

HIGH COURT OF CHHATTISGARH, BILASPUR**FA No.113 of 2014**

- Sunil Kumar Jain S/o Komalchand Jain Aged About 43 Years Office- Shop No. 105, 106, Midtown Hotel Complex, Near Telephone Exchange, Bus Stand Road, Bilaspur C.G., Chhattisgarh

---- Appellant/Plaintiff**Versus**

1. Anju Choudhry W/o Girija Shankar Choudhary R/o Chandrakanta Colony, Seepat Road, Bilaspur, Tah. And Distt. Bilaspur C.G., Chhattisgarh
2. Sheela Jaiswal W/o Ashok Jaiswal R/o Revenue Colony, Sarkanda, Tah. And Distt. Bilaspur C.G., District : Bilaspur, Chhattisgarh
3. Vasanti Jaiswal D/o Rakesh Kumar Jaiswal R/o Revenue Colony, Sarkanda, Tah. And Distt. Bilaspur C.G., District : Bilaspur, Chhattisgarh
4. Ashok Jaiswal S/o R.P. Jaiswal R/o Revenue Colony, Sarkanda, Tah. And Distt. Bilaspur C.G., District : Bilaspur, Chhattisgarh
5. State Of Chhattisgarh Thru- Collector, Bilaspur, Office Collectorate, Bilaspur C.G., District : Bilaspur, Chhattisgarh
6. Lalit Kumar Patel S/o Late Baijanath Patel Aged About 55 Years Occupation Agriculturist, R/o Village Rudha, Post- Paikin, Police Station And Tahsil Saraipali, District- Mahasamund, Chhattisgarh., District : Mahasamund, Chhattisgarh
7. Machhinder Lal Patel (Dead) Nil
 - 7.1 - (A) Bal Krishna Patel S/o Late Machhinder Lal Patel, Aged about 39 years
 - 7.2 - (B) Uttara Kumar Patel S/o Late Machhinder Lal Patel Aged About 36 Years
 - 7.3 - (C) Smt. Ramkunwar Patel Wd/o Late Machhinder Lal Patel Aged About 57 Years

All residents of Village Jaimura, P. S. & Tehsil Kharsiya, District Raigarh (CG)

---- Respondents/Defendants

For Appellants : Shri Amrito Das, Advocate
 for Respondents No.1 to 4: Shri Ravindra Agrawal, Advocate
 For Respondents No.6 to 7: Shri B. P. Sharma, Advocate

Division Bench : Hon'ble Shri Justice Manindra Mohan Shrivastava & Hon'ble Smt. Justice Rajani Dubey

CAV Order**10/01/2019**

1. This appeal is directed against the impugned judgment and decree dated 19-06-2014 passed by the First Additional District Judge to the Court of 3rd Additional Judge, Bilaspur in Civil Suit No.59-A/2013, by which, suit filed by the appellant-plaintiff for specific performance of contract has been dismissed.

2. The appellants filed a suit seeking decree of specific performance of contract on the pleadings inter alia that the defendant No.4-Ashok Jaiswal, a Power of Attorney Holder of defendants No.1 to 3 executed an agreement on 01-05-2007 for sale of suit land in dispute (Khasra No.77, 78 & 80, ad-measuring 1.06 Acres, 2.60 Acres and 0.78 Acres, total ad measuring 4.44 acres situated in Village Lokhandi, Tahsil Takhatpur, District Bilaspur), in favour of the plaintiff for a consideration of Rs.43,75,000/- and received advance of Rs.6 Lakhs. According to the plaintiff's pleadings, as per the conditions stipulated in the agreement, the sale deed was required to be executed within a period of three months and before that, demarcation of the suit land was required to be carried out, so that balance payments could be made. Moreover, according to the plaintiff, 30 feet wide road on the western side of the land in dispute was also required to be made available to the plaintiff in order to provide access to the land in dispute from the main road. According to the plaintiff, though, he was always ready and willing to perform his part of contract, but the defendants failed to provide 30 feet wide road as per the agreement and therefore, the plaintiff expressed that the sale deed of the land in dispute may be executed by reducing the amount of sale consideration by Rs.15 Lakhs, which the defendants agreed, but despite

several demands, the defendants failed to perform his part of contract, giving rise to the dispute.

3. The defendants contested the plaintiff's suit on the pleadings that even though, demarcation report indicated existence of road, despite giving notice on 20-11-2007, the plaintiff did not appear before the Deputy Registrar for execution and registration of the sale deed along with payment of the balance amount of consideration. Therefore, the plaintiff having failed to perform his part of contract, he is not entitled to any relief. It was also pleaded that the suit otherwise was barred by limitation.

4. The learned trial Court on the basis of the pleadings of the parties and issues arising therefrom, framed as many six issues, which are as below:-

क्र०	वाद प्रश्न	निष्कर्ष
1	क्या, वादी एवं प्रतिवादी क्र०-1 से 4 के मध्य वादग्रस्त भूमि के संबंध में निष्पादित अनुबंध दिनांक 1/5/07 निरस्त हो चुका है, अगर हां तो प्रभाव ?	“ नहीं ”
2	क्या, वादी अनुबंध का अपना पक्ष निष्पादित करने के लिये सदैव तैयार रहा है?	“ हां ”
3	क्या, प्रतिवादी क्र०-1 से 4 के द्वारा अनुबंध की शर्त (30 फीट रास्ता संबंधी) का अनुपालन नहीं किया गया है?	“ नहीं ”
4	क्या, वादी द्वारा सप्तम व्यवहार न्यायाधीश वर्ग-2, बिलासपुर के समक्ष प्रस्तुत व्यवहार वाद क्र०'271-अ/07 के निरस्त होने के परिप्रेक्ष्य में प्रश्नाधीन प्रकरण चलने योग्य नहीं है?	“ नहीं ”
5	क्या, वादी का वाद समयबाधित है?	“ नहीं ”
6	सहायता एवं वाद व्यय?	“ निर्णय की कंडिका '32 के अनुसार ”

The learned Trial Court recorded a finding that the plaintiff succeeded

in proving that the agreement to sell was executed on 01-05-2007 in respect of the land in dispute and further that it was one of the stipulations that 30 feet wide road would be made available. The learned trial Court therefore, proceeded to hold in favour of the plaintiff and against the defendants on the first issue that the agreement dated 01-05-2007 was not cancelled. On the second issue, the learned trial Court also recorded a finding that the plaintiff was ready and willing to perform his part of contract. On the third issue, the learned trial Court also held that the defendants No.1 to 4 have failed to perform their part of contract, under which, they were required to provide 30 feet wide road. On fourth issue, as to whether, in view of the dismissal of plaintiffs earlier civil suit No.271-A/2007 by the Seventh Civil Judge Class II, Bilaspur, suit in the present case was maintainable, the learned trial Court recorded a specific finding in favour of the plaintiff and against the defendants that the suit was maintainable. On the fifth issue, as to whether the suit was barred by limitation, again, finding was recorded in favour of the plaintiff that the suit was not barred by limitation. However, on the last Issue No.6, as to whether the plaintiff was entitled to any relief, the learned trial Court proceeded to hold that as the agreement dated 01-05-2007 contained stipulation that the sale deed would be executable, after making available the road, whereas the title and ownership of Khasra No.79, on which, road is to constructed, vested with some other person, therefore, the performance of contract has become impossible. The learned trial Court also recorded a finding that the plaintiff was not willing to execute the sale deed without plaintiff making available the road and as the plaintiff pleaded regarding purchase of land only and the performance of contract was dependent on the happenings of contingencies, agreement dated 01-05-2007 was legally not enforceable. The learned Trial Court also held that the plaintiff has failed to

prove oral agreement altering the original agreement in writing dated 01-05-2007 that in the event of defendants failing to make available the road, the defendants agreed to sell the land in dispute on a reduced rate i.e. Rs.15 Lakhs, less than the original agreed consideration amount, because the plaintiff has not come out with any agreement and that the defendants No.1 to 4 denied such subsequent oral agreement altering the terms and conditions of written agreement dated 01-05-2007. Lastly, the learned trial Court also held that the plaintiff has not prayed for specific relief of return of Rs.6 Lakh paid by him as an advance, no relief can be granted, and therefore, the suit was accordingly dismissed.

5. Assailing legality and validity of the impugned judgment and decree, learned counsel for the appellant-plaintiff argued that the appellant was otherwise ready and willing to perform his part of contract. He paid advance and required the defendants to perform their part of contract and the defendants required to pay the entire balance amount and proceeded to purchase, but they have failed to perform their part of contract, under which, the defendants were under an obligation to provide approach or access road to the property in dispute. It is next submitted that the plaintiff could always relinquish a part of his claim. Even if ultimately, the learned trial Court found that the performance of condition of providing road as access to the land in dispute could not be performed by the defendant as he was not the owner of the land and for this reason, that part of the contract was not legally enforceable under the law, it was independent and separable. Sale of land and provision for road part were separate. It is also argued that execution of sale deed was not contingent upon provision of road and even without road, the plaintiff was entitled to seek specific performance of that part of contract which related to execution of sale deed in respect of the land only without

making available road. Further case of the plaintiff is that the plaintiff has not only pleaded, but also proved from the categorical oral evidence that later on, the parties altered the terms and conditions of agreement orally, under which, it was agreed to between the parties that if, within the time stipulated in the agreement, the road was not constructed, the sale amount would be reduced by Rs.15 lakhs and sale deed in respect of the land would be executed. He would further argue that having held that the plaintiff was ready and willing to perform his part of contract, learned trial Court completely erred in holding that the contract was otherwise vague and uncertain. Referring to the provisions contained under Section 12 & 16 of the Specific Relief Act, it is argued that the contract being in two parts which were separate and divisible, there was no legal impediment in granting decree of specific performance of that part of the contract which related to execution of sale deed in respect of land, even if no road was constructed. Learned counsel for the appellant also drawn attention of the Court on the admitted position that the land situated in Khasra No.79/1, 79/2 & 79/3 is recorded as *Abadi Road* in the Jamabandi records of 1928-29. Learned counsel for the appellant-plaintiff relied upon several authorities.

6. On the other hand, learned counsel for the respondents-defendants No.1 to 4 submitted that the plaintiff came out with a case of agreement in writing executed on 01-05-2007, which clearly stipulate that the road would be made available on the plot. It has always been the case of the plaintiff and as reflected from the oral and documentary evidence, that the plaintiff always insisted on performance of both parts of contract by expressing that he would pay the balance amount only when road would be made available. As Khasra No.79 was not owned by the plaintiff, which is an admitted position, contract itself is not legally enforceable under the law. The plaintiff was therefore, not

entitled to any relief on this ground. He would further submit that the plaintiff's case of their being subsequent oral agreement altering terms and conditions of oral agreement in writing executed on 01-05-2007, is completely an afterthought and concocted story, only in order to get relief. In the earlier suit filed by the plaintiff, this was nowhere pleaded. In the second suit filed in exercise of liberty granted by the Court, for the first time, plea of alteration of agreement in writing, by oral agreement was taken, which the plaintiff failed to prove. He would further submit that in the documents, Ex.D-2 & D-3, the road is shown, yet the plaintiff has failed to perform his part of contract.

7. Learned counsel appearing for the subsequent purchaser-defendants No.5 & 6 argued that the agreement itself is not enforceable in law as the agreement was executed by Ashok Jaiswal in respect of three different properties without there being any power of attorney in his favour. He would further argue that for different properties, single agreement could not be executed and unless there are three different agreements, executed by duly constituted by power of attorney holder, the very basis of the plaintiff's suit fails. He would also assail the finding of the learned trial Court on Issue No.1, 4 & 5, by submitting that the plaintiff has failed to perform his part of contract. He would submit that it being clearly reflected from the revenue records that there already existed a road bearing Khasra No.79/1, 79/2 and 79/3, yet the plaintiff avoided to perform his part of contract by offering the balance amount of consideration on one pretext or the other, which is clear from the various correspondences between the parties and came out with the fabricated plea of there being oral agreement altering terms and conditions of the agreement in writing dated 01-05-2007. He would next argue that even according to the plaintiff, the first agreement was altered and there was novation of contract, therefore, no relief of specific performance of contract

could be sought on the basis of agreement dated 01-05-2007, because that agreement was cancelled, even according to the case of the plaintiff. He would further argue that even though, cross-objection is only with regard to finding on Issue No.2 & 3, bonafide purchaser can assail the finding in favour of plaintiff on Issues No.1, 4 & 5, which is legally permissible under Order 41 Rule 33 CPC. Next submission of learned counsel for the respondents No.5 & 6 is that in the first suit, the plaintiff initially sought a relief of specific performance, but the same was deleted. Order passed in the earlier suit was in substance, an order granting permission to withdraw one claim under Order 23 Rule 1 CPC without liberty to file fresh suit. As no permission to file a fresh suit was granted, subsequent suit on the same cause of action would be barred under Order 2 Rule 2 CPC. Learned counsel for respondents No.5 & 6 further argued that the plaintiff's suit would be liable to be dismissed, in view of the specific bar created under Section 14 of the Specific Relief act. It is also argued that the condition of providing road was inseparable and indivisible part of contract. According to him, it was an essential term of contract and the conduct of the plaintiff has also been that the plaintiff always pleaded the said condition to be an essential condition in the contract. As the land comprised in Khasra No.79 did not belong to the plaintiff, but *Abadi Land* shown along with the road in the jamabandi records of 1928-29, no decree of specific performance could be granted under Section 12 of the Specific Relief Act. The plaintiff is not entitled to decree of specific performance of contract in view of Section 62 of the Contract Act, because earlier contract was cancelled under the oral agreement. Even otherwise, the plaintiff has failed to prove alteration of original agreement by oral evidence. The relief sought is composite and not alternative, therefore, on the plea of alteration of contract, the plaintiff is liable to be non-suited. Lastly, it is argued

that the defendants No.5 & 6 was bonafide purchaser having pleaded good faith, therefore, entitled to raise plea of bar against specific performance in view of the provisions contained in Section 19-B of the Specific Relief Act. Learned counsel for the respondents-defendants also relied upon several authorities.

8. During the course of hearing, the appellant came out with the application seeking amendment of the plaint along with an application for grant of leave. The application for amendment has been made at the stage of hearing of the appeal so as to amend the prayer of the plaint in the manner that the plaintiff may be granted decree of specific performance of contract as per the agreement dated 01-05-2007, leaving aside the agreement relating to 30 feet wide road. The prayer was opposed by the counsel for the respondents.

Apparently, the amendment at the belated stage is sought to strengthen the case of the plaintiff and to support the argument that the plaintiff is entitled to relinquish a part of his claim at any stage of the proceedings including the appellate stage.

According to the pleadings in the plaint, amendment is not at all bonafide and therefore, we are not inclined to grant leave to amend the plaint. The application, is therefore, rejected.

9. In the present appeal, the respondents No.1 to 4/defendants have filed their cross-objection against the findings on Issue No.2 & 3 recorded by the trial Court. However, during the course of hearing, learned counsel appearing for the respondents No.1 to 4 as also learned counsel appearing for the respondents No.6 & 7 assailed correctness and validity of findings recorded

by the learned trial Court on Issues No.1, 4 & 5, to which, objection has been taken from the appellant side that as cross-objection is confined only to Issue No.2 & 3, the respondents are not entitled to assail the correctness of the findings recorded by the trial Court on Issue No.1, 4 & 5.

However, in view of the decision of this Court in the case of ***State of Chhattisgarh and others vs. M/s Shree Krishna Industries***¹, the appellant's objection is liable to be overruled, wherein, relying upon the decision of the Supreme Court, this Court examined the scope and ambit of provisions contained under Order 41 Rule 33 of CPC in the case of ***M/s Shree Krishna Industries*** (supra) and it was held thus:-

13. On the correctness of finding recorded by the trial Court on Issue No.1, learned Deputy Advocate General raised serious objection that the same may not be gone into this appeal, as no such specific cross objection by the plaintiff in this regard has been raised in his cross-appeal and cross appeal is confined only in so far as refusal of claim for damages is concerned. For this purpose, learned State counsel has placed reliance on the provisions contained under Order 41 Rule 22 of CPC, wherein it has been provided that the respondent may, in whose favour, decree has been passed, nevertheless raise cross objection against any finding that may have been recorded against him while deciding the case.

In this regard, we may refer to the provisions contained under Order 41 Rule 22 CPC, which reads as under:-

Order XLI- Appeals from original decrees.

Rule 22- **“Upon hearing respondent may object to decree as if he had preferred a separate appeal.-** (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree ¹[but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection] to the decree which he could have taken by way of appeal provided he has filed such objection in the Appellant Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the

¹ FAM No.182 of 2017, decided on 18-09-2018

Appellate Court may see fit to allow.

[Explanation—A respondent aggrieved by a finding of the Court in the judgment on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of that respondent.]

(2) **Form of objection and provisions applicable thereto**—Such cross-objection shall be in the form of a memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

²[(3) Omitted]

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

(5) The provisions-relating to appeal by indigent persons shall, so far as they can be made applicable apply to an objection under this rule.”

14. Though, number of judgments were cited before us, in view of what has been authoritatively pronounced by Their Lordships in the Supreme Court in the case of ***Delhi Electric Supply Undertaking*** (supra), we conclude that even without such specific objection having been taken, this Court being the appellate Court, has all the power and jurisdiction to examine the correctness of finding recorded on Issue No.1. In the aforesaid decision, it was held-

17. “In our approach we can also draw strength from the provisions of rule 33 of Order 41 of the Code of Civil Procedure which is as under :

“33. Power of court of appeal. - The appellate court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees :

Provided that the appellate court shall not make any order under [section 35A](#), in pursuance of any objection on which the

court from whose decree the appeal is preferred has omitted or refused to make such order."

18. This provision was explained by this court in [Mahant Dhangir v. Madan Mohan](#) 1987 Supp(SCC) 528 in the following words (page 534) :

"The sweep of the power under rule 33 is wide enough to determine any question not only between the appellant and respondent, but also between respondent and co-respondents. The appellate court could pass any decree or order which ought to have been passed in the circumstances of the case. The appellate court could also pass such other decree or order as the case may require. The words 'as the case may require' used in rule 33 of Order 41 have been put in wide terms to enable the appellate court to pass any order or decree to meet the ends of justice. What then should be the constraint ? We do not find many. We are not giving any liberal interpretation. The rule itself is liberal enough. The only constraint that we could see, may be these : that the parties before the lower court should be there before the appellate court. The question raised must properly arise out of the judgment of the lower court. If these two requirements are there, the appellate court could consider any objection against any part of the judgment or decree of the lower court. It may be urged by any party to the appeal. It is true that the power of the appellate court under rule 33 is discretionary. But it is a proper exercise of judicial discretion to determine all questions urged in order to render complete justice between the parties. The court should not refuse to exercise that discretion on mere technicalities."

Therefore, even though, in the cross-appeal, the plaintiff may not have specifically raised the issue regarding the correctness and legality of the trial Court's finding on Issue No.1, we are inclined to examine the correctness of the said finding.

10. It is to be noticed that after dismissal of the suit filed by the plaintiff and before filing of the instant appeal, the respondents/defendants No.1 to 4 sold the property in dispute in favour of the defendants No.6 & 7. On application under Order 1 Rule 10 CPC, filed by the appellant for impleadment of subsequent purchaser, the subsequent purchaser have been impleaded as defendants/respondents.

11. On the issue of limitation, learned trial Court has recorded a finding on Issue No.5 that the suit is not barred by limitation.

12. What has been contended by learned counsel for the respondents is

that the cause of action for filing of the suit would arise on 01-05-2007, when agreement was executed between the parties and therefore, the limitation is to be counted from that date and once the limitation begins to run, it will not be arrested, merely because, earlier a suit was filed by the plaintiff and later on, withdrawn and second suit was filed on 19-07-2010. This argument has no merit, in view of the provisions contained in Article 54 of the Schedule appended to the Limitation Act, which provides for limitation for filing a suit for specific performance of contract, which is three years. The time from which, limitation begins to run, as provided therein, is from the date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused. As per the agreement dated 01-05-2007, Ex.P-1, three month's time was fixed for performance, therefore, limitation would begin to run only after 01-08-2007, that means, the plaintiff could file a suit on or before 2nd of August, 2007, whereas in the present case, the plaintiff has filed a suit on 19-07-2010. Therefore, the finding of the learned trial Court on Issue No.5 that the suit is filed within the limitation, does not warrant any interference and the said finding is therefore, affirmed.

13. A legal objection with regard to maintainability of the suit has been raised on behalf of the respondents, by submitting that as the agreement was not executed by the owners of the land namely defendant No.1-Anju Choudhary, Sheela Jaiswal and Vasanti Jaiswal, but the same was executed on their behalf by the defendant No.4-Ashok Jaiswal, who had no valid power of attorney in his favour, therefore, the agreement is illegal and not enforceable and only on this ground, the plaintiff's suit is liable to be dismissed. In this regard, if the pleadings made by the plaintiff in this plaint are looked into, it is found that in para 2 of the plaint, the plaintiff averred that the during the course of meeting of the plaintiff with the defendant No.4

Ashok Jaiswal in the month of April, 2007, Ashok Jaiswal showed to the plaintiff, his authority letter given by the defendants No.1 to 3 and expressed to sell the land in dispute, to which, the plaintiff agreed. This averment has remained unrebutted and the defendants No.1 to 4 in para 2 of their written statement, have averred that the plaintiff himself had approached the defendants No.4 and thereafter, the agreement was entered into on 01-05-2007 for sale of the disputed land by the defendant No.4. Apparently, the defendants No.1 to 3 did not dispute the authority letter given to defendant No.4 to act on their behalf and enter into agreement with the plaintiff. Not only this, the defendant-Ashok Jaiswal has deposed as witness of the defendants, in which, he has clearly stated in his affidavit that he was appointed as Power of Attorney Holder on behalf of defendants No.1 to 3 and had entered into agreement on their behalf. Therefore, it being an admitted position, at that stage, the respondents/defendants cannot be permitted to raise this issue, particularly when, no such issue was framed before the trial Court. Therefore, the objection to the maintainability of the suit on such ground is liable to be rejected.

14. A very forceful objection to the maintainability of the present suit, in so far as prayer for specific performance of agreement dated 01-05-2007 is concerned, has been raised on the submission that earlier, the plaintiff had filed a suit in the Court of VIIth Civil Judge Class II, Bilaspur, registered as Civil Suit No.271-A/2007, on the same cause of action, in which, a mandatory injunction was sought for specific performance of agreement dated 01-05-2007 for execution of sale deed, after providing 30 feet approach road. The said relief was however, deleted by way of amendment and the plaintiff sought relief of declaration that the agreement dated 01-05-2007 cannot be treated as cancelled only upon issuance of the legal notice and the same is

binding on the defendants. According to the learned counsel for the respondents, this amounted to withdrawal of part of claim in the suit for specific performance of contract, because the prayer for specific performance of contract by making available 30 feet wide road was omitted. The plaintiff having not been granted any liberty to file a separate suit or fresh suit, in respect of relief for specific performance of contract based on agreement dated 01-05-2007, by making available 30 feet approach road, the present suit for specific performance based on the same agreement and the same cause of action and for the same relief, is barred under Order II Rule 2 CPC.

15. It is not in dispute that the appellant had earlier filed a suit. A copy of the plaint of that suit is placed on record as Ex.P-10 by the plaintiff himself, which shows that initially the appellant/plaintiff sought a relief of specific performance of contract dated 01-05-2007, for execution of the sale deed, after making available 30 feet road along with three other reliefs. The second relief was for grant of permanent injunction to restrain the defendants from selling the property in dispute to a third party. However, thereafter, the relief clause was amended as per the order dated 17-12-2007. The first relief was sought for mere declaration that the agreement dated 01-05-2007 cannot be treated as cancelled only on sending legal notice and the same continues to be binding for the defendants. Therefore, the first relief, as sought in the suit, which apparently was for the specific performance of contract by executing sale deed, after providing 30 feet wide road, was omitted. This certainly amounted to withdrawal of part of claim by the plaintiff. There is no averment made by the plaintiff in the plaint made in the present case that while seeking amendment of the plaint and the withdrawal of a part of claim of specific performance of contract, the plaintiff was granted liberty to file a fresh suit in respect thereof.

It is to be noted that the earlier suit was withdrawn and the present suit was filed. Vide order dated 24-04-2008, the learned trial Court allowed application of the plaintiff under Order 7 Rule 20 CPC and directed return of plaint along with the court fees. The learned trial Court further recorded that the plaintiff may revive or file a fresh suit provided any order in favour of the plaintiff is passed by this Court in a pending petition. A perusal of order dated 24-04-2008 would show that the permission was granted to file a fresh suit in support of the claim, which was pending before the Court. At that point of time, even if the arguments of the appellant is to be accepted, he could file a fresh suit in respect of the same relief and on the same cause of action, that too, in the eventuality that order is passed in his favour by this Court. The appellant-plaintiff has not come out with a case that the order dated 24-04-2008 wholly or in part, was challenged by the plaintiff, the order therefore, attained finality.

16. In view of above discussion, two factual position clearly emerge. Firstly, that the plaintiff had earlier filed a suit, in which, prayer for specific performance of contract dated 01-05-2007 was made and claim was, later on withdrawn, without there being any liberty to file a fresh suit. Secondly, the suit itself was permitted to be withdrawn with the liberty to file a fresh suit, in case, any favourable order is passed in favour of the plaintiff.

17. As far as relief for specific performance of contract is concerned, the same would be barred under Order 2 Rule 2 CPC.

Provision contained under Order 2 Rule 2 CPC is extracted, as below:-

2. Suit to include the whole claim.

(1) ----- xxx ---

(2) Relinquishment of part of claim-- Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or

relinquished.

(3) ---- xxx ---

Sub Rule 2, as it plainly reads, where the plaintiff relinquishes or omit to sue any part of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. The scope and ambit of the aforesaid provision was explained by the Supreme Court in the case of ***Virgo Industries (ENG.) Private Limited versus Venturetech Solutions Private Limited***², as below:-

9. "Order II Rule 1 requires every suit to include the whole of the claim to which the plaintiff is entitled in respect of any particular cause of action. However, the plaintiff has an option to relinquish any part of his claim if he chooses to do so. Order II Rule 2 contemplates a situation where a plaintiff omits to sue or intentionally relinquishes any portion of the claim which he is entitled to make. If the plaintiff so acts, Order II Rule 2 of CPC makes it clear that he shall not, afterwards, sue for the part or portion of the claim that has been omitted or relinquished. It must be noticed that Order II Rule 2 (2) does not contemplate omission or relinquishment of any portion of the plaintiff's claim with the leave of the court so as to entitle him to come back later to seek what has been omitted or relinquished. Such leave of the Court is contemplated by Order II Rule 2(3) in situations where a plaintiff being entitled to more than one relief on a particular cause of action, omits to sue for all such reliefs. In such a situation, the plaintiff is precluded from bringing a subsequent suit to claim the relief earlier omitted except in a situation where leave of the Court had been obtained. It is, therefore, clear from a conjoint reading of the provisions of Order II Rule 2 (2) and (3) of the CPC that the aforesaid two sub-rules of Order II Rule 2 contemplate two different situations, namely, where a plaintiff omits or relinquishes a part of a claim which he is entitled to make and, secondly, where the plaintiff omits or relinquishes one out of the several reliefs that he could have claimed in the suit. It is only in the latter situations where the plaintiff can file a subsequent suit seeking the relief omitted in the earlier suit provided that at the time of omission to claim the particular relief he had obtained leave of the Court in the first suit."

The object behind the enactment of the aforesaid provision did not contain any Order 2 Rule 2 CPC, Order 2 Rule 3 CPC was also explained, as below:-

10. The object behind enactment of Order II Rule 2 (2) and (3) of the CPC is not far to seek. The Rule engrafts a laudable principle that discourages/prohibits vexing the defendant again and again by multiple

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suits except in a situation where one of the several reliefs, though available to a plaintiff, may not have been claimed for a good reason. A later suit for such relief is contemplated only with the leave of the Court which leave, naturally, will be granted upon due satisfaction and for good and sufficient reasons. The situations where the bar under Order II Rule 2 (2) and (3) will be attracted have been enumerated in a long line of decisions spread over a century now. Though each of the aforesaid decisions contain a clear and precise narration of the principles of law arrived at after a detailed analysis, the principles laid down in the judgment of the Constitution Bench of this Court in [Gurbux Singh v. Bhooralal](#)[AIR 1964 SC 1810] may be usefully recalled below:

“In order that a plea of a bar under O. 2. r. 2(3), Civil Procedure Code should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based, (2) that in respect of that cause of action the plaintiff was entitled to more than one relief, (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court, omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar.” The above principles have been reiterated in several later judgments of this Court. Reference by way of illustration may be made to the judgments [Deva Ram & Anr. v. Ishwar Chand & Anr.](#)[(1995) 6 SCC 733] and [M/s. Bengal Waterproof Ltd. v. M/s Bombay Waterproof Manufacturing Co.& Anr.](#)[(1997) 1 SCC 99]

Their Lordships cautioned that the cardinal requirement for application of the provisions contained under Order 2 Rule 2 & Order 2 Rule 3 CPC would be that the cause of action in the later suit must be same as in the first suit and the observations as contained in Para 11 of the aforesaid decision, reads thus:

11. “The cardinal requirement for application of the provisions contained in Order II Rule 2(2) and (3), therefore, is that the cause of action in the later suit must be the same as in the first suit. It will be wholly unnecessary to enter into any discourse on the true meaning of the said expression, i.e. cause of action, particularly, in view of the clear enunciation in a recent judgment of this Court in the *Church of Christ Charitable Trust and Educational Charitable Society, represented by its Chairman v. Ponniammam Educational Trust represented by its Chairperson/Managing Trustee*[5]. The huge number of opinions rendered on the issue including the judicial pronouncements available does not fundamentally detract from what is stated in Halsbury’s Law of England, (4th Edition). The following reference from the above work would, therefore, be apt for being extracted hereinbelow:

“Cause of Action” has been defined as meaning simply a factual situation existence of which entitles one person to obtain from the Court a remedy against another person. The phrase has been held from earliest time to include every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which a defendant would have a right to traverse. ‘Cause of action’ has also been taken to mean that particular action the part of the defendant which gives the plaintiff his cause of complaint, or the subject-matter of grievance founding the action, not merely the technical cause of action.”

18. In the present case, there are four stages. Firstly, when the appellant-plaintiff withdrew a part of claim/relief of specific performance of contract in the first suit, the plaintiff chose to confine reliefs based on a particular cause of action only to declaration and injunction, though initially, while filing the first suit, the plaintiff had not only asked for declaration and injunction but also for specific performance of contract based on the same agreement dated 01-05-2007. While seeking to omit claim of relief of specific performance of contract, the plaintiff did not seek leave of the Court to file separate or fresh suit.

The other stage was when the plaintiff withdrew the whole suit which was permitted to be withdrawn with the specific condition that the plaintiff would be at liberty to file a fresh suit, in case, relief is granted in his favour by the High Court. Nothing has been brought on record by the plaintiff in its pleading or evidence that the said conditional order was subjected to challenge. The order granting permission to withdraw the suit with liberty to file fresh suit itself was subjected to a condition, which attained finality. In the pleadings of the present case, there is no whisper as to how the said pre-condition was fulfilled in favour of the plaintiff by the reason of order, if any, passed in his favour by the High Court. Therefore, the suit of the plaintiff would certainly be barred under Order 2 Rule 2 CPC, as discussed above.

19. It is well settled legal position that in order to succeed in a suit for specific performance of contract, the plaintiff is required to fulfill and comply

with the statutory requirement as contained in Section 16(C) of the Specific Relief Act that he was ready and willing to perform his part of contract. Therefore, the plaintiff is not only required to plead, but also to prove that he was ready and is willing to perform his part of contract. For this purpose, it is necessary to look into the pleadings made by the plaintiff in its suit. The plaintiff has pleaded that an agreement was entered into between the plaintiff and defendant Ashok Jaiswal, representative of other defendants/owners of the land for sale of 4.4 acres of land comprised in Khasra No.77, 78 and 80 of P.H.No.31, Revenue Circle Sakri, Tahsil Takhatpur, District Bilaspur, on 01-05-2007. The plaintiff has further pleaded that he was assured by the defendant No.4 that the sale deed would be executed only after making available 30 Feet wide road, as approach to the land under agreement and it was only upon this assurance and undertakings, the plaintiff proceeded to enter into the agreement of sale in dispute. On the face of this specific pleading, as contained in para 2 of the plaint, the plaintiff claims to have proceeded to enter into an agreement. The defendant has not disputed the execution of agreement dated 01-05-2007 between the parties in respect of 4.4 acres of land for a total consideration of Rs.43,75,000/-. Moreover, the plaintiff's pleading that on 01-05-2007, upon execution of agreement, an advance of Rs.6 lakh was given to the defendants and it was agreed that the registration would be done within a period of three months, upon receiving balance amount of consideration, has also not been disputed by the defendants in their written statement. It is also not in dispute that the plaintiff had paid Rs.6 lakhs as advance. Moreover, specific pleading that on the date of agreement, it was also agreed between the parties that before registration, due demarcation of the land would be carried out and the seller would be paying the balance amount according to the availability of the land and spot,

is also clearly stipulated in the agreement dated 01-05-2007, Ex.P-1.

20. It is also pleaded by the plaintiff that as the demarcation proceedings could not be undertaken at the instance of the defendants, sale could not be completed within three months and the plaintiff has pleaded that it had received information from the defendant No.4 that the demarcation is to be carried out on 05-11-2007. According to the plaintiff's pleading, when upon demarcation, Nistari Road was not indicated in the demarcation report, the plaintiff requested the defendants to make available the road, but the defendant started avoiding to perform his part of contract of providing approach road by stating that in the map prepared during demarcation, dotted lines shown over the land situated in Khasra No.79/1 indicates the existing approach road. This, however, has been denied by the defendants stating that firstly at the time, even before execution of agreement dated 01-05-2007, the defendants made available Missal Bandobast records of the year 1928-29 showing approach road over land comprised in Khasra No.79/1 and that the plaintiff, upon spot inspection, was satisfied and then only proceeded to enter into agreement. It has been stated that information of demarcation scheduled on 05-11-2007 was given by the defendant No.4 to the plaintiff, whereafter on the stated date, the demarcation was carried out and in the spot map prepared upon demarcation, dotted lines were indicated showing existence of approach road over Khasra No.79, it was the plaintiff who was not willing to perform his part of contract, fresh notice dated 20-11-2007 was given to the plaintiff to remain present in the office of Deputy Registrar, Bilaspur, along with the balance amount.

21. What the plaintiff has pleaded in para 5 of the plaint that few days after demarcation, defendant No.4 approached the plaintiff informing that he would

get arranged oral permission of the owners of land comprised in Khasra No.79/1 for the purposes of making available 30 Feet wide Nistari Road, on which, the plaintiff stated that he agreed to pay Rs.43,75,000/- only on the undertaking that the defendant would provide 30 feet wide road and if such road is not made available, the plaintiff would not pay the balance amount and the sale deed would be executed only when a satisfactory document of consent of those owners namely, Laxman Das Dewani and Vijay Narwani was given to the plaintiff. Further pleading of the plaintiff is that the notice dated 20-11-2007 was given to him by the defendant to get the sale deed executed by receiving the balance amount in the office of Deputy Registrar, Bilaspur on 27-11-2007, failing which, agreement would be cancelled. Plaintiff gave reply on 23-11-2007 and also got the news published in the newspaper on 24-11-2007 that subject to the defendant making available 30 feet road on the spot, the plaintiff is ready and willing to execute the sale deed on 27-11-2007, upon payment of the balance amount, but on that date, the defendants did not come in the office of the Deputy Registrar, though the plaintiff had attended the office.

However, the defendant has completely denied by stating that the defendant was present in the office of Deputy Registrar on 27-11-2007, but the plaintiff neither came nor paid the balance amount and therefore, the agreement dated 01-05-2007 came to an end.

22. In the entire plaint, the plaintiff's pleading is to the effect that in the agreement, it was one of the essential term that the defendant will make available 30 feet wide road as approach to the land proposed to be sold under the agreement and that the plaintiff was ready and willing to perform his part of contract by making payment of the balance amount, subject to

fulfillment of defendant's part of agreement of making available approach road. This specific stand of the plaintiff that the defendant's part of contract to make available 30 feet wide road was not only an essential term of contract, but also a pre-condition for payment of the balance amount of sale consideration, is clearly reflected from specific pleadings contained in para 2, 3, 4, 5, 6 & 7.

23. The agreement dated 01-05-2007, Ex.P-1 also contains stipulation that 30 feet wide road will be make available on the spot so as to provide approach to the land under agreement of sale. This is clear from the following recitals of the agreement:-

“यह कि भूमि के उत्तर में खसरा नंबर 76 की भूमि दक्षिण में खसरा नंबर 81 की भूमि पूर्व में खसरा नंबर 83/1,2,11 की भूमि पश्चिम में खसरा नंबर 79/1,2,3 की भूमि है। करारशुदा भूमि पर जाने हेतु मार्ग से 30 फुट चौड़ा रास्ता मौके पर उपलब्ध कराकर दिया जायेगा व जिसकी चतुसीमा नीचे वर्णित अनुसार है:-

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24. The plaintiff Sunil Kumar Jain, PW-1 has also stated in his affidavit under Order 18 Rule 4 CPC that the provision of 30 feet wide road was the essential term of contract and payment of balance amount was only subject to fulfillment of defendants performance of his part of contract, under which, 30 feet wide road was to be made available by him. In his cross-examination, this witness has admitted that he had seen all the documents and after being satisfied, he had executed the agreement. He has further stated that he had also inspected the land at the spot. In his cross-examination, he has deposed that availability of road was also one of the conditions of the agreement.

If we look into various correspondences between the parties, we find that in those correspondences also, the plaintiff has taken emphatic stand that availability of 30 feet wide road on the spot is an essential term of

agreement between the parties and that the plaintiff was required to pay the balance amount only after fulfillment of defendants' obligations to make available 30 feet wide road. Thus, according to the plaintiff himself, it was one of the essential term of contract that the plaintiff will have to pay the balance amount of consideration only when the defendants makes available 30 feet wide approach road from the main road, up to the land proposed to be sold under the agreement between the parties. In the Legal Notice dated 23-11-2007, Ex.P-4, the plaintiff clearly stated that on account of non-availability of 30 feet wide road, sale could not be completed and further that the defendant is avoiding to fulfill the essential that the sale deed would be executed only after making available the approach road and subject to defendants making available the road, the plaintiff is ready and willing to perform his part of contract. The plaintiff also made an allegation on the defendants that in fact, the defendants cheated the plaintiff to enter into the agreement by falsely stating availability of road. Finally, it is stated in the notice that if the defendants wants to demonstrate their bonafide towards fulfillment of agreement dated 01-05-2007, the defendants should make available the approach road and accordingly satisfy the plaintiff. In another complaint, Ex.P-7 addressed to the Deputy Registrar, the plaintiff has taken the same stand that the sale deed was to be executed upon payment of balance consideration by the plaintiff subject to defendants making available the 30 feet wide road. It has already been stated that if the defendant makes available 30 feet wide approach road, the plaintiff is ready and willing to perform his part of contract.

In the earlier suit filed by the plaintiff also, the plaintiff came out with the pleadings that it was essential term in the agreement that the defendant would first make available the approach road and then only the defendant

would be required to pay the balance amount of consideration towards execution of sale deed.

25. It would thus be seen that the plaintiff's case is that under the agreement dated 01-05-2007, the defendant was under an obligation to make available 30 feet wide road, which the defendant did not make available, that it was an essential term of contract and further that the plaintiff's obligation to pay the balance amount of consideration was subject to the defendant's making available 30 feet wide road. According to him, the plaintiff repeatedly stated his readiness and willingness subject to availability of 30 feet wide road and when pursuant to notice, which was duly replied, he reached to the office of the Deputy Registrar on 27-11-2007, the defendant did not come nor the defendant satisfied the plaintiff regarding availability of 30 feet wide approach road, due to which, the sale deed could not be executed on 27-11-2007. Except entering into the agreement between the parties, the defendant denied the plaintiff's claim by stating that the plaintiff was already shown 1928-29 Missal Bandobast records showing existence of road on Khasra No.79 and upon full satisfaction, the plaintiff had entered into the agreement of sale and even in the demarcation report dated 05-11-2007, the spot map indicated the existence of approach road by dotted lines and further that though the defendant went to the office of Registrar, the plaintiff did not come nor paid the balance amount of consideration and therefore, the agreement came to an end.

26. From the plaintiff's own pleading and evidence, it is clearly proved that the plaintiff fully knew that the land comprised in Khasra No.79 did not belong to the defendant and it was not within the authority of the defendant either to give an undertaking or to construct or to make available any approach road

up to the land proposed for sale under the agreement between the parties. Nowhere in the plaint, the plaintiff has pleaded much less proved that the land comprised in Khasra No.79 belonged to the plaintiff. On the other hand, in para 2 of the plaint, it has been pleaded that the land comprised in Khasra No.79 was recorded as Abadi land and road in Missal Bandobast records and proposed to be connected with Mungeli Road to Ratanpur Road as by pass. It is thus clear that on the date of execution of agreement, it was fully known to the plaintiff that the land comprised in Khasra No.79 does not belong to the defendant.

27. Sunil Kumar Jain, PW-1 (plaintiff) has admitted and clearly stated in his evidence that before execution of agreement, he had seen all the documents of property and also inspected the property at the spot. Stipulation in the agreement dated 01-05-2007 that the defendant would make available the approach road on Khasra No.79, could not be performed by the defendant for the simple reason that it did not belong to him. This was fully known to the plaintiff yet the plaintiff chose to enter into such type of agreement where the defendants assured the plaintiff to make available the approach road through the land, on which, defendants had no title, ownership or even possessory right at the time of execution of agreement. On the contrary, the plaintiff fully knew that in the Missal Bandobast records, it has been shown as Abadi land and Road. However, not only in his pleadings, but also in various correspondences, which have been referred to hereinabove, the plaintiff also insisted the defendants to first make available the road and took a firm stand for his obligation to pay the balance amount shall be only subject to availability of approach road.

28. In the considered opinion of this Court, such kind of agreement is not at all enforceable under the law, in view of provision contained in Section 14 of

the Specific Relief Act, which reads as under:-

“14. Contracts not specifically enforceable.— (1) The following contracts cannot be specifically enforced, namely:—

(a) a contract for the non-performance of which compensation in money is an adequate relief;

(b) a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms;

(c) a contract which is in its nature determinable;

(d) a contract the performance of which involves the performance of a continuous duty which the court cannot supervise.

(2) Save as provided by the Arbitration Act, 1940 (10 of 1940), no contract to refer present or future differences to arbitration shall be specifically enforced; but if any person who has made such a contract (other than an arbitration agreement to which the provisions of the said Act apply) and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

(3) Notwithstanding anything contained in clause (a) or clause (c) or clause (d) of sub-section (1), the court may enforce specific performance in the following cases:—

(a) where the suit is for the enforcement of a contract,—

(i) to execute a mortgage or furnish any other security for securing the repayment of any loan which the borrower is not willing to repay at once: Provided that where only a part of the loan has been advanced the lender is willing to advance the remaining part of the loan in terms of the contract; or

(ii) to take up and pay for any debentures of a company;

(b) where the suit is for,—

(i) the execution of a formal deed of partnership, the parties having commenced to carry on the business of the partnership; or

(ii) the purchase of a share of a partner in a firm;

(c) where the suit is for the enforcement of a contract for the construction of any building or the execution of any other work on land: Provided that the following conditions are fulfilled, namely:—

(i) the building or other work is described in the contract in terms sufficiently precise to enable the court to determine the exact nature of the building or work;

(ii) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-

performance of the contract is not an adequate relief; and (iii) the defendant has, in pursuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed."

Clause (b) of sub section(1) of Section 14 of the Specific Relief Act, 1963 reveals that when a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms.

In the present case, having found that condition of providing approach road could not be performed by the defendants, how can the Court direct the defendants for specific performance of contract, by directing the defendants to make available the approach road and execute sale deed in favour of the plaintiff by receiving the whole amount?

It has to be noticed that till filing of the first suit by the plaintiff, the plaintiff's consistent case has been that it is obligatory on the part of the defendants to first provide 30 feet wide road and then only the plaintiff would be obliged under the law to pay the balance amount of consideration. In the present suit, the same stand has been reiterated in the pleadings, evidence and various communications made by the plaintiff that the provision of 30 feet wide road is one of the essential term of the contract so much so that the plaintiff's obligation to pay the balance amount of sale consideration is dependent upon the defendants fulfillment of promise of approach road.

29. It has already been held hereinabove that the plaintiff having chosen to file a suit for specific performance of contract, based on agreement dated 01-05-2007, chose to withdraw his claim of relief of specific performance of contract from the reliefs claimed in the first suit and that too without any

liberty.

30. In the present suit, i.e. the subsequent suit, the plaintiff has come out with a case that when the sale deed could not take place under the first agreement dated 01-05-2007, after few days, the plaintiff and the defendants agreed that if the defendants is not able to provide 30 feet wide road, the plaintiff may get the sale deed executed on a reduced sale price. This pleading has been made by the plaintiff in para 13 of the plaint. According to the plaintiff, there was alteration of contract that if the defendant fails to make available the 30 feet wide road, the plaintiff would pay the balance amount and sale deed would be executed but if the defendant fails to make available the approach road, sale consideration would be reduced by 15 lakhs and the defendants would execute the sale deed at the reduced sale consideration in favour of the plaintiff. According to the plaintiff, the defendant, however, avoided to execute the sale deed as per the modified terms and conditions of the agreement between the parties on a reduced rate despite repeated request made and publication of notice in the newspaper which led to filing of fresh suit. The relief sought in the present suit, as below:-

(23)	वादी निम्नलिखित अनुतोष कि प्रार्थना करता है:-
(अ)	वादी के पक्ष में आज्ञाप्ति पारित की जावे कि प्रतिवादीगण क०1 से 4 अनुबंध दिनांक 1/5/2007 के अनुसार उसका विशिष्ट अनुपालन करते हुए वादभूमि का विक्रय कर वादी के पक्ष में विक्रयपत्र तहरीर कर पंजीयन करावें। एवं यदि प्रतिवादीगण किसी कारणवश अनुबंधित निस्तारी रास्ता उपलब्ध नह करा सकते हो तो अनुबंध की कुल राशि में से 15,000.00/- रु० (पन्द्रह लाख रुपये) कम प्राप्त कर अनुबंध का विशिष्ट अनुपालन करते हुए वादभूमि का विक्रय कर वादी के पक्ष में विक्रयपत्र तहरीर कर पंजीयन कराने प्रतिवादीगण को आदेशित किया जावे।
(ब)	यदि प्रतिवादीगण द्वारा वादीभूमि का विक्रय कर वादी के पक्ष में विक्रयपत्र तहरीर कर पंजीयन नहीं कराया जाता है तो माननीय न्यायालय प्रतिवादीगण की ओर से अनुबंध दिनांक 1/5/2007 का पालनकर वादभूमि का विक्रयपत्र वादी के पक्ष में तहरीर कराकर उसका पंजीयन कराने की दया करें।
(स)	वादी को प्रतिवादीगण से वादव्यय दिलाया जावे।
(द)	अन्य कोई अनुतोष जो माननीय न्यायालय उचित समझे, वादी के पक्ष में प्रतिवादीगण के

विरुद्ध दिलाया जावे।

Relief sought is for specific performance of contract dated 01-05-2007 or if the defendants for the some reason, is unable to make available the alternative approach road, then decree of specific performance may be granted by directing the defendants to execute the sale deed by receiving sale consideration reduced by 15 lakhs.

As far as first part of relief is concerned, relief was prayed for by the plaintiff in earlier suit, but it was withdrawn and for reasons stated hereinabove, subsequent suit would be clearly barred. The second part of the relief sought is essentially based on so-called subsequent oral agreement that if for some reason, the defendant is unable to provide approach road, he would execute the sale deed in favour of the plaintiff for a consideration reduced by 15 lakhs.

31. The defendants have emphatically denied any such subsequent oral agreement altering terms and conditions of earlier agreement had even taken place or any such new agreement was entered into between the parties.

32. It is highly improbable that in the background of dispute between the parties, the parties would be entering into the oral agreement to alter the terms and conditions of a written agreement executed earlier i.e. on 01-05-2007.

If we closely look into the pleadings in the plaint, the plaintiff has not even stated the date, on which, such oral agreement was entered into between the parties. Th averment made in the plaint are blissfully vague mentioning "Few days before". This makes highly doubtful the plaintiff's case regarding novation of written agreement by altering the terms and conditions

through oral agreement. Neither in the plaint nor anywhere in the evidence, the plaintiff or his witnesses have stated as to on which date, this oral agreement was entered into between the parties. Everyone invariably stated "Few days thereafter". In order to prove existence of oral agreement between the parties claimed to have been entered into "Few days after i.e. on 27-11-2007, the plaintiff has examined himself and two other witnesses.

33. Ashok Mishra, PW-2 states that when sale deed could not take place under the first agreement dated 01-05-2007, due to non-availability of the approach road, few days thereafter, the parties met and it was mutually agreed that if the approach road could not be made available, the sale consideration would be reduced by 15 lakhs. He is unable to say the date on which oral agreement was entered into between the parties. He admits in his affidavit that he is an associate of the plaintiff Sunil Jain since last 15 years. In his cross-examination, he states that talks between the plaintiff and the defendant regarding alteration of terms of contract had taken place when he met with Ashok Jaiswal 1 ½ -2 months after 01-05-2007 and he does not remember the date. He states that on that date, documents were not shown to him and when he asked as to what will happen when road will not be made available, Ashok Jaiswal said that Registry would be made after reducing the sale consideration amount of 15 lakhs. According to this witness, this all happened within 1 ½ -2 months, some times in the month of June 2007. He has been given suggestion in his cross-examination that no such oral agreement was entered into between the parties. Similar is the statement of Abdul Hafiz, PW-3. According to him, he met Ashok Jaiswal in the month of April, 2008 and at that time, it was agreed between the parties under oral agreement that if approach road could not be made available, sale consideration would be reduced by 15 lakhs. According to him, this oral

agreement was entered into the parties, after withdrawal of first suit. Thus, both the witnesses Ashok Mishra, PW-2 & Abdul Hafiz, PW-3 talk of oral agreement between the parties at different point of time. While Ashok Mishra, PW-2, such oral agreement had taken place within two months of the first agreement. According to Abdul Hafiz, PW-3, oral agreement had taken place in April 2008, both the witnesses are unable to state the date, on which, oral agreement was entered into the parties. According to Sunil Kumar Jain, PW-1, such talks had taken place in the month of April 2008 and it was also agreed that the parties would not enter into litigation and whatever case is pending, would be withdrawn. According to the plaint averments, the plaintiff was permitted to withdraw his earlier suit on 24-04-2008. It has been rightly pointed out by learned counsel for the respondents that in the first suit filed by the plaintiff that there is no whisper of oral agreement between the parties. In all the correspondences between the parties, correspondences which has been filed by the plaintiff, there is no specific case of the plaintiff that the written agreement dated 01-05-2007 was, later on, altered in material terms under an oral agreement between the parties.

34. In view of above consideration, the plaintiff's case of parties having entered into oral agreement subsequently appears to be completely afterthought case and an attempt to get a relief of specific performance of contract on the pleadings that under the subsequent oral agreement, the sale considerations was reduced by 15 lakhs.

35. If according to the plaintiff, the performance of his part of contract under agreement dated 01-05-2007 was dependent upon the performance of defendants part of contract by him i.e. making available 30 feet wide approach road over the land, on which, the defendant had no control, such

contract could not be enforced in view of the provision contained in Section 14 of the Specific Relief Act.

36. Though submissions have been made on the aspect of relinquishment of claim at the appellate stage in view of our specific finding that the plaintiff's suit for specific performance of contract dated 01-05-2007 is barred by law, but also that such contract could not be specifically enforced and that the plaintiff has failed to prove that first agreement was altered by an oral agreement, no relief of specific performance of contract can be granted in favour of the plaintiff. This is specially so when the plaintiff has neither pleaded nor proved that even though making available the road, he was willing to pay the balance amount of consideration, after deduction of 6 lakhs paid as advance. Even if it is held that the contract was not capable of being performed in whole, yet the plaintiff's readiness and willingness continued at all stages, to accept part performances, the plaintiff may have a case under the law. However, in the present case, the plaintiff insisted on performance of whole part of contract, which included making available the approach road by the defendants. Therefore, the plaintiff, after having lost in the suit, now in the appeal, cannot turn around to say that the plaintiff is willing to accept the part performance by paying the balance amount of consideration, even though, no approach road is made available. In fact, it is contrary to the plaintiff's own pleading of oral agreement that the parties had agreed for sale by reducing price. Therefore, reliance on the decision of the Supreme Court in the case of ***Surjit Kaur versus Naurata Singh and another***³, is misplaced under the law. In that case, it was held:-

14. It must be clarified that this Court is not saying that merely because in correspondence or orally a party has insisted on performance of the whole contract he cannot thereafter elect to accept performance in part. A

3 (2000) 7 SCC 379

mere assertion that contract must be performed in full or even a filing of a suit for specific performance of the whole contract without averring that the plaintiff is willing to accept performance in part may not amount to electing not to accept performance in part. It is only in cases where a party has categorically refused to accept performance in part i.e. he has unambiguously elected not to accept part performance that he will be precluded from subsequently turning around and electing to accept performance in part. Whether a party has categorically elected or not will depend on facts of each case.

15. It is also settled law that specific performance cannot be granted to a party who has not been ready and willing at all stages to perform the contract. Of course, the 1st Respondent was ready and willing to perform the contract in its entirety. To that extent there would be readiness and willingness on the part of the 1st Respondent. But in cases where a contract is not capable of being performed in whole then the readiness and willingness, at all stages, is the readiness and willingness to accept part performance. If a contract is not capable of being performed in whole and a party clearly indicates that he is not willing to accept part performance, then there is no readiness and willingness, at all stages, to accept part performance. In that case there can be no specific performance of a part of the contract at a later stage. None of the authorities cited by Mr. Rao lay down anything contrary. In all those cases the party had been insisting on part performance and/or the time for election had not arrived. In none of those cases an election not to accept part performance had been made. It is under those circumstances that the Courts held that the party could elect to accept part performance at any stage of the litigation. In those cases it could not be said that there was no readiness and willingness to accept part-performance.”

37. For additional reason, we are not inclined to exercise discretion in favour of the plaintiff, which was admitted in the present case that after dismissal of the suit and before filing of the appeal, property in dispute has been sold in favour of the defendants No.5 & 6. Provision contained in Section 19(b) of the Specific Relief Act, 1963, protects a transferee for value who has paid his money in good faith and without notice of the original contract. Relief of specific performance of contract is discretionary relief.

38. In the result, the appeal is dismissed. Parties to bear their respective costs. Let appellate decree be drawn accordingly.

SD/-
(Manindra Mohan Shrivastava)
JUDGE

SD/-
(Rajani Dubey)
JUDGE