



AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment delivered on 27-03-2023

FA No.290 of 2017

{Arising out of judgment and decree dated 30-1-2017 passed by the
Second Additional District Judge, Raipur, in civil suit No.5-A/2011}

1. Shri Ghanshyam Kishor Das (Dead) Through LRs.

1(a) Rajshree Devi Wd/o Late Shri Ghanshyam Kishor Das Aged
About 60 Years.

1(b) Giriraj Kishor Das, S/o Late Shri Ghanshyam Kishor Das,
aged about 40 years.

1(c) Devraj Kishor Das S/o Late Shri Ghanshyam Kishor Das
Aged About 35 Years

No.1(a) to 1(c) are R/o 50, Ward No. 2, Chhuikhadan Bada,
Idgahbhatha, Near Water Tank, Mukut Nagar, Raipur, District
Raipur Chhattisgarh.

1(d) Radha Rani D/o Late Shri Ghanshyam Kishor Das W/o Shri
Vijendra Singh, Aged About 38 Years R/o 8V9, Rukmani Nagar,
Vijyapura, Jamdoli SO Jaipur (Rajasthan).

1(e) Bharti Devi, D/o Late Shri Ghanshyam Kishor Das, W/o
Devendra Singh, aged about 37 years, R/o Bhawani Mansion,
Bazar Para, Chandrapur, Dabhara, Dist. Janjgir-Champa, CG.

2. Ms. Vijay Lakshmi Devi (Dead)

3. Ms. Mahalaxmi Devi D/o Late Shri Rituparna Kishor Das, Aged
About 59 Years, R/o Chhuikhadan, Idgahbhata, Near Water Tank,
Mukut Nagar, Raipur, Chhattisgarh.

---- Appellants

Versus

1. M/s Nagarjuna Construction Company Limited Through
Authorized Representative And Power Of Attorney Holder Shri
Rohit Bhargava S/o Shri R.N. Bhargava, E-15, Sector-2, Avanti
Vihar, Raipur, Tahsil And District Raipur, Chhattisgarh

---- Respondent



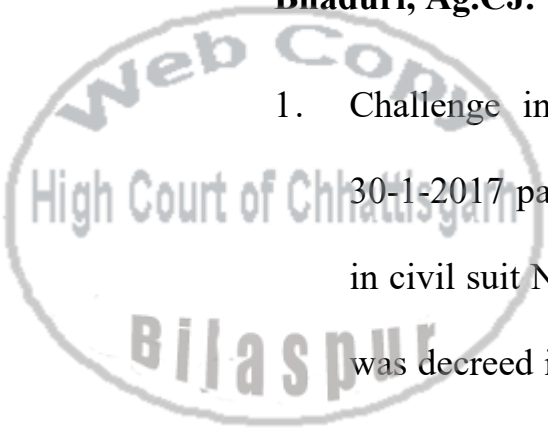
For Appellants	Mr. Anurag Dayal Shrivastava with Mr. Arvind Shrivastava, Advocates
For Appellant No.1(b)	Mr. Sachin Tamrakar, Advocate
For Appellant No.3	Mr. Bharat Rajput, Advocate
For Respondent	Mr. B.P. Sharma with Mr. Nitesh Jain, Ms. Sameeksha Gupta and Mr. M.L. Sakat, Advocates

Hon'ble Mr. Goutam Bhaduri, Ag.CJ &
Hon'ble Mr. N.K. Chandravanshi, J.

CAV Judgment

The following judgment of the Court is delivered by **Goutam Bhaduri, Ag.CJ.**

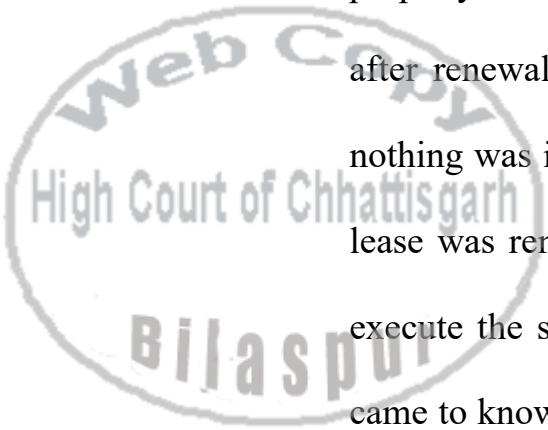
1. Challenge in this appeal is to the judgment and decree dated 30-1-2017 passed by the Second Additional District Judge, Raipur, in civil suit No.5-A/2011 whereby the suit for specific performance was decreed in favour of the respondent/plaintiff. Being aggrieved by such judgment and decree, the present appeal is preferred by the defendants.
2. The facts, in brief, are that the plaintiff company entered into an agreement with Ghanshyam Kishor Das (since deceased), who acted on behalf of his mother Vijay Lakshmi Devi (defendant No.2) and sister Mahalaxmi Devi (defendant No.3) for sale of land admeasuring 2.45 acres (1,06,740 sq.ft.) which is a lease hold plot bearing No.1/2 situated at Western Civil Station 32, Chhui Khadan Bada, Raipur. The agreement was executed on 8-3-2005. The





plaintiff agreed to purchase the suit property at the rate of Rs.320/- per sq.ft. and a sum of Rs.10.00 lacs was paid towards advance money by cheque and rest was agreed to be paid in 07 installments. Plaintiff averments show that the remaining amount was to be paid on information being given by the defendant about renewal of lease. It was further pleaded that the suit property was initially held on lease for 30 years by the father of Ghanshyam Kishor Das namely; Rituparna Kishoredas, which was being renewed from time to time. The plaintiff pleaded that after the death of Rituparna Kishoredas the defendants being the legal heirs were in possession of the suit property and despite having specific terms in the agreement that after renewal of the lease it would be informed to the purchaser, nothing was informed. The plaintiff, on enquiry, came to know that lease was renewed and served letter & notice to the defendants to execute the sale deed, but they did not do it, instead, the plaintiff came to know that the defendants are trying to sell the land to some one else. According to the plaintiff, renewal of the lease was already done on 26-12-2005, but despite that the defendants did not execute the sale deed, as such the civil suit was filed on 25-2-2008 for specific performance and permanent injunction.

3. (i) In reply to the plaint allegations, defendant No.1 Ghanshyam Kishor Das (since deceased) disowned the agreement and stated that he was in need of money to perform marriage of children as such took the amount of Rs.10.00 lacs and signed the document. At the time of signature of such document, he was not





mentally fit. It was further stated that over the said land a building of 5000 sq.ft. in a dilapidated condition situates, but the same was not properly shown in the agreement.

(ii) The defendant further stated that when the agreement was executed by the defendant No.1 at that time no lease was existing and renewal of the lease was pending with the Nazul Department. The defendant also stated that the agreement to sell was not intended to be acted upon and the execution of agreement without the lease in its existence would show that the agreement could not be specifically enforced. It was further stated that only the defendant No.1 Ghanshyam Kishor Das executed the agreement whereas the defendants No.2 & 3 i.e. mother & sister of the defendant No.1 had only given power of attorney to look after and manage the said property, therefore, the agreement itself was not enforceable.

(iii) Service of notice was also denied and it was stated that plaintiff was not in a good financial position to pay the balance amount. It was further stated that the suit property being the ancestral one, as such the right of defendants No.2 & 3 was also vested in it. It was also stated that the defendant No.1 was not entitled to execute any agreement to sell the entire property and the agreement is void. Defendant No.2 Vijay Lakshmi Devi (since deceased) also disowned the agreement and stated that she has not signed the agreement and if some one has signed without her



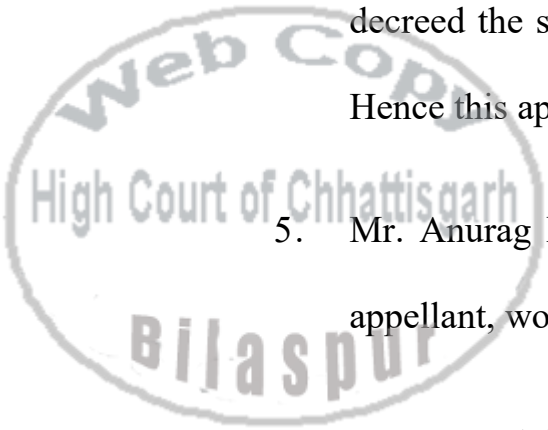


authorisation it would be invalid, as it does not have her consent and knowledge. Receipt of notice was also denied and prayed for dismissal of the suit.

4. Based on the pleadings, the learned trial Court framed six issues. The plaintiff examined Rohit Bhargava (PW-1), signatory to the agreement and T.N.L. Prasad (PW-2), General Manager (Finance & Accounts). The defendant No.1 Ghanshyam Kishor Das examined himself as DW-1 as sole witness. Defendant No.2, mother of defendant No.1, did not adduce any evidence. Defendant No.3, sister of defendant No.1, remained *ex parte*. Learned trial Court decreed the suit for specific performance in favour of the plaintiff. Hence this appeal by the defendants.

5. Mr. Anurag Dayal Shrivastava, learned counsel appearing for the appellant, would submit that :

- at the time of execution of alleged agreement the lease deed was not alive;
- the subject property which was alleged to be sold is a nazul land and after the agreement Ex.P/3 dated 8-3-2005 the lease was renewed from 1992 to 31-3-2022 vide Ex. P/17 dated 26-12-2005;
- learned counsel would further submit that the lease is not under the provisions of the Transfer of Property Act, 1882 (for short 'the TP Act'), but was under the





provisions of the Government Grants Act, 1895 (for short ‘the GG Act, 1895’), which was earlier known as ‘Crown Grants Act’. Section 2 of the GG Act, 1895 excludes the application of the TP Act. Section 3 of the GG Act, 1895 would show that Government grants to take effect according to their tenor;

- learned counsel would also submit that agreement to sell was governed under Section 54 of the TP Act, which is about sale of immovable property, but by virtue of Section 2 of the GG Act, 1895 it overrides the provisions of the TP Act;

- according to learned counsel, agreement is for sale of the land and not for transfer of the lease hold right so the nature of land is lessee holds to use, consequently is not a free hold land to confer ownership;

- on the date of agreement since no lease was alive, the ownership being not vested with Ghanshyam Kishor Das, he would not be the title holder or owner or have any user right, therefore, it would be hit by the provisions of Section 56 of the Indian Contract Act, 1872 (for short ‘the Contract Act’) as it would be impossible to transfer the ownership and, therefore, would be void;





- it is further submitted that terms of lease came into effect after execution of the agreement as the lease was renewed on 26-12-2005 so when the agreement to sell was executed on 8-3-2005 the terms of lease was not available or was in existence, as the renewal came after the agreement of sale;
- subsequent renewal of lease by clause समनुदेशन i.e. assignment, lease hold right could not have been sold barring the ownership and the specific performance cannot be granted of the agreement;
- the subsequent lease would show that the Government has the right to re-enter, therefore, the State is the owner and the ownership is vested with the State and the contract between the parties are required to be interpreted literally and the content of thing which is not available in the contract cannot be added and, therefore, sale or transfer of ownership cannot be performed;
- learned counsel would submit that the trial Court has re-written the contract by enhancing the price of land and the Court cannot, in a decree for specific performance, substitute a new contract of its own;
- the other legal heirs also exist, who were the co-parceners, therefore, the agreement cannot be executed;





- learned counsel would place reliance upon the decision of the Supreme Court rendered in the matter of *Pradeep Oil Corporation v Municipal Corporation of Delhi and Anr.*¹, to submit that in the facts of the case the rights and obligations of the parties would be governed by the terms of the provisions of the GG Act, 1895 and when the limitation is imposed and restrictions upon the grants and other transfer then the TP Act would have a like consequence and the defendant No.1, therefore, since was holding the property under the GG Act, 1895, the property could not have outrightly sold;

- further reliance is placed in the matter of *Satyabrata Ghose v Mugneeram Bangur and Co. and Another*² to submit that when something inherent is impossible the specific performance of the decree cannot be ordered for; and

- by citing the decision rendered in the matter of *Ramdass v Sitabai and Ors.*³ learned counsel would submit that one co-owner of the property may sell his share, but cannot place the vendee into possession.

6. Mr. Bharat Rajput, learned counsel appearing for the appellant No.3, would submit that the suit property being a nazul, the

1 AIR 2011 SC 1869
2 AIR 1954 SC 44
3 AIR 2009 SC 2735





ownership belonging to the Government as such the State would be a necessary party and in absence of State the specific performance could not be enforced against the State behind the back of it. To buttress his contention, learned counsel would place reliance in the matter of *State of Uttar Pradesh and Others v United Bank of India and Others*⁴. Learned counsel would further submit that the order sheet of the trial Court would show that on 25-4-2009 this appellant (Mahalaxmi Devi) was directed to be noticed again and subsequently the notice was sent on wrong address as such the appellant was wrongly proceeded *ex parte*. He would also submit that as per Section 17 of the Specific Relief Act, 1963 (for short 'the Act, 1963') on the date of agreement i.e. 8-3-2005 the seller did not have any salable right to the property and had no title, therefore, the agreement cannot be specifically enforced and the suit was liable to be dismissed.

7. Mr. B.P. Sharma, learned counsel appearing for the respondent, *per contra*, would submit that :

- the instant appeal is under Section 96 of the Code of Civil Procedure, 1908 and the grounds are required to be considered as per Order 41 Rule 1(2) and beyond those grounds which are stated in memo of appeal, no argument can be advanced;

4 (2016) 2 SCC 757



- with respect to the objection to the non joinder or mis joinder, learned counsel would submit that such objection should have been taken at the first instance as per Order 1 Rule 13 of the CPC and in absence thereof it would be deemed to have been waived;
- learned counsel would further submit that Section 6 of the TP Act postulates that what property can be transferred which include that the property of any kind may be transferred, except the exception carved out in Section 6, therefore, the assignment of lease can be made;
- learned counsel would also submit that as per Section 7 of the TP Act every person competent to contract and entitled to transferable property, or authorised to dispose of transferable property not his own, is competent to transfer such property to the extent and in the manner, allowed and prescribed by law and option of transfer would take effect by virtue of Section 8 of the TP Act and it would be a legal to hold the lease hold right can be transferred;
- learned counsel would also submit that as per Section 38 of the TP Act, transfer of the immovable property can be made and the ostensible owner can also sale the right;





- according to the learned counsel, transfer be acquired in the property transfer and such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists;
- referring to the agreement (Ex.P/3), learned counsel would submit that the purchaser knew the fact about expiry of the lease and the transferor were in possession, consequently, the right of renewal was pending, therefore, knowing full well the sale deed was not executed at the time of agreement;
- learned counsel would submit that the defence of the defendant No.1 was only to the extent that it was security for loan along with mental disbalance, but those facts have been negated by the finding of the trial Court for which no cross appeal is pending;
- referring to the statement of PW-1 Rohit Bhargava and the suggestion given to him, learned counsel would submit that they were aware of the fact that the lease had expired and it was the duty of the seller to raise a boundary wall, but the same was not carried out, therefore, the seller failed in his obligation to perform the part of contract and, therefore, time would not be essence of contract;





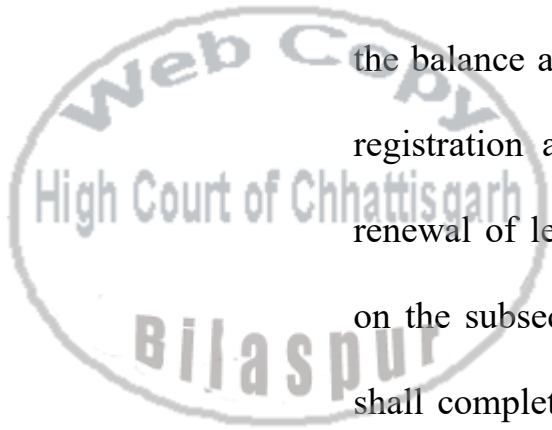
- he would submit that from the statement of PW-2 T.N.L. Prasad it is manifest that sufficient amount exists in the company to pay the sale consideration, but the seller since failed to perform their part of contract, the sale deed could not be executed;
- he would next submit that evidence would show that the seller was trying to sell the property to third person, therefore, the suit was filed and the learned trial Court instead of Rs.320/- per sq.ft. enhanced to Rs.580/- per sq.ft. on application of PRT (Price, Rate of Interest & Time) with interest, therefore, the equity have been balanced;
- learned counsel would submit that as per Section 10 of the TP Act, certain condition restraining the alienation of property can be done alone;
- referring to Sections 181 and 182 of the Chhattisgarh Land Reven Code, 1959 (for short 'the CGLRC') the counsel would submit that these statutes govern the terms of Government lessees and no ambiguity can be attached when the lease hold rights are subjected to sale; and
- learned counsel further refers to Ex.D/1 & Ex.D/2, the power of attorney, to submit that absolute power was given to the defendant No.1 Ghanshyam Kishor Das to





sell the land and accordingly he executed the agreements, therefore, the order of the learned trial Court is well merited, which do not call for any interference.

8. We have heard learned counsel appearing for the parties at length, perused the pleadings and the evidence available on record.
9. The agreement for sale is Ex.P/3 and is dated 8-3-2005. The agreement shows that the suit property was agreed to be sold at the rate of Rs.320/- per sq.ft. for an area of 1,06,740 sq.ft. (1,06,740 sq.ft. x Rs.320/- per sq.ft. = Rs.3,41,56,800/-). An amount of Rs.10.00 lacs was paid to the seller by cheque as an advance and the balance amount was agreed to be paid on or before the date of registration and 07 subsequent installments were fixed i.e. after renewal of lease Rs.31,56,800/- and thereafter, Rs.50.00 lacs each on the subsequent dates. The agreement purports that the vendor shall complete the formalities of renewal of lease of said property and shall inform about the same to the vendee by registered post. The agreement also purports that before further payment is made the seller Ghanshyam Kishor Das, who was then alive, would obtain a fresh registered general power of attorney of seller No.3, Mahalaxmi, who is daughter of Rituparna Kishoredas. Perusal of the said agreement would show that at the time of execution of the agreement, the suit property, which is a lease hold property, known as 'Bada of Chhuikhadan'. Further perusal of the agreement shows that three sellers have stated that they have obtained succession





certificate after death of Rituparna Kishoredas. The earlier lease deed is not on record. It is not in dispute that at the time of execution of sale agreement, the earlier lease had expired in 1992.

10. The lease of Nazul land was earlier governed by the GG Act, 1895. Sections 2 & 3 very specifically provide that the provisions of the TP Act do not apply to Government lands. Sections 2 & 3 read as under :

“2. Transfer of Property Act, 1882, not to apply to Government grants.--Nothing in the Transfer of Property Act, 1882, contained shall apply or be deemed ever to have applied to any grant or other transfer of land or of any interest therein heretofore made or hereafter to be made by or on behalf of the Government to, or in favor of, any person whomsoever; but every such grant and transfer shall be construed and take effect as if the said Act had not been passed.

3. Government Grants to take effect according to their tenor.--All provisions, restrictions, conditions and limitations over contained in any such grant or transfer as aforesaid shall be valid and take effect according to their tenor, any rule of law, statute or enactment of the Legislature to the contrary notwithstanding.“

11. The lease of subject land was subsequently renewed on 26-12-2005 (Ex.P/17). The new lease was granted in the name of Ghanshyam Kishor Das, S/o Rituparna Kishoredas and such name is in Nazul Khasra (Ex. P/18) as the sole lessee. Further the condition of the renewal lease deed is governed by Sections 181 & 182 of the CGLRC, which read as under :





181. Government lessees..-(1) Every person who holds land from the State Government or to whom a right to occupy land is granted by the State Government or to Collector and who is not entitled to hold land as a bhumiswami shall be called a Government lessee in respect of such land.

(2) Every person who at the coming into force of this Code-

(a) holds any land in the Madhya Bharat region as an ordinary tenant as defined in the Madhya Bharat Land Revenue and Tenancy Act, Samvat 2007 (66 of 1950); or

(b) holds any land in the Vindhya Pradesh region as a special tenant as defined in the Vindhya Pradesh Land Revenue and Tenancy Act, 1953 (III of 1955), or as a gair haqdar tenant any grove or tank or land which has been acquired or which is required for Government or public purposes; or

(c) holds any land from the State Government in the Sironj region as a gair khatedar tenant as defined in the Rajasthan Tenancy Act, 1955 (3 of 1955);

shall be deemed to be a Government lessee in respect of such land.

(3) x x x

182. Rights and liabilities of a Government lessee. - (1) A Government lessee shall, subject to any express provisions in this Code, hold his land in accordance with the terms and conditions of the grant, which shall be deemed to be a grant within the meaning of the Government Grants Act, 1895 (XV of 1895).

(2) A Government lessee may be ejected from his land by order of a Revenue Officer





on one or more of the following grounds,
namely :-

(i) that he has failed to pay the rent for a period of three months from the date on which it became due; or

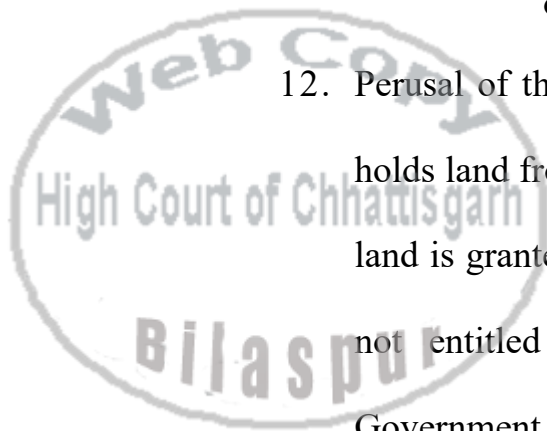
(ii) that he has used such land for purposes other than for which it was granted; or

(iii) that the term of his lease has expired; or

(iv) that he has contravened any of the terms and conditions of the grant :

Provided that no order for ejection of a Government lessee under this sub-section shall be passed without giving him an opportunity of being heard in his defence.

12. Perusal of the aforesaid provisions would show that a person who holds land from the State Government or to whom a right to occupy land is granted by the State Government or to Collector and who is not entitled to hold land as a bhumiswami shall be called Government lessee and terms of lease would be governed by the express provisions of the Code in accordance with the terms and conditions of the “grant” which shall be deemed to be a grant within the meaning of GG Act, 1895. Perusal of the subsequent lease granted would show that the ownership right was not granted and clause 6 of the lease shows that it contains the word समनुदेशन i.e. assignment and for such assignment certain conditions are attached to be followed. The lease deed also engrafts that the Government can re-enter into any part and parcel of the sale of land when it is felt that there is some breach of promise of conditions.





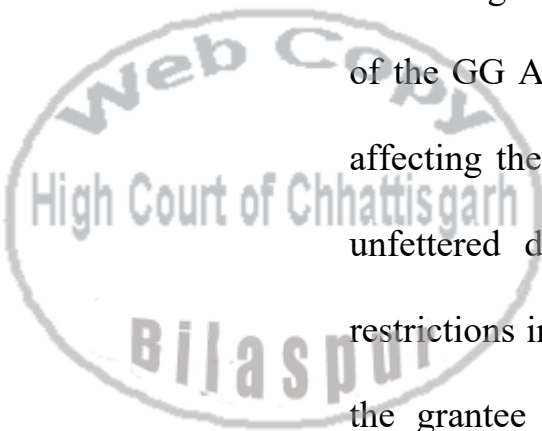
13. The earlier lease deed is not on record. The subsequent lease when is read along with the agreement, it shows that Ex.P/3 is an agreement for sale of a nazul land of permanent lease along with the house built upon it. The earlier lease was under GG Act, 1895. The Supreme Court in the matter of *Azim Ahmad Kazmi and Ors. v State of U.P. and Anr.*⁵, has referred to its earlier decision rendered in the matter of *The State of U.P. v Zahoor Ahmad and Another*⁶ wherein it has been held that Section 3 of the GG Act, 1895 declares the unfettered discretion of the Government to impose such conditions and limitations as it thinks fit, no matter what the general law of the land be. The meaning of Sections 2 & 3 of the GG Act, 1895 is that the scope of that Act is not limited to affecting the provisions of the TP Act only. The Government has unfettered discretion to impose any conditions, limitations, or restrictions in its grants, and the right, privileges and obligations of the grantee would be regulated according to the terms of the grant, notwithstanding any provisions of any statutory or common law.

14. Likewise, the Supreme Court in the matter of *Pradeep Oil Corporation* (supra) observed at para 17 as under :

17. In the present case grant has been made by the President of India in terms of Section 2 of the Government Grants Act, 1895 and the Transfer of Property Act, 1882 may have little bearing in the instant case. The former, i.e. the Government Grants Act,

5 2012 AIR SCW 4204

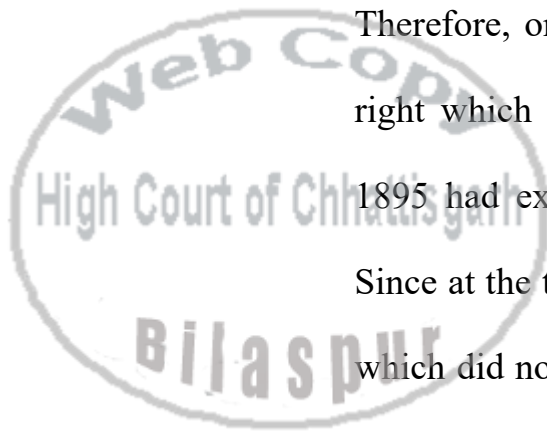
6 AIR 1973 SC 2520





1895 being a special statute would prevail over the general statute, i.e. the Transfer of property Act, 1882. Accordingly, the rights and obligations of the parties would be governed by the terms of the provisions of Government Grants Act, 1895 whereunder the Government is entitled to impose limitations and restrictions upon the grants and other transfer made by it or under its authority.

15. On the date of agreement for sale dated 8-3-2005, admittedly the lease was not in existence which rendered the earlier lessee as only occupant. It was renewed on 26-12-2005. Earlier at the time of agreement of sale, three vendors were shown as seller. They are the legal heirs of Rituparna Kishoredas i.e. son, wife & daughter. Therefore, on the date of agreement the vendors did not have any right which can be assigned as the lease granted under GG Act, 1895 had expired long back before execution of sale agreement. Since at the time of agreement, the GG Act, 1895 was in existence, which did not confer any ownership right on sellers, after expiry of lease the seller could not assign or transfer any right to vendee as corpus of property reverted back to Government on expiry of lease.
16. The appellant being not the owner on the date of agreement cannot be asked to transfer the ownership by specific performance of the agreement dated 8-3-2005 and a party cannot claim anything more than what is covered by the terms of contract, for the reason that contract is a transaction between the two parties and has been entered into with open eyes and understanding the nature of contract. Thus, contract being a creature of an agreement between





two or more parties, has to be interpreted giving literal meanings unless, there is some ambiguity therein.

17. Further through out the entire litigation, the State was not arrayed as a party in the suit or appeal. The agreement when was executed, the right of the vendors was not in existence and the State was never made a party. It being a nazul property, under the GG Act, 1895, the settlement of transaction in absence and behind the back of the State would be a suppression of material facts. The State being not arrayed as a party, it is not known that when subsequent renewal of lease was under consideration with State whether it was brought to the notice of State that proposed lessee had already entered into a sale agreement to transfer the lease in favour of third party. Therefore, in the like nature of cases where nazul lands are involved, State would be necessary party as the grant of lease by State cannot be used as a wind fall for the lessee to monetize alone. The State being not a party to litigation, the State side remained unanswered.

18. The Supreme Court in the matter of *State of Uttar Pradesh and Others v United Bank of India and Others* {(2016) 2 SCC 757} held that when no interest is subsisting decree cannot be obtained at the back of the title holder. In the said decision, the Supreme Court held thus at para 46 :

“46.....without appreciating the fact that the Bank has not having any subsistence (*sic* subsisting) interest in the leasehold





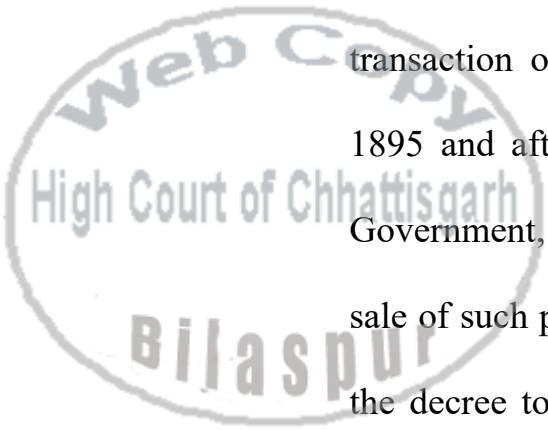
property obtained a mortgage decree behind the back of the State being the paramount title holder applied the doctrine of legitimate expectation.”

Consequently, the decree obtained by the respondent on the basis of agreement, in absence and behind the back of the State of Chhattisgarh could not have been enforced against the State.

19. Therefore, no interest was subsisting on the date of agreement with the vendor Ghanshyam Kishor Das as the property in hold was under the GG Act, 1895. The said Act subsequently stood repealed by the Parliament in the Repealing and Amending (Second) Act, 2017 (Act No.4 of 2018) on 5-1-2018. Therefore, at earlier time transaction of the property was being governed by the GG Act, 1895 and after expiry of lease the property reverted back to the Government, the vendor could not have executed the agreement for sale of such property and it would become an impossible nature for the decree to be followed by a specific performance for directing execution of sale deed.

20. During pendency of this appeal, the vendor Ghanshyam Kishor Das died and his legal heirs were brought on record. Ghanshyam Kishor Das since had no title on the date of agreement it cannot relate back in favour of the legal heirs.

21. The Supreme Court in the matter of *Satyabrata Ghose* (supra) held as under at para 9 :

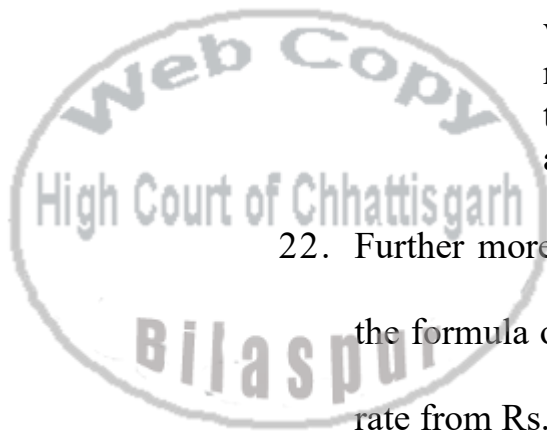




9. The first paragraph of the section lays down the law in the same way as in English. It speaks of something which is impossible inherently or by its very nature, and no one can obviously be directed to perform such an act. The second paragraph enunciates the law relating to discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done. The wording of this paragraph is quite general, and though the illustrations attached to it are not at all happy, they cannot derogate from the general words used in the enactment. This much is clear that the word "impossible" has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor finds it impossible to do the act which he promised to do.

22. Further more the learned Court below in its judgment has applied the formula of PRT (Price, Rate of Interest & Time) to increase the rate from Rs.320/- per sq.ft. to Rs.580/- per sq.ft.

23. In view of foregoing discussions, when the vendor did not have any title on the date of agreement and in absence of State being the party, the land being nazul such formula cannot be set into motion as it would inculcate the interest of State and would amount to creation of a contract by an order of the Court even against the State. Looking into the issue from different angle, the purchaser/respondent cannot have a better title than what vendor had. The property was initially hold by Rituparna Kishoredas under the GG





Act, 1895 and not by Ghanshyam Kishor Das, therefore, one of the co-sharer also could not have put vendor in possession of specific part of the property.

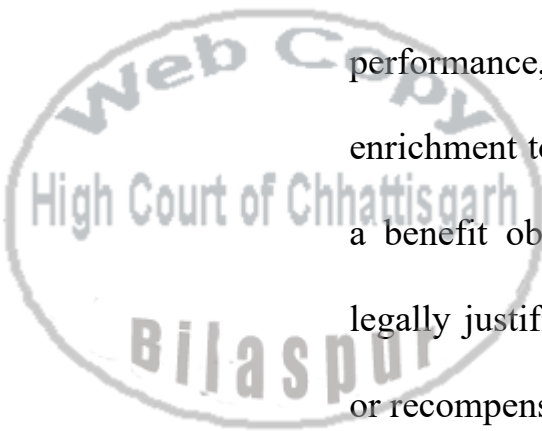
24. Accordingly, we are of the view that no decree for specific performance can be granted and the impugned judgment and decree deserves to be set aside. It is ordered.

25. The facts would further show that the respondent has paid an amount of Rs.10.00 lacs on 8-3-2005. No efforts have been made by Ghanshyam Kishor Das or his legal heirs for return of the said amount. Since we have declined to issue the decree for specific performance, therefore, at the same time it may not lead to unjust enrichment to the appellant. Unjust enrichment could be defined as a benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense.

26. The Supreme Court in the case of *Indian Council for Enviro-legal Action Versus Union of India and others*⁷ discussed different case laws. Few of the paras i.e. para Nos.152, 153, 154, 155 & 156 are reproduced hereinbelow:-

152. Unjust enrichment' has been defined by the court as the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. A person is enriched if he has received a benefit, and he is unjustly

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enriched if retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.

153. Unjust enrichment is "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." A defendant may be liable "even when the defendant retaining the benefit is not a wrongdoer" and "even though he may have received [it] honestly in the first instance." (Schock v. Nash (732 A 2d 217) Delaware 1999), 232-33.

154. Unjust enrichment occurs when the defendant wrongfully secures a benefit or passively receives a benefit which would be unconscionable to retain. In the leading case of **Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd. [1942] 2 All ER 122**, Lord Wright stated the principle thus :

"...(A)ny civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution."

155. Lord Denning also stated in *Nelson v. Larholt*, [1947] 2 All ER 751 as under:-

".....It is no longer appropriate, however, to draw a distinction between law and equity. Principles have now to be stated in the light of their combined effect. Nor is it necessary to canvass the

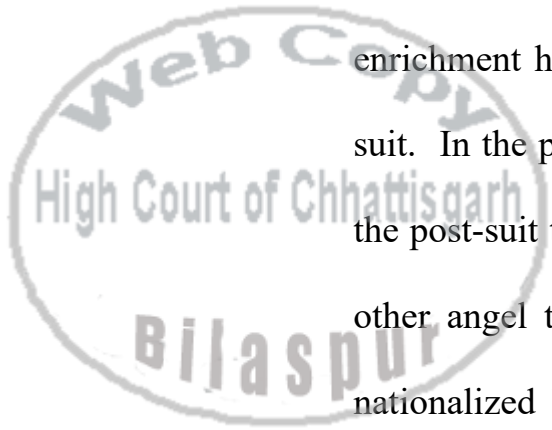




niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular frame-work. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution, if the justice of the case so requires."

156. The above principle has been accepted in India. This Court in several cases has applied the doctrine of unjust enrichment.

27. Since the money is in the hold of Ghanshyam Kishor Das or his legal heirs, we are of the opinion that the respondent has a right of restitution and it cannot be deprived of the said amount. The Supreme Court has observed that the restitution and unjust enrichment have to be viewed in two stages i.e. Pre-suit and post-suit. In the pre-suit position the amount is not returned and also in the post-suit the amount is still with the appellants. If we look into other angle that the appellant has borrowed the money from the nationalized bank, what the bank would demand. Therefore, by applying the principles of justice and equity and not to make it as an incentive for the appellants and to implement in practical terms in concept of time, value and money, we deem it appropriate to grant an interest @ 6 % p.a. from 8-3-2005 at the interval of three years. Meaning thereby interest paid on principle and the previously accumulated interest would be calculated at an interval of a period of three years as principal sum. The appellants 1(a) to 1(e) are since inherited the liability and assets of deceased Ghanshyam Kishor Das they would be liable to pay jointly and severally to the





respondent within a period of sixty days from the date of the judgment.

28. In the result, the appeal is allowed in part, leaving the parties to bear their own cost(s).
29. A decree be drawn accordingly.

Sd/-

(Goutam Bhaduri)
Acting Chief Justice

Sd/-

(N.K. Chandravanshi)
Judge

Gowri

