

- The agreement to sell was executed on stamp paper purchased in the name of the plaintiff's wife, but this is of no consequence.
- The execution of the agreement is not in dispute, and the agreement was exhibited without any objection.
- Even if it is an irregularity, the defendant has waived it.
- The court can only deem the document to be not properly stamped but cannot hold it to be invalid.
- Still, it is admissible in evidence on payment of duty and penalty.
- The agreement, even if executed on plain paper, can be admitted in evidence by paying stamp duty and penalty.
- The legal representative of the deceased defendant cannot take a plea that is inconsistent or contrary to the plea taken by the deceased defendant.
- The vendor cannot plead defect in his title as a defense.
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2010 PLRonline 0009 (Chatt.)

[ID 210300]

CHHATTISGARH HIGH COURT

Before:-Mr. N.K. Agarwal, J.

Asha Pandey and others – Appellants

Versus

D. K. Dubey – Respondents

First Appeal No. 144 of 2001. 1.2.2010.

Agreement to sell - The agreement to sell was executed on stamp paper purchased in the name of the plaintiff's wife, but this is of no consequence - . The execution of the agreement is not in dispute, and the agreement was exhibited without any objection - Even if it is an irregularity, the defendant has waived it - The court can only deem the document to be not properly stamped but cannot hold it to be invalid - Still, it is admissible in evidence on payment of duty and penalty - The agreement, even if executed on plain paper, can be admitted in evidence by paying stamp duty and penalty. [Para 12]

Civil Procedure Code, 1908, Order 22, Rule 3 - Legal representative of the deceased defendant cannot take a plea which is inconsistent or contrary to the plea taken by the deceased defendant. [Para 11]

Specific Relief Act, 1963 Section 17 - Vendor cannot plead defect in his title as

defence. [Para 19]

For the Appellant :- Mr. Vishnu Kosta, Advocate. For the Respondent :- Mr. Rajeev Shrivastava, Advocate.

JUDGMENT

N.K. Agarwal, J. – This is defendants’ first appeal arising out of the judgment and decree dated 29th September, 2001 passed by the District Judge, Raipur in Civil Suit No.28A/99 whereby and whereunder, the plaintiffs suit has been decreed.

2. Facts of the case, in brief, are that the plaintiff/respondent filed a suit on 14.06.1993 for specific performance of agreement to sell dated 24.05.1990 (Ex.P 1) against late Prabha Shankar Pandey (defendant) i.e., husband of appellant No. 1 /defendant No. 1 and father of other appellants inter alia on the ground the original defendant late Prabha Shankar Pandey entered into agreement to sell with regard to a house bearing No.17, situated at Aadarsh, State Bank of India, Employees Cooperative Housing Society, Sunder Nagar, Raipur for a sale consideration of Rs. 2 lacs and received Rs. 5,000/- as advance. Later on, on 03.02.1991, an additional sum of Rs. 2,000/- was also paid by the plaintiff.

3. According to the plaintiff, the sale deed was to be executed after seeking permission from the State Bank of India; balance amount of sale consideration was payable at the time of registration of sale deed. The defendant moved an application on 10.07.1990 seeking permission to sell the house to the plaintiff which was granted by the Bank on 10.05.1991. The plaintiff also paid instalment of Rs. 6,951 /- of loan amount to the Society on behalf of the defendant and thus has paid Rs. 13,951 /- towards the sale price. After completion of the formalities by the defendant, the plaintiff sent a Bank Draft of Rs. 1,86,049/- to the defendant by registered post but the same was returned as defendant refused to take the registered letter. Thereafter the plaintiff sent a legal notice on 20.04.1992 which was also refused by the defendant. Again another legal notice was sent on 16.04.1993 which was replied by the defendant stating that the agreement dated 24.05.1990 is fictitious and does not create any right in plaintiffs favour beyond getting refund of Rs. 7,000/- which he shall refund in due course; by lapse of two long years, the cost of land as well as building material increased manifolds, time was essence of contract; the defendant changed the idea of shifting himself to Bilaspur from Raipur; he did not receive any earlier registered letter from the plaintiff; he is not aware whether or not the plaintiff has deposited Rs. 6,951/- on his behalf. Thus defendant refused to execute sale deed.

4. According to the plaintiff, he was always ready and willing to perform his part of contract but the defendant refused to execute the sale deed.

5. After notice, the defendant appeared in the case and filed his written statement and denied the plaintiffs claim inter alia on the ground that the defendant has no absolute title over the suit house; the plaintiff was never ready and willing to perform his part of contract; as per the contract, the plaintiff had to pay full instalment and in addition to Rs. 2 lacs towards sale consideration within a year and get sale deed registered at his cost. The defendant accepted his proposal but the plaintiff failed to do so, therefore, he is not obliged

to execute the sale deed in plaintiffs favour and he had sent a letter to Secretary, Aadarsh, State Bank of India Employees Cooperative Housing Society, Sunder Nagar, Raipur dated 24.03.1992 showing his intention of withdrawing his consent to sell the suit house and for cancellation of the agreement. A copy of which was also endorsed to the plaintiff; on the date of agreement to sell, title to suit house was not transferred by Aadarsh, State Bank of India Employees Cooperative Housing Society, Sunder Nagar, Raipur in defendant's favour and, therefore, the said agreement was not valid and was fictitious to the knowledge of the plaintiff and the said agreement does not create any right in plaintiff's favour.

6. The defendant died on 17.03.1997 and appellants were substituted in his place as his legal representatives in the suit. They also filed written statement and denied the claim of the plaintiff. Both the parties led oral and documentary evidence on issues framed in the case.

7. Learned Trial Court on a close scrutiny of evidence led, material place and submissions made by the parties, passed the impugned judgment and decree in plaintiff's favour. Hence this appeal.

8. Shri Vishnu Kosta, learned Counsel for the appellant would submit that the judgment and decree passed by learned Court below is bad and deserved to be set aside on the following grounds:

i. At the time of execution of the agreement to sell, the defendant was not absolute owner of the suit house, at that time, the title of the suit house was with the Society and, therefore, the said agreement to sell does not create any right in favour of the plaintiff nor cast any obligation on the defendant to execute the sale deed;

ii. The plaintiff failed to perform his part of the contract inasmuch as the installments of the loan amount were not paid by him and therefore, the defendant had withdrawn his consent and cancelled the agreement;

iii. The appellants i.e., legal representatives of the deceased defendant by filing their written statement have denied the execution of agreement to sell;

iv. The plaintiff has not fulfilled the condition of permission to sell Ex.P4 granted by the competent authority of the Society and, therefore, he is not entitled for specific performance of contract;

v. The plaintiff was never ready and willing to perform his part of contract, his conduct was not equitable and as such he is not entitled for discretionary relief of specific performance of contract.

vi. The agreement Ex.P 1 is invalid and is not. legally enforceable inasmuch as the same as not been executed and signed by both the parties.

Reliance has been placed on the following judgments:

- i. ***Waheed Baig v. Bangi Lakshman & Ors., 2008(3) Civil Court Cases 750 (S.C.) : 2008(3) Civil Court Cases 750 (S.C.) : 2008(14) SCC 435***
- ii. ***Rajendra Kumar Bhandari v. Poosammal & Ors., AIR 1975 Madras 379***
- iii. ***Shankerlal & Anr. v. Jethmal & Anr., AIR 1961 Rajasthan 196***
- iv. ***Thiruvengada Pillai v. Nabaneethammal & Ors., 2008(2) Apex Court Judgments 067 (S. C.) : 2008(2) Civil Court Cases 266 (S. C.) : AIR 2008 SCW 1684***
- v. ***Sohan Lal v. Union of India & Ors., 1991 Civil Court Cases 603 (S. C.) : AIR 1991 Supreme Court 955***
- vi. ***Ganesh Shet v. Dr. C.S. G.K. Shetty & Ors., 1998(2) Apex Court Journal 85 (S. C.) : 1998(2) Civil Court Cases 711(S.C) : 1998(11) MPLJ 490***
- vii. ***Anil Singh v. Smt. Kholbahrin Bai & Anr., 2009(1) CGLJ 142***
- viii. ***Pratap Lakshman Mulchandani & Ors. v. Sham Lal Uddavadas Wadhwa & Ors., 2008(2) Apex Court Judgments 158 (S.C.) : 2008(2) Civil Court Cases 101 (S. C.) : AIR 2008 SCW 819***
- ix. ***R. Chinnadurai v. Rajalakshmi, AIR 2004 Madras 313***

9. Per contra, Shri Rajeev Shrivastava, learned Counsel for the respondents supported the judgment and decree passed by the Trial Court and submitted that learned Trial Court has passed the said decree based on appreciation of evidence and material place on record by both the parties, which deserves to be upheld.

10. I have heard learned Counsel for the parties, perused the judgment and decree impugned and the record of the Trial Court.

11. As per the provisions contained in Order 22, Rule 4 (2) of Civil Procedure Code, legal representative of the deceased defendant cannot take a plea which is inconsistent or contrary to the plea taken by the deceased defendant. Any such person may make any defence appropriate to his character as legal representative of the deceased and not more than that. Therefore, the matter requires consideration in the light of the written statement filed by the deceased defendant P.S.Pandey.

12. The defendant never denied the execution of agreement to sell in plaintiff's favour nor denied receipt of Rs. 7,000/- as advance. Permission of State Bank of India as well as Adarsh State Bank of India Employees Cooperative Housing Society, Sunder Nagar, Raipur to sell the said house to the plaintiff obtained by the defendant was also not specifically denied. In view of above, the question raised by Shri Koshta with regard to validity of agreement to sell on the plea that the same has not been signed by both the parties, the stamp was purchased in the name of the plaintiffs wife are of no consequence and the judgment in case of ***R. Chinnadurai v. Rajalakshmi, AIR 2004 Madras 313***, cited by

Shri Koshta is of no help to him. In the above case, there was specific denial of execution of agreement by the vendor, purchaser did not examine the attesting witness, as per the Court, the document was not genuine document, therefore, the Single Bench of Madras High Court after considering various factors held the said document as not genuine document for various reasons. The document was not signed by both the parties, was one of the circumstances upon which the said document has been held by the Court as ungenuine. Here in the instant case, execution of agreement to sell has not been denied and, therefore, the plea taken is without merit.

If the execution of agreement to sell is not in dispute then the plea taken by the appellant's Counsel that the stamp paper of the agreement has been purchased in the name of wife of the plaintiff is also of no consequence. The agreement was exhibited in the case without any objection. Even assuming the same as an irregularity, the same has been waived by the defendant. So far as genuineness of the agreement is concerned, that is not subject matter of the dispute in the present case as the same has already been admitted by the defendant. Even otherwise in such cases where the document is not properly stamped, the Court can only deem the document to be not properly stamped but cannot, only on that ground, held the document to be invalid. Even if, an agreement is not executed on requisite stamp paper, it is admissible in evidence on payment of duty and penalty under Section 35 or 37 of the Stamp Act, 1899. If the agreement is executed on a plain paper, it could be admitted in evidence by paying duty and penalty. The Supreme Court in case of **Thiruvengada Pillai v. Navaneethammal & Anr.** (supra) has observed in para 12 of the judgment as under:

"12. The Stamp Rules in many States provide that when a person wants to purchase stamp papers of a specified value and a single stamp paper of such value is not available, the stamp vendor can supply appropriate number of stamp papers requires to make up the specified value; and that when more than one stamp paper is issued in regard to a single transaction, the stamp vendor is required to give consecutive numbers. In some States, the Rules further require an endorsement by the stamp vendor on the stamp paper certifying that a single sheet of required value was not available and therefore more than one sheet (specifying the number of sheets) have been issued to make up the requisite stamp value. But the Stamp Rules, 1925 applicable to Tamil Nadu, do not contain any provision that the stamp papers of required value should be purchased together from the same vendor with consecutive serial numbers. The Rules merely provide that where two or more sheets of paper on which stamps are engraved or embossed are used to make up the amount of duty chargeable in respect of any instrument, a portion of such instrument shall be written on each sheet so used. No other rule was brought to our notice which required use of consecutively numbered stamp papers in the State of Tamil Nadu."

13. Shri Koshta would further submit that on the date of execution of agreement to sell, absolute title was with the Society and not with the vendor/defendant. Since the defendant was not having any marketable title of the suit house on the date of agreement to sell, therefore, the said agreement cannot be specifically enforced in the eye of law.

14. To appreciate the above plea taken by the appellant, it would be appropriate to advert

to the evidence adduced in the case. As per the agreement to sell Ex.P 1, the suit house belonged to defendant Prabhashankar Pandey and sale deed has to be executed after due permission of the State Bank of India authorities. The State Bank of India as well as the Adarsh State Bank of India Employees Cooperative Housing Society, Sunder Nagar, Raipur have accorded their permission vide, Annexures P3 and P4. As per para 3 of the statement of Smt.Asha Pandey DW 1, entire instalments have been paid to the society.

15. Section 13(1) of the Specific Reliefs Act. reads as under:

13. Rights of purchaser or lessee against person with no title or imperfect title. – (1) Where a person contracts to sell or let certain immovable property having no title or only an imperfect title, the purchaser or lessee (subject to the other provisions of this Chapter), has the following rights, namely,

(a) if the vendor or lessor has subsequently to the contract acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest;

(b) where the concurrence of other persons is necessary for validating the title, and they are bound to concur at the request of the vendor or lessor, the purchaser or lessee may compel him to procure such concurrence, and when a conveyance by other persons is necessary to validate the title and they are bound to convey at the request of the vendor or lessor, the purchaser or lessee may compel him to procure such conveyance;

(c) where the vendor professes to sell unencumbered property, but the property is mortgaged for an amount not exceeding the purchase money and the vendor has in fact only a right to redeem it the purchaser may compel him to redeem the mortgage and to obtain a valid discharge, and, where necessary, also a conveyance from the mortgagee;

(d) where the vendor or lessor issues for specific performance, of the contract and the suit is dismissed on the ground of his want of title or imperfect title, the defendant has a right to a return of his deposit, if any, with interest thereon, to his costs of the suit, and to a lien for such deposit, interest and costs on the interest, if any, of the vendor or lessor in the property which is the subject-matter of the contract.

(2) The provisions of sub-section (1) shall also apply, as far as may be, to contracts for the sale or hire of moveable property.

16. In the instant case, the suit property was subject-matter of grant of loan by the State Bank of India admittedly which has been repaid. As per the condition of agreement to sell Ex.P 1, the sale deed was to be executed by the vendor after due permission of the State Bank of India authorities which has already been obtained vide, Ex.P3 and P4. In view above and in the light of Section 13(1) of the Specific Reliefs Act, it cannot be said that the agreement to sell in question is not legally enforceable. Privy Council in case of **Motilal v. Nanhelal, AIR 1930 Privy Council 287**, laid down that if the vendor had agreed to sell the property which can be transferred only with the sanction of some Government Authority, the Court has jurisdiction to order the vendor to apply to the authority within a

specified period, and if the sanction is forthcoming, to convey to the purchaser within a certain time. This proposition of law was followed in **Chandnee Widya Vati Madden v. Dr. C.L. Katial**, AIR 1964 Supreme Court 978, and **R.C. Chandiok v. Chuni Lal Sabharwal**, 1970 (3) SCC 140. The Privy Council in Motilal case also laid down that there is always an implied convenient on the part of the vendor to do all things necessary to effect transfer of the property regarding which he has agreed to sell the same to the vendee.

17. The Supreme Court in case of **Vishwa Nath Sharma v. Shyam Shanker Goela**, 2007(2) Apex Court Judgments 664 (S.C.) : 2007(2) Civil Court Cases 702 (S.C.) : 2007(10) SCC 595, has observed in paras 12 as under :-

“12. The Privy Council in **Motilal v. Nanhelal**, laid down that if the vendor had agreed to sell the property which can be transferred only with the sanction of some Government authority, the Court has jurisdiction to order the vendor to apply to the authority within a specified period, and if the sanction is forthcoming, to convey to the purchaser within a certain time. This proposition of law, was followed in **Chandnee Wiadya Vati Madden v. Dr. C. L. Katial** and **R. C. Chandiok v. Chuni Lal Sabharwal**. The Privy Council in Motilal case also laid down that there is always an implied convenient on the pan of the vendor to do all things necessary to effect transfer of the property regarding which he has agreed to sell the same to the vendee. Permission from the Land and Development Officer is not a condition precedent for grant of decree for specific performance. The High Court relied upon the decisions in **Chandnee Widya Vail Madden v. Dr. C. L. Katial** and **Bhim Singhji v. Union of India** to substantiate the conclusion. In Chandnee Widya this Court confirmed the decision of the Punjab and Haryana High Court holding that if the Chief Commissioner ultimately refused to grant the sanction to the sale, the plaintiff may not be able to enforce the decree for specific performance of the contract but that was not a bar to the Court passing a decree for that relief. The same is the position in the recent case. If after the grant of the decree of specific performance of the contract, the Land and Development Officer refused to grant permission for sale, the decree-holder may not be in a position to enforce the decree but it cannot be held that such a permission is a condition precedent for passing a decree for specific performance of the contract.”

18. The Supreme Court in case of **M. Meenakshi & Ors. v. Metadin Agarwal (D) by LRs. & Ors.**, 2006(3) Apex Court Judgments 289 (S.C.) : 2006(4) Civil Court Cases 267 (S.C.) : 2006 AIR SCW 4323, was dealing with a case in which at the time when parties entered into an agreement of sale, property was subject-matter of the proceedings under Land Ceiling Act. The agreement to sell was subject to the grant of permission by the competent authority under the said Act. As per recital of the agreement, in the event of refusal on the part of competent authority to grant such permission, the advance paid to the defendant would be refunded. Permission to sell the said land was rejected by the competent authority. In such situation, the Court has held that decree for specific performance of contract could not have been granted.

19. There is no quarrel with the ratio laid down by the Supreme Court in the above referred case, but facts are not same here. In the instant case, permission has already been

accorded by the Bank authorities and also by the society and, therefore, the ratio laid down in the above referred case is not applicable in the facts and circumstances of the present case, as in the instant case, permission has already been accorded by the Bank authorities. Moreover under Section 17 of the Specific Relief Act, vendor cannot plead defect in his title as defence. Therefore, the contention raised by the appellant that the agreement is not specifically enforceable for want of defendant's absolute title over the suit property is sans substance.

20. Shri Koshta would further contend that in the facts and circumstances of the case, the plaintiff is not entitled for discretionary relief of specific performance of contract as the plaintiff has not shown his readiness and willingness to perform his part of contract; the loan, amount has not been paid by him and as such failed to fulfil the condition of permission granted by the State Bank of India (Ex.P4).

So far as sale consideration is concerned, as per the agreement to sell Ex.P-1, the total consideration of Rs. 2 lacs is payable by the plaintiff. Nowhere it has been mentioned in the agreement that this amount would be in addition to the loan installment of the suit house which was not paid to the society by the defendant at that, time. The suit has been filed immediately after communication of refusal to execute the sale deed by the defendant. By no stretch of imagination it can be said that time was essence of contract inasmuch as even not time limit is prescribed under the said agreement and in such cases the suit can always be filed within a reasonable time which has been filed immediately after refusal by the defendant.

The Supreme Court in case of **Mademsetty Satyanarayana v. G. Yelloji Rao & Ors., AIR 1965 Supreme Court 1405**, has held that mere delay without such conduct on the part of the plaintiff as to cause prejudice to the defendant does not empower the Court to refuse such a relief. The Supreme Court in the above case has further observed in para 11 as under:

"11. The result of the aforesaid discussion of the case law may be briefly stated thus: While in England mere delay or laches may be a ground for refusing to give a relief of specific performance, in India mere delay without such conduct on the part of the plaintiff as would cause prejudice to the defendant does not empower a Court to refuse such a relief. But as in England so in India, proof of abandonment or waiver of a right is not a pre-condition necessary to disentitle the plaintiff to the said relief, for if abandonment or waiver is established, no question of discretion on the part of the Court would arise. We, have used the expression "waiver" in its legally accepted sense, namely, "waiver is contractual and may constitute a cause of action; it is an agreement to release or not to assert a right; see **Dawson's Bank Ltd v. Nippon Menkwa Kabushiki Kaisha**. It is not possible or desirable to lay down the circumstances under which a Court can exercise its discretion against the plaintiff. But they must be such that the representation by or the conduct or neglect of the plaintiff is directly responsible in inducing the defendant to change his position to his prejudice or such as to bring about a situation when it would be inequitable to give him such a relief."

21. The defendant has not shown any such circumstances showing plaintiffs intention to abandon his right for specific performance under the agreement. Further the defendant also failed to establish that alleged delay caused any prejudice to the defendant and the delay was deliberate and for that, the sole responsibility lies upon the respondent.

As per the written statement of the original defendant, time was essence of the contract, but the plaintiff failed to perform his part of contract within a period of one year, as per the agreement, by that time the market value of the suit house has been considerably increased and, therefore, the plaintiff is not entitled for discretionary relief of specific performance of contract, but the defendant failed to establish the aforesaid plea. As held earlier, the agreement to sell (Ex.P 1) did not contain any such time limit of one year; time was not essence of contract, no definite evidence has been adduced by the defendant showing unusual increase in the price of the suit house. In view of above, it cannot be said that the plaintiff is not entitled for the discretionary relief of specific performance of contract as per Section 20 of the Act.

22. The cases referred and relied upon by Shri Koshta are of no help to him as the same are not applicable in the facts and circumstances of the present case. Facts in the present case as discussed here inabove are entirely different.

23. The appellant utterly failed to demonstrate from the record any circumstance which could show that learned Trial Court erred in granting discretionary relief of specific performance of the contract in favour of the plaintiff.

24. Therefore, it cannot be said that in the facts and circumstances of the case, the plaintiff is not entitled for specific performance of contract. As a result of discussion as aforesaid, I do not find any substance in the appeal preferred by the appellant.

25. The appeal being devoid of substance is liable to be dismissed and is hereby dismissed.

26. In the facts and circumstances of the case, no order as to costs.

Appeal dismissed.