

HIGH COURT OF CHHATTISGARH, BILASPUR

FA No. 192 of 2015

- S. K. Roy S/o Virendranath Roy Aged About 47 Years R/o B-3, M.P. Grih Nirman Mandal Colony, Balco Nagar, Korba, Tahsil And District Korba Chhattisgarh.

---- Appellant

Versus

1. Dhaniram Sahu S/o Chintaram Sahu Aged About 55 Years R/o Village Kharmora, Tahsil And District Korba And Village Pawni, Bilaigarh District Raipur Chhattisgarh
2. Dr. Manvesh Nath Sinha S/o S.N. Sinha Aged About 35 Years R/o Chattnunga Tenisi, U.S.A., Through Power Of Attorney Holder S.N. Sinha, S/o Late Kailash Sinha, R/o Kosabadi, Korba, Tahsil And District Korba Chhattisgarh
3. Smt. Indu Sharma W/o P.N. Sharma Aged About 46 Years R/o Kosabadi, Korba, Tahsil And District Korba Chhattisgarh Through S.N. S/o M.N. Sharma, R/o 237 Kosabadi, Korba, Tahsil And District Korba Chhattisgarh
4. S.N. Sharma S/o M.N. Sharma R/o 237 Kosabadi, Korba, Tahsil And District Korba Chhattisgarh
5. State Of Chhattisgarh Representative Through Collector Korba District Korba Chhattisgarh

---- Respondents

For Appellant	: Shri HB Agrawal, Senior Advocate with Smt Preeti Yadav, Advocate
For Respondent- 1	: Shri CR Sahu, Advocate
For Respondents- 2 to 4	: Shri Sandeep Dubey, Advocate
For the State	: Shri Sidharth Dubey, Dy Govt Advocate

**Hon'ble Shri Prashant Kumar Mishra, Actg CJ &
Hon'ble Shri Justice Parth Prateem Sahu**

Order on Board by Prashant Kumar Mishra, Actg CJ.

01.05.2019

- 1) This is plaintiff's appeal under Section 96 of Code of Civil Procedure challenging the judgment and decree of the trial Court dismissing his suit

for specific performance of agreement dated 04.02.2003 and in the alternative for refund of the advance amount.

2) The parties entered into an agreement on 04.02.2003 vide Ex.P/1 wherein defendant- 1 Dhaniram Sahu agreed to sell land admeasuring 2.80 acres bearing Khasra No.41/5 and 41/6 at village Kharmora, Patwari Halka No.5, district Korba to the plaintiff for a sum of Rs.9,50,000/-. Defendant- 1 received earnest money of Rs.1,50,000/- on the date of agreement and promised to execute the sale deed within six months by accepting the balance sale consideration of Rs.8 lakhs. The agreement further stipulated that out of the balance sale consideration of Rs.8 lakhs, instalment of Rs.2 lakhs each shall be paid by the plaintiff to defendant- 1 in April and June 2003 respectively and the remaining Rs.4 lakhs in July, at the time of execution and registration of sale deed. It is also stated that demarcation and boundary panchnama together with other necessary proceedings shall be completed by the seller within six months and if for some reason said proceedings are not completed, the agreement will be extendable for another period of five months. It was further provided that on the basis of the sale agreement, the purchaser shall have the right to further sell the property to any other person and the seller shall be bound to execute the sale deed in favour of such person at the discretion of the purchaser (plaintiff). The agreement would further record that the purchaser has been authorised to construct roads, drains and develop plots on the land.

3) The suit was preferred on 19.04.2005 on pleadings that despite repeated effort by the plaintiff, defendant- 1 did not execute the sale deed

in his favour and has mischievously and deliberately executed sale deed in favour of defendant- 3 on 16.02.2004 for a sum of Rs.22,40,000/-. According to the plaintiff, defendant- 1 demonstrated his inability to get the land demarcated on the ground that few persons have encroached the land for which appropriate proceedings are to be undertaken and the defendant demanded additional sum pursuant to which the plaintiff paid Rs.25,000/- on 10.03.2003, Rs.35,000/- on 05.01.2004 and Rs.83,000/- by way of cheque on 06.01.2004 and cash of Rs.45,000/-. Thus a total sum of Rs.3,38,000/- was paid by plaintiff to defendant- 1 as advance. Plaintiff further stated that he was always ready and willing to perform his part of the contract but defendant- 1 deliberately avoided to execute the sale deed, therefore, he is entitled for a decree for specific performance and / or for refund of the advance amount.

4) The defendant contested the suit on the pleading that the plaintiff having failed to pay instalment of Rs. 2 lakh each in April and June 2003, the agreement stood cancelled, therefore, he was at liberty to sale the property to any other person. Hence, the sale deed executed in favour of defendant- 3 on 16.02.2004 does not suffer from any infirmity or adverse contractual obligation. It is also stated that the plaintiff having failed to perform his part of contract and being not ready and willing to perform his part of contract, he is not entitled for specific performance of agreement or refund.

5) On the basis of pleadings and evidence, the trial Court has found that the plaintiff was not ready and willing to perform his part of contract, therefore, he is not entitled to decree for specific performance.

6) Assailing the finding, learned Senior counsel for the appellant would submit that defendant- 1 having failed to get the land demarcated and obtain permission from the jurisdictional Collector as required under Section 165 of the Chhattisgarh Land Revenue Code, 1959 (CGLR Code), the plaintiff was not bound to pay the instalment due for payment in the month of April and June, 2003. It is further argued that the plaintiff cannot be blamed for violation of the contract and he was entitled for a decree. It is also argued that, in any case, the trial Court should have directed refund of the entire advance amount of Rs.3,38,000/- with interest.

7) Per contra, learned counsel for the respondents would support the impugned decree passed by the trial Court.

8) Admittedly, plaintiff has not produced any evidence of making any effort to pay the instalment of Rs. 2 lakhs each in the month of April and June 2003. Payment of instalments was not made dependant upon demarcation under any part of the recital in the agreement which stipulates that advance of Rs.1,50,000/- was paid on the date of agreement and out of balance sale consideration of Rs.8 lakhs, Rs.2 lakhs each was to be paid in two instalments falling in April and June 2003. For the remaining consideration of Rs.4 lakhs it was provided that the said sum shall be payable at the time of registration before which the demarcation and other formalities would be completed. Thus, payment of last instalment of Rs.4 lakhs may be said to be dependant on demarcation because the sale deed was to be executed after demarcation. But that was not the condition attached for payment of first two instalments of Rs.2 lakhs each.

9) It is the stand of plaintiff, from inception, that he did not make payment of instalment of Rs.2 lakh each because the defendant did not initiate the proceedings for demarcation. This stand of plaintiff does not appear to be in conformity with the recital in the agreement. Therefore, the trial Court has rightly found that for this particular conduct of the plaintiff, he cannot be said to be ready and willing to perform his part of the contract before filing of suit.

10) Payment of amount of Rs.25,000/- & Rs.35,000/- was made on 10.03.2003 & 02.09.200 respectively, vide Ex.P-22, whereas payment of Rs.83,000/- was made vide Ex.P-20 on 05.01.2004. In Ex.P-20 it is not mentioned that the amount is paid towards payment of first instalment of Rs.2 lakhs. Similarly, there is no mention in Ex.P-22 which is the receipt of payment of Rs.25,000/- & Rs.35,000/- that the amount is paid towards any of the instalments of Rs.2 lakhs. These payments are independent of the terms for payment of instalments provided in the contract, though they were eventually to be adjusted in the advance amount. If these payments have not been accepted by defendant No.1 towards any of the instalments, a plea cannot be raised that defendant No.1 having accepted the part payment of advance amount subsequently, he had either condoned or extended the period for payment of instalment. Thus, the trial Court has rightly found that the appellant having failed to pay the instalment amount in April and June, 2003, he has not proved his readiness and willingness.

11) The trial Court has also refused to pass the decree for refund of the advance amount despite recording a finding in para-51 of the judgment

that the plaintiff has proved payment of Rs.2,10,000/- to the defendant on different dates. In addition to this finding, we have also found that payment of Rs.83,000/- through cheque dated 05.01.2004 has been proved by the plaintiff by producing certificate of payment issued by the concerned Banker vide Ex.P-20. In this certificate the Bank of India, Korba Branch has certified that the cheque amount in the name of Dhani Ram Sahu for Rs.83,000/- has been paid on 05.01.2004. Thus, the trial Court's finding to the effect that this payment has not been proved by the plaintiff does not appear to be correct. The said finding deserves to be set aside. We have thus found that the plaintiff has proved payment of advance amount of Rs.2,93,000/- on different dates.

12) The agreement contains a forfeiture clause mentioning that if even after completion of all the formalities, the purchaser fails to get executed the sale deed, the agreement shall stand cancelled and the purchaser shall not be entitled to seek refund. Defendant's reliance on this forfeiture clause to defeat the claim for refund does not appear to be proper for the reason that forfeiture would occasion only when defendant No.1 should have completed the demarcation and other formalities within 6 months. If these proceedings were not completed by defendant No.1, the forfeiture clause would not come to his rescue for resisting refund of the advance amount to the plaintiff.

13) In the matter of **Satish Batra Vs Sudhir Rawal** reported in 2013 (1)1 SCC 345, Hon'ble Supreme Court has held that precision and clarity in clauses of contract to justify forfeiture is necessary and that in agreement for purchase of immovable property, the forfeiture clause will

not apply when the payment is made only towards part-payment of consideration and not intended as earnest money.

14) In the case at hand, the break up of payment of Rs.1,50,000/- and other amounts would suggest in definite terms that these payments are part and parcel of the amount of consideration and were never intended to be earnest money. Thus, once payment of the advance amount has been proved by the plaintiff and the forfeiture clause is not attracted for the benefit of defendant No.1, the trial Court was bound to have decreed the said part of the claim seeking refund of advance amount. We accordingly, hold that the plaintiff was entitled to seek refund of Rs.2,93,000/- from defendant No.1.

15) For the foregoing, the appeal succeeds in part. While maintaining the decree regarding dismissal of suit for specific performance, the other part of the claim seeking refund of advance amount is allowed to the extent of Rs.2,93,000/- (Rupees two lakh ninety three thousand) only. Defendant No.1 -Dhani Ram Sahu shall pay this amount to the plaintiff within a period of three months from today, failing which the amount shall carry interest @ 12 % per annum from the date of decree till payment.

16) No order as to costs. A decree be drawn accordingly.

Sd/-
Actg Chief Justice
(Prashant Kumar Mishra)

Sd/-
Judge
(Parth Prateem Sahu)