



**IN THE HIGH COURT OF MADHYA PRADESH  
AT GWALIOR  
BEFORE**

**HON'BLE SHRI JUSTICE G. S. AHLUWALIA**

**ON THE 6<sup>th</sup> OF JANUARY, 2025**

**SECOND APPEAL No. 1794 of 2024**

***SHER SINGH***

*Versus*

***RAMKISHAN RATHORE AND OTHERS***

**Appearance:**

Shri Sameer Kumar Shrivastava, Advocate for appellant.

Shri Vinod Kumar Dhakad, Advocate for respondent no.1

Shri G K Agrawal, Government Advocate for respondent no.2/State.

Shri D. S. Rajawat, Advocate for respondent nos. 3 and 4.

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**JUDGEMENT**

This second appeal, under section 100, CPC, has been filed against the judgment and decree dated 15/5/2024 passed by Principal District Judge, Shivpuri in RCA No. 71/2023 thereby reversing the judgment and decree dated 18/7/2023 passed by I Civil Judge, Senior Division, Shivpuri in RCSA No. 1/2021.

2. Present appeal has been filed by defendant no.1. Facts necessary for disposal of present appeal, in short, are that respondent no.1/plaintiff filed a suit for specific performance of contract pleading *inter alia* that appellant/defendant no.1 was co-owner and in possession of Survey No. 1253 area 1.47 hectares situated in Village Ratore, Tahsil and District Shivpuri. Defendant No.1 had share to the extent of 0.32 hectare. Since defendant no.1/appellant was in need of money, therefore, he entered into an agreement



to sell 0.20 hectare of land for a consideration amount of Rs.9 lacs and, accordingly, a written agreement was executed on 27/04/2019. Plaintiff/respondent no.1 also paid an amount of Rs.3,00,000/- by Cheque No.88478 dated 27/4/2019. Since defendant no.1/appellant was co-sharer and partition had not taken place, therefore, it was assured by defendant no.1 that he would get the land partitioned within a period of six months i.e. up to 30/10/2019 and thereafter he would execute the sale deed after receiving an amount of Rs.6 lacs. It was further pleaded that defendant no.1, in spite of accepting the advance amount, did not take any action for demarcation and partition. Whenever plaintiff requested defendant no.1 to initiate the aforesaid proceedings, then he always avoided the same and, accordingly, the period of six months expired. Thereafter, even for a further period of six months, no action was taken by defendant no.1 for partition and demarcation. As a result, execution of sale deed was not possible. It is further pleaded that plaintiff was always ready and willing to execute the sale deed and was in possession of remaining sale consideration, as well as, expenses for registration etc. It was further pleaded that plaintiff is still in possession of aforesaid funds and he is ready and willing to get the sale deed executed. It is the case of plaintiff that though defendant no.1 received an amount of Rs.3 lacs but he was intending to cheat from very inception that he would not execute the sale deed. It was further pleaded that in spite of multiple reminders, defendant no.1 did not take any action for demarcation and partition. It was further pleaded that thereafter defendant no.1 executed another agreement to sell in favor of one Virendra Rathore and has also received an amount of Rs.3 lacs on 9/10/2019. It was further pleaded that since defendant no.1 has already executed agreement to sell in favour of plaintiff, therefore, he does not have right or title to enter into agreement to



sell with any other person. Thus, it was pleaded that in view of written agreement dated 27/04/2019, plaintiff is still ready and willing to get the sale deed executed after making payment of remaining consideration amount of Rs.6 lacs. It was further pleaded that on 28/07/2020 plaintiff had given a notice to defendant no.1, but defendant no.1 neither gave any reply nor executed the sale deed. Accordingly, another notice dated 3/9/2020 was sent to which a wrong reply was sent by defendant no.1 and he did not take any action to execute the sale deed. Thus, suit for specific performance of contract was filed.

3. Defendant no.1 filed his written statement and admitted that he has share in the property as pleaded by the plaintiff. He claimed that co-sharers have not been made party and further claimed that Survey No.1253 has not been partitioned so far. It was further pleaded by defendant no.1 that he had entered into agreement to sell, but period for execution of sale deed has expired and, therefore, plaintiff is not entitled to get the advance amount returned from defendant no.1. It was further pleaded that defendant no.1 had not assured that he would get the land demarcated and partitioned. It was further pleaded that defendant no.1 had never informed plaintiff that how much time would be required for partition. Since plaintiff did not approach defendant no.1 to execute the sale deed within six months, therefore, now the agreement has come to an end. It was further pleaded that even the sale deed could have been executed in respect of unpartitioned land and therefore it is clear that plaintiff had deliberately not executed the sale deed and now the time for execution of sale deed has come to an end. It was further pleaded that subsequent agreement which was entered into by defendant No.1 with Virendra Rathore was executed after the agreement with plaintiff had expired. Even Virendra Rathore did not get the sale deed executed, therefore, the



agreement which was entered into between defendant No.1 and Virendra Rathore has also expired. It was also pleaded that plaintiff has no right to file suit after the period of execution of sale deed has expired.

4. During the pendency of trial, it appears that on 16.01.2023 one Shrilal/respondent No.3 filed an application under Order I Rule 10 CPC for impleading him as defendant being a co-sharer. The said application was allowed by order dated 20.01.2023 and Shrilal S/o Devilal was impleaded as defendant No.3 and he was directed to file written statement. On 01.02.2022, defendant No.3 filed his written statement but expressed that he does not wish to cross-examine the plaintiff witnesses and also expressed that he does not wish to lead any evidence in his defence and, accordingly, his right was closed. Since evidence of plaintiff as well as defendant No.3 was recorded, therefore, the case was fixed for final arguments. Thereafter, on 10.02.2022, plaintiff filed an application under Order I Rule 10 CPC of CPC for impleading another co-sharer, namely, Smt. Mewabai, as defendant No.4. The said application was allowed. Defendant No.4 entered her appearance on 28.04.2023 and time was granted to file written statement. Defendant no.4 filed her written statement on 3/7/2023 and on the very same day expressed that she does not wish to lead any evidence and also expressed that she does not wish to cross-examine the plaintiff's witnesses and, accordingly, case was once again fixed for final arguments and, ultimately, the suit was dismissed by judgment and decree dated 18/7/2023. Being aggrieved by the said judgment and decree, plaintiff filed an appeal which has been allowed by the appellate Court by Principal District Judge, Shivpuri by judgment dated 15.05.2024 passed in Regular Civil Appeal No.71/2023.

5. Challenging the judgment and decree passed by the Appellate Court it is submitted by counsel for appellant that since the agreement was executed



in respect of unpartitioned land, therefore, the same is not enforceable by law and further the plaintiff has failed to prove his readiness and willingness because the notice was issued after nine months of expiry of time to execute the sale deed. To buttress his contention, counsel for appellant has relied upon judgment passed by the Supreme Court in the case of **Rajesh Kumar Vs. Anand Kumar and others** decided on 17.05.2024 in Civil Appeal No.7840/2023, **Sabbir (Dead) Through Lrs Vs. Anjuman (Since Deceased) Through LRs** decided on 22.09.2023 in Civil Appeal No.6075/2023, **Pemmada Prabhakar & Ors. Vs. Youngmen's Vysya Association & Ors** reported in (2015) 5 SCC 355, **Janardan Das & Ors. Vs. Durga Prasad Agarwalla & Ors** decided on 26.09.2024 in Civil Appeal No.613/2017.

6. *Per contra*, appeal is vehemently opposed by counsel for respondents.
7. Heard learned counsel for the parties.
8. The undisputed fact is that land in dispute was unpartitioned land. Execution of agreement to sell was admitted by defendant No.1/appellant. Therefore, the only question for consideration is as to whether the agreement to sell in respect of unpartitioned land is executable/enforceable and whether the plaintiff was ready and willing to perform his part of contract?
9. In order to claim that agreement to sell in respect of unpartitioned land is not enforceable, it is submitted that it is well established principle of law that co-sharer cannot alienate a specific piece of unpartitioned land and since the agreement to sell was in respect of specific piece of land, therefore, the same was not enforceable.
10. A co-sharer can alienate his share in unpartitioned land but cannot alienate any specific piece of land. Whenever a co-sharer alienates his share in undivided land then purchaser would step into the shoes of vendor and would get right to initiate proceedings for partition and the purchaser would



get the specific piece of land after the unpartitioned land is partitioned in accordance with law. Therefore, it cannot be said that if co-sharer has executed an agreement by specifically mentioning the boundaries, then the intending purchaser would not get any right at all. In case the intending purchaser insists that he would take only that piece of land which was mentioned in the agreement to sell, then he can be non-suited, but if he agrees for the share of vendor then he cannot be denied the fruits of agreement to sell because the sale deed would be executed only to the extent of share of vendor without mentioning the specific boundaries and the purchaser would step into the shoes of vendor and would get a right to seek partition of land and only after the order of partition is passed, the purchaser would get a specific piece of land. So far as the judgments relied upon by the appellant to show that the suit was not maintainable are concerned, it was fairly conceded by counsel for appellant that in none of the aforesaid judgments the concept of alienation of share of co-sharer has been taken note of.

**11.** The Supreme Court in the case of **Kartar Singh Vs. Harjinder Singh (AIR 1990 SC 854)** has held as under:-

“6. As regards the difficulty pointed out by the High Court, namely, that the decree of specific performance cannot be granted since the property will have to be partitioned, we are of the view that this is not a legal difficulty. Whenever a share in the property is sold the vendee has a right to apply for the partition of the property and get the share demarcated. We also do not see any difficulty in granting specific performance merely because the properties are scattered at different places. There is no law that the properties to be sold must be situated at one place. As regards the apportionment of consideration, since admittedly the appellant and respondent's sister each have half share in the properties, the consideration can easily be reduced by 50% which is what the First Appellate Court has rightly done.”

**12.** One thing is clear that co-sharer can alienate to the extent of his share,



therefore, at the most it can be said that the agreement to sell to the extent of specific boundaries mentioned in it, would not be enforceable in law but it can be enforced to the extent of share of vendor and if the intending purchaser does not insist upon specific piece of land mentioned in the agreement and wishes to purchase the share of the vendor, then the agreement to sell would be enforceable by law.

It was stated by counsel for plaintiff that plaintiff is ready to purchase the share of defendant No.1 and would not insist upon specific piece of land as mentioned in the agreement to sell.

Since plaintiff has expressed his willingness to purchase the share of defendant No.1, therefore, contention of appellant that since agreement to sell was executed in respect of specific piece of unpartitioned land, therefore, it is not enforceable by law, is misconceived and is hereby rejected.

**13.** Furthermore, in the present case, Shrilal who is one of the co-sharers himself had moved an application under Order 1 Rule 10 CPC. He was impleaded as defendant No.3. He filed his written statement but thereafter did not lead any evidence and also refused to cross-examine the plaintiff's witnesses. Similarly, Smt. Mewabai who is another co-sharer was impleaded as defendant No.4. She also filed her written statement but did not lead any evidence and refused to cross-examine plaintiff's witnesses. Thus, it is clear that co-sharers were also made party to the suit and they did not contest the suit and expressed that they neither want to lead any evidence nor want to cross-examine plaintiff's witnesses. Under these circumstances, it is clear that they had given their consent to the agreement to sell by maintaining silence.

**14.** It was next contended by counsel for appellant that since the notice for specific performance of contract was issued after nine months of expiry of time for execution of sale deed, therefore, it is clear that plaintiff was not



ready and willing to perform his part of contract. To buttress his contention, counsel for appellant has relied upon judgment passed by this Court in the case of **Vijay Bhadur And Chamapal Vs. Surendra Kumar** reported in **2003 (2) MPLJ 86**.

15. Considered the submission made by counsel for appellant.

16. So far as the question of readiness and willingness is concerned, Supreme Court in the case of **R. Lakshmikantham v. Devaraji** reported in **(2019) 8 SCC 62** has held as under:

11. The High Court order is not correct in stating that readiness and willingness cannot be inferred because the letters dated 18-12-2002 and 19-12-2002 had not been sent to the defendant. The High Court also erred in holding that despite having the necessary funds, the plaintiff could not be said to be ready and willing. In the aforesaid circumstances, the High Court was also incorrect in putting a short delay in filing the suit against the plaintiff to state that he was not ready and willing. In India, it is well settled that the rule of equity that exists in England, does not apply, and so long as a suit for specific performance is filed within the period of limitation, delay cannot be put against the plaintiff — See *Mademsetty Satyanarayana v. G. Yelloji Rao* [*Mademsetty Satyanarayana v. G. Yelloji Rao*, AIR 1965 SC 1405] (para 7) which reads as under: (AIR p. 1409)

“7. Mr Lakshmaiah cited a long catena of English decisions to define the scope of a court's discretion. Before referring to them, it is necessary to know the fundamental difference between the two systems—English and Indian—qua the relief of specific performance. In England the relief of specific performance pertains to the domain of equity; in India, to that of statutory law. In England there is no period of limitation for instituting a suit for the said relief and, therefore, mere delay — the time lag depending upon circumstances — may itself be sufficient to refuse the relief; but, in India mere delay cannot be a ground for refusing the said relief, for the statute prescribes the period of limitation. If the suit is in time, delay is sanctioned by law; it is beyond time, the suit will be dismissed as barred by time; in either case, no question of





equity arises.”

**17.** If the reply to notice which was sent by defendant No.1 (Ex.P-10) is seen then it is clear that defendant No.1 was under an impression that since sale deed has not been executed by 30/10/2019, therefore, agreement to sell has come to an end. Surprisingly, same defence was taken in the written statement. Counsel for appellant was directed to clarify the stand of defendant No.1 and to clarify that in a case where time is the essence of contract and if sale deed is not executed within the specified period, then whether the agreement to sell by itself would come to an end or cause of action would arise only after period of execution of sale deed expires? Counsel for appellant fairly conceded that the stand taken by defendant No.1 in his reply to notice (Ex.P-10) as well as in written statement was palpably wrong. In fact, the cause of action for filing suit for specific performance of contract would arise only if sale deed is not executed within the time-frame or when defendant expressly or impliedly refuses to execute the sale deed. Article 54 of Schedule of Limitation Act of 1963 provides that period of limitation would be three years from the date fixed for performance or if no such date is fixed, then when plaintiff has noticed that performance is refused.

**18.** In the present case, defendant No.1 had assured that he would get the land partitioned. Although in his written statement he has claimed that even sale deed in respect of unpartitioned land could have been executed, but the said stand is not completely right. Only the extent of share of vendor in unpartitioned land can be alienated and not any specific piece of land. In the present case, admittedly, defendant No.1 did not take any action for partition of land and demarcation. Thus, it is not a case that although proceedings were initiated by him for partition but the same could not come to an end within the time fixed in the agreement. Thus, it is clear that intention of appellant



was to defraud the plaintiff right from very inception of contract.

**19.** Be that whatever it may be. One thing is clear that defence taken by defendant No.1 that since suit was not filed by 30.10.2019, therefore, agreement had come to an end is not correct. In fact, the correct legal position is that the cause of action arose immediately after 30.10.2019 as defendant No.1 had failed to execute the sale deed.

**20.** So far as the contention of counsel for appellant that since notice was given to defendant No.1 after nine months of expiry of time fixed in the agreement is concerned, it cannot be said as a hard and fast rule that whenever there is a delay in sending notice, then it would reflect that plaintiff is not ready and willing to execute his part of contract. Plaintiff has specifically mentioned in the plaint that whenever defendant No.1 was requested to execute the sale deed then he always avoided the same and as a result he spent six months and thereafter further six months, in all, twelve months to get the land partitioned. When plaintiff was expecting that defendant would execute the sale deed by getting land partitioned, then it was not expected that he would immediately file the suit after expiry of time fixed in the agreement. Mere delay in sending the notice cannot be said to be sufficient to hold that plaintiff was not ready and willing to perform his part of contract. No argument with regard to willingness and readiness of plaintiff in respect of non-availability of funds was raised by counsel for appellant. Thus, it is clear that plaintiff was ready with his funds and merely because he was waiting for defendant No.1 to get the land partitioned, that by itself would not be sufficient to hold that he was not ready and willing to perform his part of contract. Furthermore, this Court in exercise of power under Section 100 of CPC cannot interfere with the findings of fact until and unless they are shown to be perverse. No perversity could be pointed out by counsel



for appellant.

**21.** As no substantial question of law arises in the present appeal, accordingly, judgment and decree dated 15/5/2024 passed by Principal District Judge, Shivpuri in RCA No. 71/2023 is hereby affirmed.

**22.** Appeal fails and is hereby *dismissed*.

**(G.S. Ahluwalia)**  
**Judge**

(and)