

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

SA No. 399 of 2003

1. Ajmat Khan (Dead) Through LRs.

1(A). Tabijan Bibi (deleted as Per Hon'ble Court Order Dated 16-05-2018).

1(B). Amanullah S/o Ajmat Khan Aged About 47 Years R/o Sarbhoka, Tehsil Baikunthpur, District Korla Chhattisgarh.

1(C). Jamauddin S/o Ajmat Khan Aged About 44 Years R/o Gelhapani Colliery, Police Station Chirmiri, Tehsil Manendragarh, District Korla Chhattisgarh.

1(D). Haliman D/o Ajmat Khan, W/o Shafaiyat Khan Aged About 32 Years R/o Pondi, Police Station Shrinagar, Tehsil Surajpur, District Surguja Chhattisgarh.

1(E). Atiman D/o Ajmat Khan, W/o Noor Mohammad, Aged About 30 Years R/o Karabel, Police Station Sitapur, Tehsil Sitapur, District Surguja Chhattisgarh.

1(F). Enayatulla S/o Amjat Khan Aged About 37 Years R/o Sarbhoka, Tehsil Baikunthpur, District Korla Chhattisgarh. (Plaintiffs)

---- Appellants

Versus

1. Navidad Khan @ Marhu Khan (Dead) deleted As Per Honble Court Order Dated 06-11-2013, Through Lrs.

1(A). Yusuf S/o Late Navidad Khan @ Marhu Khan Aged About 32 Years R/o Village Mahora, Police Station Patna, Tahsil Baikunthpur, District Korla Chhattisgarh., District : Koriya (Baikunthpur), Chhattisgarh

1(B). Kanij Fatma D/o Navidad Khan @ Marhu Khan Aged About 30 Years R/o Village Mahora, Police Station Patna, Tahsil Baikunthpur, District Korla Chhattisgarh., District : Koriya (Baikunthpur), Chhattisgarh

1(C). Israil Khan S/o Navidad Khan @ Marhu Khan Aged About 28 Years R/o Village Mahora, Police Station Patna, Tahsil Baikunthpur, District Korla Chhattisgarh., District : Koriya (Baikunthpur), Chhattisgarh

1(D). Ayub Khan S/o Navidad Khan @ Marhu Khan Aged About 26 Years R/o Village Mahora, Police Station Patna, Tahsil Baikunthpur, District Korla Chhattisgarh., District : Koriya (Baikunthpur), Chhattisgarh

2. The State Of Madhya Pradesh Through Collector Surguja, (Now State Of Chhattisgarh) Through Collector Korla Chhattisgarh. (Dfd.No. 2), District : Koriya (Baikunthpur), Chhattisgarh

---- Respondents

For Appellants	:	Shri A.K. Prasad, Advocate
For Respondents 1 (A) to 1 (D)	:	Shri Ashok Kumar Shukla, Advocate
For State/Respondent No.2	:	Shri Vaibhav Singh, Panel Lawyer

S.B. : Hon'ble Shri Justice Manindra Mohan Shrivastava

Judgment On Board

16/10/2019

1. This appeal is directed against the impugned judgment and decree dated 20th June 2003 passed by learned Additional District Judge, Baikunthpur (Koria) in Civil Appeal No.28-A of 2002 by which learned lower appellate Court, reversing the judgment and decree dated 22.4.1997 passed by learned trial Court in Civil Suit No.37-A of 1992 has allowed the appeal of the defendant and dismissed plaintiff's suit.
2. Appellant-plaintiff Ajmat Khan filed a suit seeking decree of specific performance of contract on the pleadings, inter alia, that the plaintiff and defendant entered into an agreement of sale of the property in dispute on 20.11.1991. Further pleadings of the plaintiff was that, though, the plaintiff was ready and willing to perform his part of contract by paying balance amount of consideration and for that purpose, he repeatedly approached the defendant for execution of sale deed, the defendant kept on assuring the plaintiff that he may remain in possession and enjoy the property and sale deed would be executed in times to come. According to the plaintiff, he repeatedly approached the defendant but the defendant, every time, kept on giving assurances.
3. According to the plaintiff, cause of action arose when suddenly the defendant approached Sub Divisional Magistrate, Baikunthpur by instituting proceedings under Sections 145 & 147 Cr.P.C. in which the plaintiff was dispossessed from the property.
4. On the other hand, the defendant denied the claim of the plaintiff stating that the defendant had not executed any such agreement with any intention of selling his property. According to the defendant, the plaintiff was not ready and willing to perform his part of contract. The defendant

had also denied execution of sale deed. According to defendant, it was a case of agreement of 1981 and as the plaintiff failed to perform his part of contract, no decree could be granted in his favour.

5. Learned trial Court framed as many as six issues, which included issue as to whether agreement was executed between the parties on 20th November 1981; whether the possession was handed over to the plaintiff by the defendant upon receipt of Rs.500/- as advance and also whether the defendant malafide refused to execute sale deed. Learned trial Court also framed issue as to whether the suit was barred by limitation. Deciding the issues in favour of the plaintiff, learned trial Court decreed the suit of the plaintiff. Aggrieved by the judgment and decree of learned trial Court, defendant filed appeal. The learned lower appellate Court, primarily confining consideration on the issue of limitation, held that the suit of the plaintiff was barred by limitation and in that process, it also held that the plaintiff failed to prove that he was ready and willing to perform his part of contract.

6. This appeal was admitted by this Court on following two substantial questions of law :-

“1. Whether the finding arrived at by the trial Court and the lower appellate Court, while reversing the judgment of the trial Court in respect of the suit being barred by limitation is proper or not ?

2. Whether the finding arrived at by the lower appellate Court is perverse on the basis of evidence of Nabidad (DW1) ?”

7. Learned counsel for the appellant-plaintiff would contend that the finding of learned lower appellate Court that the plaintiff's suit was barred by limitation is patently illegal and contrary to provisions of article -54 in the Schedule of the Limitation Act. He submits that period of limitation would begin to run from the date of refusal and not from the date of agreement. Secondly, his submission is that the learned lower appellate Court has completely misread the pleadings of the plaintiff in this regard by holding

that plaintiff admitted that the performance was refused on 12.3.1982. According to him, what was pleaded in the plaint was that when the plaintiff approached defendant for execution of sale deed on 12.3.1982, defendant on that day, did not execute stating that plaintiff may continue in possession and later on, sale deed would be executed. Learned counsel for the appellant-plaintiff would further argue that the pleadings and evidence on record prove that the plaintiff repeatedly approached the defendant for execution of sale deed and every time, defendant gave assurance and it is only when defendant instituted the case before the SDM and the plaintiff was dispossessed on 8.10.1992 that the plaintiff, treating it to be implied refusal on the part of defendant, filed a suit on 18.11.1992. Therefore, the suit was clearly within limitation.

8. On the second substantial question of law, learned counsel for the appellant- plaintiff would argue that learned lower appellate Court framed only one issue for determination as to whether suit was barred by limitation but while deciding that issue without considering the oral and documentary evidence on record, it perfunctorily observed that the plaintiff has failed to prove that he was ready and willing to perform his part of contract. Therefore, the finding is clearly perverse.
9. Per contra, learned counsel for the respondent-defendants would submit that learned lower appellate Court has rightly recorded a finding that plaintiff himself admitted in his evidence that on 12.3.1982, the defendant refused to execute sale deed. He would submit that refusal, coupled with the assurance to continue in possession cannot be treated to be assurance on the part of defendant to execute sale deed. He would further submit that according to plaintiff himself, every time the defendant was approached, he insisted to execute sale deed. Therefore, cumulative effect would be that long back, a refusal to perform his part of contract had taken place and, therefore, the plaintiff ought to have approached the Court within limitation of three years from the date of notice of such refusal, but the plaintiff waited till he was dispossessed in 1992. Therefore, the suit has been rightly held to be barred by limitation by the learned lower appellate Court.
10. On the second substantial question of law, learned counsel for the

respondent- defendant would argue that though in brief, learned lower appellate Court has clearly recorded a finding that the plaintiff has failed to prove that he was ready and willing to perform his part of contract as he did not give any notice requiring defendant to come to the office of the Registrar and get sale deed executed stating that he was having balance amount of consideration ready for payment to defendant. This finding is essentially a finding of fact and it does not suffer from any patent illegality or perversity. Therefore, no interference is called for in the impugned judgment and decree.

11. Additionally, learned counsel for the respondent-defendant prayed this Court to frame additional substantial question of law that the suit for specific performance of contract itself was not maintainable in view of provision contained in Section 14 (b) of the Specific Relief Act, 1963 because in the facts of the case, the plaintiff having pleaded that time and again he approached defendant and defendant was not executing agreement, which involve performance of a continuous duty which the Court cannot supervise. Therefore, for that additional reason, plaintiff's suit is liable to be dismissed.

12. I have heard learned counsel for the parties and perused the records of the Courts below.

13. As far as issue of limitation is concerned, a suit for specific performance of contract is required to be filed within a period of three years and the time from which period begins to run would be the date fixed for performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused. Relevant provision as contained in article- 54 of the Schedule appended to Limitation Act is reproduced as below:

“

	Description of Suit	Period of Limitation	Time from which period begins to run
X	X	X	X
54.	For specific performance of a contract	Three years	The date fixed for the performance, or, if no such date

			is fixed, when the plaintiff has notice that performance is refused.
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- 14.From perusal of the aforesaid provision, it is clear that the period of limitation is three years for filing of suit for decree of specific performance of contract. The time from which the period would begin to run has also been clearly stated in the provision. If time is fixed for completing the sale, the limitation would begin to run from that time. But in case no such time is fixed, then the limitation will have to be reckoned from the date when the plaintiff had notice that performance is refused.
- 15.In the present case, the agreement (Ex.P1) does not contain any clause fixing the time of performance. Therefore, it is required to be seen as to when the plaintiff received the notice of refusal of performance of contract.
- Pleadings as contained in para-10 of the plaint is that the defendant submitted an application under Section 145 and 146 Cr.P.C. before the Sub Divisional Magistrate, Baikunthpur on 9.7.1992 and on 8.10.1992, disputed property was seized by SHO, PS Patna and given to one Dost Mohammad. On this date, the plaintiff approached defendant No.1 and inquired regarding execution of sale under agreement of sale deed dated 20.11.1981, upon which the defendant refused to execute sale deed in favour of the plaintiff by receiving balance amount of consideration of Rs.4,500/-.
- 16.The defendant in the written statement has not come out with any specific plea that he refused performance of contract on any particular date. The evidence of the plaintiff and defendant upon being perused does not contain any specific admission on the part of the plaintiff that the defendant had refused performance of his part of contract on any particular date of which the plaintiff had notice. Moreover, the defendant has also not led any clinching evidence that he had refused performance of contract to plaintiff prior to the date as stated by the plaintiff. Learned trial Court recorded finding that the cause of action for the plaintiff arose only on 8.10.1992 when he was dispossessed in proceedings and he approached

defendant No.1 whereupon defendant No.1 refused to execute sale deed in his favour. Learned lower appellate Court, however, recorded a finding that the plaintiff himself having pleaded that defendant had refused performance of agreement, on 12.3.1982 and thereafter only assurances were given, that would mean refusal on the part of defendant long back, thus, holding the plaintiff suit to be barred by limitation.

17. In the considered opinion of this Court, such a finding of learned lower appellate Court is patently illegal being in complete contravention of the spirit of provision contained in article- 54 of the Schedule appended to the Limitation Act. The plaintiff's pleading, as contained in para-5, are that on 12.3.1982, the plaintiff approached defendant No.1 to give him Rs.550/- and request made to execute sale deed as per agreement dated 20.11.1981, whereupon, defendant did not execute sale deed but asked the plaintiff to continue in possession stating that registered sale deed would be executed later on. This pleading, read as a whole, cannot be said to be a pleading of refusal to perform part of contract. What the pleadings, on its plain understanding, means is that on 12.3.1982, the defendant was not willing to execute sale deed but it was coupled with two assurances, one that the plaintiff may continue to remain in possession of the property and secondly, sale deed would be executed later on. Therefore, it cannot be said that on 12.3.1982, the defendant altogether refused performance of contract by saying that now he is not willing to sell his property to the plaintiff.

The plaintiff's specific averment in para-10 of the plaint that the defendant instituted an application on 9.7.1992 before the SDM and property was seized on 8.10.1992 by the police officer and thereafter the plaintiff having approached defendant, defendant refused to execute sale deed has not been specifically denied. In the absence of specific denial of this averment, it has to be held that the refusal to perform the part of contract on the part of defendant took place for the first time only on 8.10.1992 and not before that. The law requires the suit to be filed within a period of three years from the date of notice of refusal of performance. Therefore, the finding of learned lower appellate Court in this regard is patently illegal, perverse and unsustainable in law.

18. On the second substantial question of law as to whether the finding of learned lower appellate Court is perverse on the basis of evidence of Nabidad (DW1), this Court finds that the learned lower appellate Court had framed for determination only on issue and that was the issue relating to limitation and nothing more. While deciding the issue of limitation, learned lower appellate Court, without discussing the pleading and evidence led by both the parties made certain passing observations that the plaintiff was not willing to perform his part of contract. This finding of learned lower appellate Court, as contained in para-15 of the judgment, to say the least, is without discussion of any material, pleading and evidence on record. It cannot be said to be a finding at all. It is merely a passing observation made by learned lower appellate Court. In sum and substance, it is completely perverse and perfunctory.
19. Though learned counsel for the respondent-defendant prayed this Court to frame additional substantial question of law that agreement was not enforceable in view of bar created under Section 14 (b) of the Specific Relief Act, 1963, the argument does not impress this Court. Merely because the plaintiff had repeatedly approached the defendant for execution of sale deed and defendant was only giving assurance, it cannot be said that the contract is one which cannot be specifically enforced because it involves performance of continuous duty which the Court cannot supervise. The said clause is made for altogether different contingency and not a case like this. Therefore, on that issue, no question of law arise for consideration.
20. This Court while hearing the appeal also found that learned trial Court has decreed the suit of the plaintiff without framing any issue as to whether the plaintiff was ready and willing to perform his part of contract, as provided under Section 16 (c) of the Specific Relief Act. Even in the entire body of judgment, there is no specific finding recorded by learned trial Court based on available evidence and pleadings of the parties. Clearly, therefore, learned trial Court granted decree without recording any finding in this regard and even without framing any issue and recording a clear finding. It is well settled law that in a suit for specific performance of contract, the plaintiff is not only required to aver but also prove by leading appropriate evidence that he is and was ready and willing to perform his part of

contract. Though, learned counsel for the appellant- plaintiff submitted that the plaintiff has not only made specific pleadings but has also led evidence in this regard, learned trial Court seems to have lost sight of this specific requirement of law before granting or refusing to grant decree of specific performance.

21.Resultantly, this appeal has to be allowed and this Court is inclined to set aside the judgment and decree of learned lower appellate Court and remit the matter to the learned trial Court with a direction to frame specific issues with regard to readiness and willingness as required under Section 16 (c) of the Specific Relief Act and record is finding on the issue afresh including the new issue with regard to ready and willingness and decide the case in accordance with law, suit having been filed within the period of limitation.

22.Appeal is accordingly allowed in the manner as held above. Let an appellate decree be drawn accordingly.

Sd/-
(Manindra Mohan Shrivastava)
Judge