaded no instructions and as no written statement was filed despite repeated opportunities, right to file written statement was closed. On behalf of the plaintiff, its Managing Director - Kamlesh Jain who had filed suit, examined himself as the sole plaintiff witness.

4. Learned Trial Court, however, dismissed the suit holding that even though the defendant had not appeared to file written statement and were proceeded ex-parte, the plaintiff could not make out a case of grant of decree. Learned Trial Court held

that the plaintiff failed to prove by leading documentary evidence, due execution of agreement of sale, proof of payment of advance, proof of title of the defendant in respect of the property in dispute and also the so called first agreement of 1981.

5. Assailing legality and validity of the impugned judgment and decree, learned counsel for the appellant argued that the learned Trial Court committed gross illegality in not decreeing the suit of the plaintiff even though the plaintiff, not only specifically pleaded but also proved due execution of agreement of sale dated 09/04/2003 and also that it had paid huge advance of Rs.32,87,961/-, details of which were clearly stated in the agreement itself. He would further argue that the learned Trial Court fell in error of law in holding that non-examination of attesting witness of the agreement was necessary to prove due execution and in the absence of such evidence, the plaintiff failed to prove the agreement. He would further argue that as the plaint averments were not disputed by filing any written statement nor the defendant even appeared to cross-examine the plaintiff witness to impeach its credibility, learned Trial Court, instead of proceeding on admission of facts pleaded in the plaint, doubted the very existence of the agreement without any basis whatsoever. He would also submit that as all the facts stated in the plaint, in the absence of denial were required to be treated as admitted facts and in view of categoric and uncontroverted testimony of plaintiff witness / PW1 and various documentary evidence, plaintiff was entitled to decree as all those facts which were necessary, were proved by the plaintiff. Lastly, it was submitted that even if the Court considered that by passage of time, sale consideration was inadequate, it could exercise its discretion in terms of judgment of the Supreme Court in the case of **Nirmala Anand v. Advent Corporation (P) Ltd. And ors., (2002) 8 SCC 146**. Reliance has been placed on other decisions of the Supreme Court in **Hans Raji (Smt.) v. Yosodanand, (1996) 7 SCC 122, Bayanabai Kaware v. Rajendra s/o. Baburao Dhote, (2018) 1 SCC 585** and **C.N. Ramappa Gowda v.**

C.C.Chandregowda (dead) by LRs. and anr., 2012 (5) SCC 265.

6. In the present case, even after notice, none appeared for the respondent.

7. Learned Trial Court dismissed the suit of the plaintiff holding that the plaintiff failed to prove necessary facts by leading appropriate evidence which would have entitled the plaintiff to decree. According to the findings of the learned Trial Court, the plaintiff failed to prove execution of agreement of sale. It also failed to prove that it had paid huge amount of advance to the defendant and further that the plaintiff failed to prove existence of so called agreement of 1981. It also held that the plaintiff also did not lead evidence to prove that the property in dispute belongs to the defendant as no documentary evidence of title and / or possession are produced by the plaintiff.

8. In the present case, the plaintiff has come out with the pleading that the property in dispute in respect of which, suit has been brought, belongs to the defendant who has been described as "United Church of Northern India Trust Association, a company deemed to be incorporated under the Companies Act, 1956 through its Trustees B.F. Gavit and Dr. T.M. Joseph." It would, thus, be seen that the suit was not filed against any private person but it was against an institution said to be association of trust and incorporated under the Companies Act as a deemed company. The suit was brought against the company through its trustees. However, in the entire suit, no details of the property of the company were pleaded. The plaintiff neither led any documentary nor specific oral evidence of any person to prove that the property in respect of which, the plaintiff claimed to have entered into an agreement belongs to respondent / trust, said to be an incorporated company. Moreover, no documentary evidence as to how the company acquired title in respect of the property in dispute was led by the plaintiff much less pleaded in the plaint. It

has to be borne in mind that in the present case, the defendant had not filed written statement and nor appeared in the case and was proceeded ex-parte. The property is said to be belonging to a trust which is said to be incorporated as company. In such a background of the case, the plaintiff was required to come out with a specific plea with regard to existence of title of the defendants over the title in dispute.

9. The plaintiff neither specifically pleaded nor led oral or documentary evidence to prove possession of the defendant over the disputed property admeasuring more than 93,408 sq.ft situated in the city of Raipur. No documents of possession contained in any revenue records or Nazul records were produced before the Court to show that the defendant was enjoying any possessory title over the disputed property.

10. Though the plaintiff averred in the plaint that it had paid Rs.32,87,961/- by way of draft pay orders as advance at the time of execution of agreement dated 09/04/2003, the evidence of plaintiff witnesses - Kamlesh Jain (PW1) is that he had paid that amount, details of which have been included in clause 2 of the agreement. Clause 2 of the agreement mentions certain details of the demand draft. However, no specific evidence have been led by the plaintiff that the amount, in respect of which, demand drafts were prepared, has transferred in the account of the other party. In the present case, where the defendant had not even filed written statement nor appeared in the case, the plaintiff was required to prove each and every fact which would entitle him for grant of decree. If the plaintiff had pleaded that he had paid advance, the plaintiff had to prove it by leading clinching evidence.

11. In the plaint as well as in the agreement dated 09/04/2013 (Ex.P/1), there is mention of the fact that earlier, an agreement of sale was executed on 27/11/1981 and an advance of Rs.2 lakhs was paid to the defendant by plaintiff's promoter

which was received by the defendant by way of a cheque. However, neither the cheque has been produced before the Court nor any clinching evidence regarding proof of payment of that amount to the defendant was led before the Court. So called agreement dated 27/11/1981 was also not produced.

12. In order to establish that the plaintiff was ready and willing to perform his part of contract whereunder, he was required to pay huge amount of Rs.1,18,51,844/- according its own pleadings, ought to have led specific evidence to prove that it had capacity to pay the aforesaid huge amount. In this regard, the sole witness of the plaintiff namely Kamlesh Jain (PW1) did not lead any specific evidence. Therefore, readiness is also not established.

13. As far as willingness is concerned, the plaintiff's pleading and evidence in this regard are blissfully vague. The plaintiff states that it met with the defendant, called over telephone and also gave notice. In the legal notice, sent by the plaintiff (Ex.P/2), there is no description regarding specific dates on which, plaintiff met with the defendant. Moreover, the plaintiff has not stated specific facts regarding his readiness also.

14. Even if the argument of learned counsel for the appellant that for proof of execution of agreement of sale deed dated 09/04/2013, examination of attesting witness was not necessary, as held in **Hans Raji** (supra) and **Bayanabai Kaware** (supra), in order to get a decree of specific performance, the plaintiff was required to prove certain basic facts and could not be granted decree mechanically on the ground that for want of written statement, averments made in the plaint have to be admitted and decrees has to be passed in his favour. The law with regard to exercise of discretion by the Court in a case where written statement was not filed, as contained in Order 8 Rule 10 CPC was considered in following decisions -

In the case of **Ramesh Chand Ardawatiya v. Anil Panjwani, 2003 (7)**

SCC 350, dealing with similar situation where written statement was not filed, it was held -

“33. xxxxxxxxxx Even if the suit proceeds ex-parte and in the absence of a written statement, unless the applicability of Order VIII Rule 10 CPC is attracted and the Court acts thereunder, the necessity of proof by the plaintiff of his case to the satisfaction of the Court cannot be dispensed with. In the absence of denial of plaint averments the burden of proof on the plaintiff is not very heavy. A prima facie proof of the relevant facts constituting the cause of action would suffice and the Court would grant the plaintiff such relief as to which he may in law be found entitled. In a case which has proceeded ex-parte the Court is not bound to frame issues under Order XIV and deliver the judgment on every issue as required by Order XX Rule 5. Yet the Trial Court would scrutinize the available pleadings and documents, consider the evidence adduced, and would do well to frame the 'point for determination' and proceed to construct the ex-parte judgment dealing with the points at issue one by one. Merely because the defendant is absent the Court shall not admit evidence the admissibility whereof is excluded by law nor permit its decision being influenced by irrelevant or inadmissible evidence.”

In a subsequent decision in the case of **C.N.Ramappa Gowda** (supra), the aforesaid legal position was further explained in greater detail as below -

“17. In support of his submission, the learned counsel has placed reliance on the ratio of the decision of this Court in *Balraj Taneja And Another. vs. Sunil Madan And Another reported in (1999) 8 SCC 396* wherein this Court has dealt with a situation which has arisen in the present appeal. In the matter of *Balraj Taneja* (supra), this Court while considering a circumstance wherein written statement was not filed by the defendant, held that the court is duty-bound to adjudicate even in the absence of complete pleadings or in the presence of pleadings of only one party.

18. The learned counsel in this context has specifically placed reliance on the observations of this Court which is of great

relevance and value wherein it was held as follows:-

“29. As pointed out earlier, the court has not to act blindly upon the admission of a fact made by the defendant in his written statement nor should the court proceed to pass judgment blindly merely because a written statement has not been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the court. In a case, specially where a written statement has not been filed by the defendant, the court should be a little cautious in proceeding under Order 8 Rule 10 CPC. Before passing the judgment against the defendant it must see to it that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of the court's satisfaction and, therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the court can conveniently pass a judgment against the defendant who has not filed the written statement. But if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy. Such a case would be covered by the expression “the court may, in its discretion, require any such fact to be proved” used in sub-rule (2) of Rule 5 of Order 8, or the expression “may make such order in relation to the suit as it thinks fit” used in Rule 10 of Order 8”.

In the aforesaid case, where the defendants had failed to file written statement and the Trial Court proceeded to grant decree, emphasizing need for adjudication in such cases, it was held -

“23. In the light of the rationes decidendi of the cases cited hereinabove, when we examined the judgment and order of the trial

court granting a decree of partition in favour of the appellant-plaintiff, we could notice that the appellant-plaintiff has sought to prove his case that the suit property was a joint family property only on the strength of affidavit which he had filed and has failed to lead any oral or documentary evidence to establish that the property was joint in nature. Even if the case of the appellant-plaintiff was correct, it was of vital importance for the trial court to scrutinize the plaintiff's case by directing him to lead some documentary evidence worthy of credence that the property sought to be partitioned was joint in nature. But the trial court seems to have relied upon the case of the plaintiff merely placing reliance on the affidavit filed by the plaintiff which was fit to be tested on at least a shred of some documentary evidence even if it were by way of an ex-parte assertion.

24. Reliance placed on the affidavit in a blindfold manner by the trial court merely on the ground that the defendant had failed to file the written statement would amount to punitive treatment of the suit and the resultant decree would amount to decree which would be nothing short of a decree which is penal in nature.

25. We find sufficient assistance from the apt observations of this Court extracted hereinabove which has held that the effect of non-filing of the written statement and proceeding to try the suit is clearly to expedite the disposal of the suit and is not penal in nature wherein the defendant has to be penalised for non filing of the written statement by trying the suit in a mechanical manner by passing a decree. We wish to reiterate that in a case where written statement has not been filed, the Court should be a little more cautious in proceeding under Order 8 Rule 10 CPC and before passing a judgment, it must ensure that even if the facts set out in the plaint are treated to have been admitted, a judgment and decree could not possibly be passed without requiring him to prove the facts pleaded in the plaint.

26. It is only when the Court for recorded reasons is fully satisfied that there is no fact which needs to be proved at the instance of the plaintiff in view of the deemed admission by the defendant, the Court can conveniently pass a judgment and decree against the

defendant who has not filed the written statement. But, if the plaint itself indicates that there are disputed questions of fact involved in the case arising from the plaint itself giving rise to two versions, it would not be safe for the Court to record an ex-parte judgment without directing the plaintiff to prove the facts so as to settle the factual controversy. In that event, the ex-parte judgment although may appear to have decided the suit expeditiously, it ultimately gives rise to several layers of appeal after appeal which ultimately compounds the delay in finally disposing of the suit giving rise to multiplicity of proceeding which hardly promotes the cause of speedy trial.”

15. In view of aforesaid clearly stated legal position, scrutiny of pleadings and evidence on record in the present case, shows that the plaintiff sought decree on the basis of a claim without proving certain foundational facts including the fact that the property belongs to the defendant - trust / company. It is rather surprising that the property in dispute was a huge chunk of land admeasuring 93,408 sq.ft. and said to belong to a trust. Yet, no documents of its title or possession were placed before the Court. Transaction of huge money were not supported by any clinching, reliable, oral and documentary evidence. Therefore, the learned Trial Court does not appear to have committed any illegality in dismissing the suit of the plaintiff. Therefore, there is no good ground to interfere with the judgment and decree of the Trial Court.

16. The appeal fails and is, therefore, dismissed. No orders as to costs. Decree be drawn accordingly.

Sd/-

(Manindra Mohan Shrivastava)
Judge

Sd/-

(Vimla Singh Kapoor)
Judge