

HIGH COURT OF CHHATTISGARH, BILASPUR**FA No. 77 of 2015**

1. Vijay Gupta S/o Late Shri Nandlal Gupta Aged About 47 Years R/o Sakin-Vinobanagar, Bilaspur, Chhattisgarh, Chhattisgarh
2. Ram Kishore Agrawal S/o Shri Ramnarayan Agrawal Aged About 47 Years R/o Sadar Bazar, Bilaspur, Chhattisgarh, District : Bilaspur, Chhattisgarh

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1. Dilip Patel S/o Late Parwatbhai Aged About 41 Years R/o Umia Saw Mill, Rly. Phatak Uslapur, Main Road, Bilaspur, Chhattisgarh, Chhattisgarh
2. Smt. Pushpa Ben W/o Basant Bhai Aged About 50 Years R/o Ganesh Timber, Mungeli Road, Bilaspur, Chhattisgarh, District : Bilaspur, Chhattisgarh
3. Smt. Gauri Ben Wd/o Late Jagdish Patel Aged About 45 Years R/o Trimurti Saw Mill. Near Uslapur Rly. Phata Mungeli Road Bilaspur, Chhattisgarh, District : Bilaspur, Chhattisgarh
4. Smt. Shanta Ben W/o Jayanti Bhai Aged About 43 Years R/o J.K. Timber, Nain Road, Korba, Chhattisgarh, District : Korba, Chhattisgarh
5. Smt. Tulsa Ben D/o Late Parwat Bhai Aged About 37 Years Through Dilip Patel, Umia Saw Mungeli Road, Bilaspur, Chhattisgarh, District : Bilaspur, Chhattisgarh
6. State Of Chhattisgarh Through Collector Bilaspur, Chhattisgarh, District : Bilaspur, Chhattisgarh

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For Appellants	:	Shri Sreekumar Agrawal, Senior Advocate along with Shri Anand Kumar Gupta, Advocate
For Respondents	:	None

Hon'ble Shri Justice Manindra Mohan Shrivastava**Hon'ble Smt. Justice Rajani Dubey****Order On Board****17/08/2018****Per Manindra Mohan Shrivastava, J.-**

This appeal is directed against impugned judgment and decree dated

18/12/2014 by which, the plaintiff's suit has only been partly decreed in the manner that though prayer for grant of specific performance of contract is rejected, advance amount paid by the plaintiff has been directed to be refunded.

2. The appellant/ plaintiff filed a suit seeking decree of specific performance of contract against respondent / defendant on the pleadings *inter alia* that on 09/05/2008, the defendants- Dilip Patel and Kanta Ben, mother of Dilip Patel had entered into an agreement to sell the property in dispute in favour of the plaintiff. It was further pleaded that the parties had agreed for sale, for a total consideration of Rs.43,60,000/- out of which, Rs.10 lakhs was paid as advance by the plaintiff to the defendants. As per the terms and conditions stipulated in the agreement, the defendant was required to remove the structure standing on the land, get all the revenue papers prepared and handed over to the plaintiff, whereafter, the plaintiff was required to get the sale deed executed on or before 30/09/2008 by paying the balance of the sale consideration. According to the plaintiff, he was ready and willing to perform his part of contract by paying the balance amount but the defendants did not perform their part of contract. Thereafter, a notice was also given but the defendants did not execute the sale deed. Therefore, the plaintiff had to file suit.

3. The defendants filed a written statement and took the plea that the prayer was joint one, owned by all the defendants but the execution of agreement was not disputed. According to the defendants, the plaintiff was not ready and willing to perform his part of contract due to which, the sale deed could not be executed within time stipulated. It was further pleaded that one of the parties to the agreement Smt. Kanta Ben Patel W/o Parvat Bhai Patel also died.

4. On the basis of the pleadings of the parties, learned Trial Court framed following

issues -

1. क्या वादीगण अनुबंध दिनांक 09/05/2008 से संबंधित अपने पक्ष का निर्वहन करने के लिए सदैव तत्पर रहा है?
2. क्या वादीगण के द्वारा अनुबंध दिनांक 09/05/2008 में निर्धारित अवधि में रजिस्ट्री नहीं की गई है, अगर हाँ तो प्रभाव ?
3. क्या वादीगणों का वाद प्रतिवादी क्र.2 से 5 के विरुद्ध पोषणीय है ?
4. क्या वादीगणों का वाद समय सीमा में प्रस्तुत किया गया है ?
5. सहायता एवं वाद व्यय।

4. Even though, learned Trial Court found that the plaintiff was ready and willing to perform his part of contract, suit was filed within limitation and also that the plaintiff had paid advance, did not grant decree of specific performance on the finding that the property in dispute was purchased by Parvat Bhai Patel and after his death, all his heirs including his widow, sons and daughters became joint sharers and as there was no partition, no decree could be granted. Learned Trial Court also held that the suit was not maintainable against the defendants 2 to 5.

5. Learned senior counsel for the appellant made pointed submission that in so far as finding that the suit was not maintainable against defendants No.2 to 5 is concerned, learned Trial Court misdirected itself in taking into consideration that the impleadment of defendants 2 to 5 was in the circumstances that before filing of the suit, Kanta Ben died and she was survived by defendant No.1 -Dilip Patel and four sisters i.e. defendants 2 to 5. Therefore, their impleadment was as legal representative of share of Kanta Ben. Next submission is that even if the property was a joint family property, held jointly by Kanta Ben and sons and daughters of deceased Parvat Bhai Patel, the plaintiffs were entitled to decree of specific performance to the extent of undivided share of Dilip Patel and Kanta Ben. In support of this submission, reliance is

placed on **Kamma Sambamurthy (deceased by LRs) v. Kalipatnapu Atchutamma (deceased by L.R.) and ors., 2010 AIR SCW 6219.**

6. There is no representation made by respondents.

7. Following points arises for determination in this appeal.

(a) Whether the learned Trial Court has correctly held that the suit is not maintainable against defendants 2 to 5.

(b) Whether the learned Trial Court committed error of law in not granting decree of specific performance on the finding that the property continued to be undivided and jointly held by the defendants.

8. As far as the agreement is concerned, there is no dispute about the same. The defendants have admitted execution of agreement dated 09/05/2008 (Ex.P/1). The agreement has otherwise been proved by the plaintiff. A perusal of the same would show that the defendant – Dilip and his mother Kanta Ben entered into an agreement to sell the property in favour of the plaintiff @ Rs.625/- per sq.ft. and had received advance of Rs.5 lakhs. The sale deed was required to be executed on or before 30/09/2008. As per the stipulation in the agreement, the defendants were required to get the entire construction structure on the land removed and also get prepared demarcation report along with other documents necessary for registration, like B-1 khasra, 22 point form, diversion paper, original documents and Rin Pustika. It was also stipulated that it would be the responsibility of the vendor / defendants to get paid, due diversion tax, property tax and other encumbrances discharged.

Learned Trial Court has recorded specific finding, to which there is no cross objection filed by the defendant that the plaintiff was ready and willing to perform his part of contract but the defendants did not perform their part of contract, due to which, the sale deed could not be executed till 30/09/2008 and the plaintiff was even thereafter

ready and willing to perform his part of contract and a notice was also given by him to the defendants and even at the time of filing of suit, the plaintiff expressed his willingness to perform his part of contract.

9. Learned Trial Court has also recorded specific finding that the property was initially held by Parvat Bhai Patel as he purchased it from another person Mr. Fida Hussain vide registered sale deed dated 01/02/1986 (Ex.D/1). After the death of Parvat Bhai Patel, Class-I heir namely his widow, sons and daughters succeeded to his property. On this premise, learned Trial Court recorded a finding that the property was a joint property of Kanta Ben, her son and four daughters i.e. defendants 2 to 5. It has also been held that there was no partition amongst the share holders. After Kanta Ben died, her share devolved upon surviving sons and daughters in equal share. On the date when the suit was filed, Kanta Ben was no longer alive and to the extent of her share, under the agreement to sell, she was survived by her son, Dilip and four daughters. Impleadment of Dilip Patel was in dual capacity. Firstly, as one of the parties to the agreement under which he agreed to sell and secondly, upon death of his mother, as one of her heirs. Impleadment of defendants 2 to 5 was in their capacity as heirs and share of their mother, Late Kanta Ben. The plaintiff had impleaded the daughters defendants 2 to 5 because he claimed a decree of specific performance on the basis of agreement executed by Dilip Patel and Kanta Ben Patel. Therefore, finding of the learned Trial Court that the suit was not maintainable against four daughters, defendants 2 to 5 does not appear to be correct and legal and therefore reversed and it is held that the suit was very much maintainable against defendants 2 to 5.

10. On the issue as to whether the decree of specific performance can be granted to the extent of undivided share of the parties to the agreement, the legal position has been expressed by the Supreme Court in the case of **Kammana Sambamurthy**

(supra). It has been held as below -

“19. The crucial question in the case is whether the agreement could be enforced against the vendor to the extent of his half share in the property. The terms of the agreement show that the vendor represented to the vendee that he was absolute owner of the property that fell to his share in the partition effected with his brothers and he did not have any male child. The vendor assured the vendee that excepting him none has got any right over the property and he would obtain the witness signatures of his daughters and get their voluntary consent letters in his favour. It is clear from the evidence that the vendee had no knowledge that vendor's wife has half share in the property which devolved upon her on the death of her son intestate.

20. Section 12 of the Specific Relief Act, 1963 reads as follows :

"S.-12. Specific performance of part of contract.-

(1) Except as otherwise hereinafter provided in this section, the court shall not direct the specific performance of a part of a contract.

(2) Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed by only a small proportion to the whole in value and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

(3) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either-

(a) forms a considerable part of the whole, though admitting of compensation in money; or

(b) does not admit of compensation in money;

he is not entitled to obtain a decree for specific performance; but the court may, at the suit of the other party, direct the party in default to

perform specifically so much of his part of the contract as he can perform, if the other party-

(i) in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and a case falling under clause (b), pays or had paid the consideration for the whole of the contract without any abatement; and

(ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

(4) When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part."

21. Section 12 prohibits specific performance of a part of a contract except in the circumstances under sub-sections (2), (3) and (4). The circumstances mentioned in these sub-sections are exhaustive. Is Section 12 attracted in the facts and circumstances of the present case? We do not think so. The present case is not a case of the performance of a part of the contract but the whole of the contract insofar as the vendor is concerned since he had agreed to sell the property in its entirety but it later turned out that vendor had only half share in the property and his wife held the remaining half. The agreement is binding on the vendor as it is without being fractured. As regards him, there is neither segregation or separation of contract nor creation of a new contract. [In Kartar Singh v. Harjinder Singh & Ors.](#)¹, this Court was concerned with a case where vendor--brother and a sister had each half share in the suit properties. The agreement for the sale was executed by the brother concerning the suit properties in which the sister had half share. The sister was not executant to the agreement; rather she refused to accept the agreement. The question for consideration before

1 (1990) 3 SCC 517

this Court was whether agreement could be enforced against the vendor--brother to the extent of his half share. This Court considered Section 12 and held as under :

"5. We are, therefore, of the view that this is not a case which is covered by Section 12 of the Act. It is clear from Section 12 that it relates to the specific performance of a part of a contract. The present is not a case of the performance of a part of the contract but of the whole of the contract so far as the contracting party, namely, the respondent is concerned. Under the agreement, he had contracted to sell whole of his property. The two contracts, viz. for the sale of his share and of his sister's share were separate and were severable from each other although they were incorporated in one agreement. In fact, there was no contract between the appellant and the respondent's sister and the only valid contract was with respondent in respect of his share in the property.

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 per cent which is what the first appellate court has rightly done."

22. Kartar Singh (supra) has been followed by this Court in [Manzoor Ahmed Magray v. Ghulam Hassan Aram & Ors](#)². In Manzoor Ahmed

2 (1999) 7 SCC 703

Magray (supra), this Court considered the matter in the context of Section 15 of J & K Specific Relief Act, 1977 which is *pari materia* to [Section 12](#) of Specific Relief Act, 1963. This Court said :

".....Hence, there is no bar for passing the decree for specific relief with regard to 1/3rd or 2/3rds share owned by the contracting party for which he can execute the sale deed. For the share of Ghulam Rasool (brother of Defendant 1) admittedly, no decree is passed by the High Court. Dealing with the similar contention where agreement was for sale of property belonging to a brother and sister each having a half share, the Court in [Kartar Singh v. Harjinder Singh](#) held that when the absentee vendor, for some reason or the other refused to accept the agreement, there is no reason why the agreement should not be enforced against the vendor who had signed and his property is identifiable by specific share. The Court further held that such case is not covered by Section 12 of the Specific Relief Act, 1963 which relates to specific performance of a part of a contract. Such type of case would be the case of specific performance of the whole of the contract so far as the contracting party is concerned. Further, whenever a share in the property is sold the vendee has the right to apply for the partition of the property and get the share demarcated. Hence there would not be any difficulty in granting specific performance of the contract to the extent to which it is binding between the parties."

23. In the case of [A. Abdul Rashid Khan \(Dead\) & Ors. v. P.A.K.A. Shahul Hamid & Ors.](#)³, this Court held that even where any property is held jointly and once any party to the contract has agreed to sell such joint property by agreement, then, even if the other co-sharer has not joined, at least to the extent of his share, the party to the contract is bound to execute the sale deed. In that case, the suit property originally belonged to one Aziz Khan. On his death, his heirs under the Muslim law--nine sons and two daughters inherited that property. The sons agreed to sell that property to the first respondent therein. However,

3 (2000) 10 SCC 636

some dispute arose between the parties and that necessitated the first respondent therein to file the suit for specific performance in which the executants of the agreement as well as the two daughters of Aziz Khan were impleaded as defendants. It was admitted case that the daughters of Aziz Khan had not joined in the agreement of sale. The trial court dismissed the suit by holding that the agreement was indivisible and could only be enforced if the daughters of Aziz Khan agreed. The first respondent therein preferred an appeal before the High Court against the judgment and decree of the trial court. The High Court held that he had not pleaded and proved that the daughters of Aziz Khan had agreed to sell the suit property and hence, it cannot be held that the said agreement was by all the heirs of Aziz Khan. The two daughters of Aziz Khan were held not bound by the agreement. However, the High Court held that insofar as the executants of the agreement (sons of Aziz Khan) were concerned they were bound by it and valid and enforceable contract existed between the first respondent and the sons of Aziz Khan. The High Court, accordingly, granted decree for specific performance to the extent of 5/6th shares which Aziz Khan's sons had in the property. This Court affirmed the decree of the High Court and it was held that plaintiff's suit for specific performance to the extent of 5/6th share was rightly decreed by the High Court warranting no interference. While holding so, this Court relied upon earlier decision in the case of Manzoor Ahmed Magray (*supra*).

24. In view of the above decisions of this Court and the facts and circumstances which have already been noticed by us, in our opinion, there is no impediment for enforcement of the agreement against the vendor to the extent of his half share in the property.

11. The legal position having been so explained by the Hon'ble Supreme Court in the aforesaid judgment, we find ourselves unable to uphold the view taken by the learned Trial Court that no decree of specific performance could be granted unless there was a partition of the joint property. Therefore, finding of the learned Trial Court is also reversed on this aspect and we hold that the plaintiff is entitled to decree of

specific performance to the extent of the share of Dilip Patel and Kanta Ben.

12. The sale deed shall mention that the plaintiff has purchased the share of Dilip and Kanta without specifying any particular part of the property in dispute. Upon execution of the sale deed in favour of the plaintiff, the plaintiff would be entitled to claim such right as may be available on his becoming share holder of the joint property along with defendants.

The impugned judgment and decree is therefore reversed in appeal. Let the appellate decree be drawn accordingly.

Sd/-

(Manindra Mohan Shrivastava)
Judge

Sd/-

(Rajani Dubey)
Judge