**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

RSA-3880-1998 (O&M)

Kishan Chand (through LRs) and others . . . . Appellants

Vs.

Balbir Singh and Others . . . . Respondents

Reserved on: 28.02.2025
Pronounced on: 01.04.2025
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CORAM: HON'BLE MR JUSTICE DEEPAK GUPTA

Argued by:- Ms. Naina Bajaj, Advocate for
LRs of appellant No.1.

Mr. M.L. Sarin, Sr. Advocate with
Mr. Ritesh Aggarwal, Advocate for
appellant Nos.2 and 3.

Mr. Amit Jain, Sr. Advocate with
Mr. Anupam Mathur, Advocate for
respondent Nos.1, 2, 3(i-ii), 4, 8, 9,
10, 11(1, ii, iv) and 12.

DEEPAK GUPTA, J.

Suit for specific performance of the property in dispute filed by plaintiffs Balbir Singh and others *(respondents herein)* was decreed by the trial Court of learned Sub Judge 1st Class, Faridabad vide his judgment & decree dated 17.04.1995. Appeal filed by the defendants Kishan Chand and others *(now appellants through respective LRs)* was dismissed by the first Appellate Court of learned District Judge, Faridabad vide judgment dated 19.08.1998. Against these concurrent findings, the defendants have approached this Court by way of the present Regular Second Appeal.

2. Trial Court record was called. Same has been perused. In order to avoid confusion, parties shall be referred as per their status before the trial Court.

3.1 Admittedly, defendant No.1 Kishan Chand was owner of agricul-

tural land measuring 417 Kanal 1 Marla being 8341/18032 share in total land measuring 901 Kanal 12 Marla situated in the Revenue Estate of Village Dulhepur, Tehsil Ballabgarh, District Faridabad as per Jamabandi for the year 1977-78. He agreed to sell the said land to the plaintiffs vide an **agreement to sell dated 28.04.1984 (Ex.P18)**, with following material terms & conditions:

- At the rate of ₹8,500/- per acre, i.e., for total sale consideration of ₹4,43,115.62/-.
- An amount of ₹1,00,000/- was received by him as earnest money. ***[Receipt - Ex.P19]***
- The possession of the land of the share, which was in possession of vendor at the time of agreement, was delivered to the plaintiffs – proposed vendees, who were authorized to utilize the land the way they liked.
- Sale deed was agreed to be executed and registered up to 01.06.1985 on payment of balance consideration of ₹3,43,115.62/-.
- Vendor i.e. defendant No.1 shall obtain income tax clearance certificate from the Income Tax Department prior to the target date.
- After the decision of the partition, the vendees will get the possession of that land, which will be allotted to defendant No.1 – vendor, for which the vendees will have no objection.
- In case by the target date of 01.06.1985, the partition proceedings are not completed due to any reason, the limitation for the execution & registration of the sale deed would automatically be considered as extended up to the final decision of the partition case.
- After getting the partition order incorporated in the revenue record, the defendant No.1 would give one month notice to the vendees for the execution and registration of the sale deed.

3.2 Since the partition proceedings were not complete up to 01.06.1985, so **supplementary agreement dated 10.06.1985 (Ex.P20)** was

executed amongst the parties, extending the date of registration for another two months of the information of decision of the appeal. An amount of ₹50,000/- ***[Receipt - Ex.P21]*** more was paid to defendant No.1 Kishan Chand at the time of this agreement, making total earnest money as ₹1,50,000/-. It was specifically *inter alia* stipulated in this agreement:

- That balance amount of ₹2,93,115.62/- shall be received by vendor at the time of registration of sale deed.

- That possession of the suit land had already been given to the buyers and that they were utilizing the same.

- That vendor was not satisfied with the partition order passed by the Assistant Collector First Grade, Ballabgarh and that the vendor i.e. defendant No.1 shall file appeal against the partition order before the Appellate Court and after decision of the appellate court, defendant No.1 give notice to the plaintiffs - vendees and after receipt thereof, the plaintiffs - vendees would get the sale deed executed and registered within next two months.

- That Vendor - defendant No.1 shall obtain income tax clearance certificate from the concerned Department before execution and registration of the sale deed.

- That rest of the terms and conditions shall be as per the prior agreement dated 28.04.1984.

3.3 As per plaintiffs, over and above the amount of ₹1,50,000/- already paid to defendant No.1, another amount of ₹12,000/- was paid to the defendant N: 1 - vendor on 11.06.1985 making the advance to ₹1,62,000/- out of the total sale consideration of ₹4,43,115.62/-.

3.4 The plaintiffs claimed that after obtaining possession of the suit land under the agreement dated 28.04.1984, they installed a tubewell and constructed a pacca room at their own expense before the completion of partition proceedings. However, during the partition, the tubewell & room were allotted

to Jagdish Chand, a co-sharer and brother of defendant No.1. The Collector, Ballabgarh, fixed ₹10,000/- as the price of the room, which Jagdish Chand paid to defendant No.1 through a receipt dated 10.05.1986. The plaintiffs contended that since they had constructed the room at their own cost, the amount received by defendant No.1 should be adjusted against the total sale price of ₹1,62,000/, making the paid amount to be ₹1,72,000/-.

3.5 As per plaintiffs, the possession of the land allotted to defendant No.1 in the partition proceedings was formally handed over to them on 30.05.2006 in the presence of Sampooran Singh *(husband of plaintiff No.5)* and the father of plaintiffs No.4 and 6, as recorded in ***Rapat No.460 (Ex.P34).***

3.6 The plaintiffs further asserted that they have always been ready and willing to execute the sale deed upon payment of the balance consideration, but defendant No.1 failed to fulfil his obligation. On 23.04.1986, defendant N: 1 sent a **legal notice *[Ex.PW3/A]*** through his counsel to Sampooran Singh *(husband of plaintiff No.5)* and the father of plaintiffs No.4 and 6, urging the plaintiffs for completion of the sale deed. In response, the plaintiffs through their counsel sent **reply dated 30.06.1986 *[Ex.P23],*** requesting defendant No.1 to obtain income tax clearance certificate and to get the mutation recorded in revenue records regarding the partition to facilitate the sale. However, defendant No.1 did not comply.

3.7 Subsequently, defendant No.1 entered into an **agreement to sell dated 17.07.1986 *(Ex.DW3/A)*** with defendant No.2 to sell his land for consideration of ₹4,00,000/- and appointed defendant No.3 as his general power of attorney for execution and registration of sale deed in favour of said defendant No.2. Plaintiffs claimed the said agreement to sell in favour of defendant No.2 to be not binding upon them in view of the prior agreement in their favour. They came to know about this agreement, when they filed a civil suit for permanent injunction on 28.07.1986. This agreement was alleged to have been executed by defendant No.1 with mala fide intention. Plaintiffs claimed that they had never parted with the possession of suit land.

3.8 With all the above averments, plaintiffs filed the suit on the basis of agreement to sell dated 28.04.1984 & 10.06.1985 claiming the decree for specific performance on payment of balance sale consideration with consequential relief of permanent injunction to restrain the defendants from interfering in their possession. In alternative, they claimed the recovery of ₹4,43,115.62/- along with interest from the date of the first agreement.

4.1 All the three defendants filed joint written statement, raising preliminary objection that suit was barred under Order II Rule 2 and Section 11 CPC; that impugned agreement to sell with the plaintiffs had already been terminated or revoked or rescinded due to their act, conduct and omissions; that plaintiffs had taken false plea of delivery of possession to them; that vide agreement dated 17.07.1986, defendant No.1 had handed over the possession of disputed land to defendant No.2 and thus, he was in possession thereof and his possession was liable to be protected under Section 53-A of Transfer of Property Act; that defendant N: 1 had already performed his part of contract and nothing remained to be done on his part.

4.2 It is also claimed that defendant No.1 had only received an amount of ₹75,000/- from the plaintiffs. There was no question of the plaintiffs having installed the tubewell or constructing any room on the suit land, as they were not in possession thereof. Defendants further denied the readiness and willingness of the plaintiffs to perform their part of contract as per the terms and conditions of the agreement to sell. Denying the entitlement of the plaintiffs to seek the decree of specific performance or recovery for total sale consideration in the alternative, defendants prayed for dismissal of the suit.

4.3 In the counter-claim separately filed by defendant No.2, it was claimed that he was one of co-sharer in possession of the suit land with other co-sharers. As per him, in the partition proceedings initiated by defendant N: 1, he was allotted 417 Kanal 2 Marla of land, the possession whereof was delivered to him on 30.05.1986, which he further delivered to him *(defendant N: 2)* on 17.07.1986, when defendant No.1 agreed to sell this land to him for ₹4,00,000/- vide agreement dated 17.07.1986 for consideration. Claiming to be

bonafide purchaser of suit land for value and without notice of the prior agreement to sell, defendant N: 2 claimed that he had taken reasonable care to ascertain that defendant No.1 had power to transfer the suit land to him. He submitted further that sale deed could not be registered in his favour on account of failure of defendant N: 1 to obtain income tax clearance certificate; and temporary injunction obtained by plaintiffs is ensuing litigation.

5. In re-joinder, plaintiffs reiterated their claim. They also opposed the counter-claim of defendant No.2.

6. Necessary issues were framed. Evidence produced by the parties was taken on record.

7. Learned trial Court held:

- that both the agreements to sell as relied by the plaintiffs were duly proved and that said agreements had not been terminated.

- that plaintiffs were ready and willing to perform their part of contract as per terms of the two agreements dated 28.04.1984 and 10.06.1985 and that they had already paid an amount of ₹1,62,000/- and further, defendant No.1 had received an amount of ₹10,000/- during partition proceedings as the cost of tubewell and kotha, which had been raised by the plaintiffs and thus, he was liable to adjust this amount in total sale consideration and this way, he had already received an amount of ₹1,72,000/- and not ₹75,000/- as had been alleged.

- that plaintiffs had received the actual physical possession of the suit land at the time of agreement to sell and had installed tubewell and constructed a kotha upon one of the killa bearing No.16.

- that defendant No.1 had failed to comply with the terms of the agreement by not getting the income tax clearance certificate and by not getting the partition proceedings mutated in the revenue record.

- that defendant No.2 had the knowledge of the previous agreement to sell

with the plaintiffs and that he had got the agreement executed in his favour with mala fide intention and as such, he was not a bona fide purchaser for valuable consideration without notice and as such, agreement to sell dated 17.07.1986 in favour of defendant No.2 and general power of attorney dated 21.07.1986 in favour of defendant No.3 were null & void and not binding on the rights of the plaintiffs.

- that defendant No.2 was not entitled to the protection under the provisions of Section 41 and 53-A of the Transfer of Property Act, as it was found that the above documents were got executed in collusion with each other to defeat the rights of the plaintiffs.

- that suit was not barred under Order II Rule 2 CPC, or Section 11 CPC.

Consequently, suit for specific performance was decreed by the trial Court on 17.04.1995.

8. All the findings as returned by the trial Court were endorsed by the first Appellate Court of learned District Judge, Faridabad, dismissing the appeal filed by the defendants, on 19.08.1998.

Contentions of appellants – defendants:

9.1 Assailing the aforesaid concurrent findings of facts recorded by courts below before this Court, it is argued by Sh. M.L. Sarin, Learned Senior Advocate for the appellants – defendants assisted by Ms. Naina Bajaj, Advocate, who is also one of the LRs of the deceased-appellant No.1 that readiness and willingness on the part of the plaintiffs is not proved and that learned Courts below have erred in believing the testimony of Sampooran Singh, examined on behalf of the plaintiffs, as the attorney of the plaintiffs despite the fact that said PW7 Sampooran Singh had been appointed as attorney much later. It is argued that readiness and willingness to perform part of contract on behalf of the plaintiffs as buyers can be proved only by the plaintiffs and not by their attorney. Reliance in this regard is placed upon ***"Rajesh Kumar v. Anand Kumar" AIR 2024 Supreme Court 3017***; besides ***"Man Kaur v. Hartar Singh Sangha" (2010) 565;*** & ***"Manisha Mahendra Gala v. Shalini Bhagwan Avatramani" (2024) 6 SCC***

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9.2 It is next contended by learned senior advocate that both the Courts below committed error in coming to the conclusion that the present suit was not barred under the provisions of Order II Rule 2 CPC and Section 11 CPC. It is urged that plaintiffs had earlier instituted three separate suits. In two of the suits filed earlier against the defendants for permanent injunction, the relief of specific performance was also available but the same was not claimed. Reliance is placed upon ***"Kewal Singh v. Lajwanti" AIR 1980 Supreme Court 161***; ***"Ishar Dass v. Kanwar Bhan" (1991-2) PLR 578***; ***"Rao Narain Singh v. Smt. Durga Devi" (1997-3) PLR 760***; ***"Bhagwan Kaur v. Harender Pal Singh" 1991 PLJ 681***; ***"Sidramappa v. Rajashetty and ors." AIR 1970 SC 1059***; ***"Tarsem Singh v. Sibu Ram" 1997 (2) PLJ 268***; ***"Smt. Ralli v. Satinderjit Kaur" (1998) 118 PLR 666*** *and* ***"Vurimi Pullarao v. Vemari Vyankata Radharani" AIR 2020 SC 395***.

9.3 It is further urged that obtaining of the income tax clearance certificate by defendant No.1 has been wrongly made as the basis by the plaintiffs for seeking specific performance, as the same was the position when they had filed the earlier suits and therefore, non-obtaining of the clearance tax certificate cannot be a ground for non-performing their part of contract by the plaintiffs.

9.4 It was also argued that suit was barred by limitation; and that counter-claim as filed by defendant N: 2 has been wrongly rejected.

9.5 With all these submissions, prayer is made for setting aside the judgments & decrees as passed by the Courts below with further prayer to dismiss the suit of the plaintiffs-respondents for specific performance by allowing this appeal.

<u>Contentions of respondents – plaintiffs:</u>

10.1 Refuting the aforesaid contentions, Sh. Amit Jain, Learned Senior Advocate appearing for the respondents-plaintiffs contended that there is no scope for interference in the concurrent findings of facts as recorded by the Courts below.

10.2 It is contended that both lower courts correctly upheld the execution of the agreements dated 28.04.1984 and 10.06.1985, as the defendants did not dispute their execution in the written statement. The defendants' claim that the agreements were terminated lack cogent evidence. Notably, defendant No.1 Kishan Chand did not testify, and defendant No.3, who appeared as his attorney, had no knowledge of the transactions with the plaintiffs. Moreover, he was appointed as attorney only on 21.07.1986, long after the agreements had been executed.

10.3 It is further argued that plaintiffs produced sufficient evidence to prove their readiness and willingness. Refuting the contention to the effect that none of the plaintiffs entered the witness-box, it is pointed out that Sampooran Singh entered the witness-box as general power of attorney holder of the plaintiffs. Not only the fact that he is the GPA holder of the plaintiffs, he is also the husband of one of the plaintiffs and father of two of the plaintiffs'. Learned senior advocate has drawn attention towards Section 120 of the Indian Evidence Act to contend that husband can testify as a witness for the wife. It is further argued that Sampooran Singh has been involved in the transaction since beginning. Even the legal notice had been sent by the defendant No.1 to said Sampooran Singh. Said Sampooran Singh was present, when the possession of the suit property was delivered after the conclusion of the partition proceedings and as such, it cannot be said that readiness & willingness of the plaintiffs is not proved due to non-examination of plaintiffs.

10.4 Regarding the plea of bar of the suit under Order II Rule 2 CPC and Section 11 CPC, it is contended by learned senior advocate that out of three suits filed by the plaintiffs previously, the plaint of two of the previous suits were rejected under Order VII Rule 11 CPC, with the specific finding by the Court concerned that plaintiffs were at liberty to seek the alternative remedy of filing the suit for specific performance. Besides, learned counsel has specifically drawn attention towards Order VII Rule 13 CPC, as per which when the plaint is rejected on any of the grounds under Order VII Rule 11 CPC that does not bar the filing of the fresh suit on the same cause of action. As far as the third suit is

concerned, that was filed only against defendant Nos.2 & 3 to restrain them from interfering in the possession of plaintiffs. However, that suit was dismissed as withdrawn on the statement of counsel for the plaintiffs having become in-fructuous, in view of the filing of the present suit for specific performance.

10.5 Learned counsel contends further that possession of the plaintiffs over the suit land has been found by both the Courts below, on the basis of oral as well as documentary evidence brought on file. It is argued that the evidence produced on record was initially appreciated by the trial Court and thereafter, it was thoroughly thrashed by the first Appellate Court, who found no ground to interfere in the findings of the trial Court.

10.6 The learned counsel further argues that the High Court's scope for interfering with the concurrent findings of the lower courts is highly limited. In the present case, there is no illegality or perversity in the lower courts' findings that would warrant interference. There has been no misreading of evidence, nor have the appellants identified any evidence that was overlooked.

10.7 Based on the above submissions, the learned senior advocate for the respondents - plaintiffs requests the dismissal of the appeal. Learned counsel has also referred to ***"Sucha Singh Sodhi v. Baldev Raj Walia" 2018(2) RCR Civil 78; "Ratnavathi and anr. v. Kavita Ganashamdas" 2018(2) SCC 736; "Inbasegaran v. S. Natarajan" 2014 (6) RAJ 130; "Bhagwan Kaur v. Harinder Pal Singh" 1991 PLJ 68; "Delhi Waqf Board v. Jagdish Kumar Narang" 1997 (10) SCC 192; "Janki Vashdeo Bhojwani v. Indusind Bank Ltd. and Ors." 2005 (1) RCR (Civil) 240; "Alka Gupta v. Narender Kumar Gupta" 2011 AIR (SC) 9; "R. M. Sundaram v. Sh. Kayarohanasamy" 2022 (2) ERC 520; "Mohan Singh v. Smt. Prem Aggarwal" 2022 (2) Law Herald 20600*** and ***"Gaddipati Divija v. Pathuri Samrajyam" 2023 (3) RCR (Civil) 19.***

11. This Court has considered submissions of both the sides at depth and have appraised the entire record thoroughly and carefully.

<u>Plea of bar under Order II Rule 2 CPC & Section 11 CPC:</u>

12. One of the principle argument raised by learned senior advocate for the appellants-defendants is regarding the maintainability of the suit, as it is contended that suit was barred under Order II Rule 2 CPC to be read with Section 11 CPC because of the previous litigation, which was initiated by the plaintiffs and which were dismissed.

13. Prior to the present suit, plaintiffs had filed following three suits:

- Suit No.463 of 1986
- Suit No.504 of 1986
- Suit No.422 of 1986

14. *Suit No. 463 of 1986* was filed by the plaintiffs solely against defendant No.1 Kishan Chand. The plaintiffs sought to restrain him from interfering with their possession as prospective vendees, alleging that he was deliberately delaying the procurement of the income tax clearance certificate and other necessary steps under the agreement, while attempting to forcibly dispossess them. Additionally, they sought a mandatory injunction to direct the defendant to execute the sale deed. The plaint of this suit is **Ex.D1**. However, the suit was dismissed by **order dated 17.11.1986 (Ex.D7)** with the court ruling that the plaintiffs had an equally efficacious remedy available—filing a suit for specific performance of the agreement to sell. Instead of amending the plaint, they were advised to pursue this alternative remedy. The court explicitly noted that the findings required in a suit for specific performance could not be adjudicated within an injunction suit and as such, matter must be determined independently.

15. Another *suit bearing No.504 of 1986* was filed by the plaintiffs against all the defendants pleading that defendant No.1 instead of executing the sale deed in favour of the plaintiffs, without obtaining the income tax clearance certificate and getting the mutation entered in respect of the partition, had executed an agreement to sell in favour of defendant No.2 and GPA in favour of defendant No.3, which are ineffective and not binding on the right, title or interests of the plaintiffs. Prayer was made to declare the agreement to sell in favour

of defendant No.2 and GPA in favour of defendant No.3 as null & void and restrain defendant N: 1 from alienating the suit property. The copy of plaint of the said suit is **Ex.DW3/H**. Plaint of this suit was rejected vide order dated 17.11.1986 **(Ex.D10)** after observing that plaintiffs had got equally efficacious remedy of seeking specific performance of the agreement to sell and that suit for permanent & mandatory injunction was not maintainable.

16. The third suit bearing *suit No.422 of 1986* was filed by the plaintiffs only against defendant Nos.2 & 3 to restrain them from interfering in the possession of the plaintiffs. Said suit was dismissed as withdrawn on 29.11.1986 vide **order Ex.D11** on the **statement Ex.D8** made by counsel for the plaintiffs to have become infructuous, as the present suit had been filed for specific performance.

17. It is clear from orders Ex.D7 and Ex.D10 that the previous two suits as filed by the plaintiffs were not decided on merits and rather, the plaint of both those suits was rejected.

18. Question is whether in the aforesaid facts and circumstances, the bar of Order II Rule 2 CPC or that of Section 11 CPC applies. Order II Rule 2 CPC runs as under:

> ***"Suit to include the whole claim.—***(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish and portion of his claim in order to bring the suit within the jurisdiction of any Court.
>
> ***(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) Omission to sue for one of several reliefs.—***A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.
>
> ***Explanation.—***For the purposes of this rule an obligation and a collateral secu-

rity for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action."

19.1 After making reference to the aforesaid Rule, it has been held by Hon'ble Supreme Court in ***Kewal Singh v. Rajwanti (supra)*** that this provision applies to cases, where a plaintiff omits to sue a portion of the cause of action on which the suit is based either by relinquishing the cause of action or by omitting a part of it. The provision has no application to cases, where the plaintiff basis his suit on separate & distinct causes of action and chooses to relinquish one or the other of them. In such cases, it is always open to the plaintiff to file a fresh suit on the basis of a distinct cause of action, which he may have so relinquished.

19.2 Effect of rejection of plaint under order VII Rule 11 *vis-a vis* Order II Rule 2 CPC was not considered in above case.

20.1 Learned senior advocate for the appellants has also referred to ***Ishar Dass v. Kanwar Bhan (supra)***, wherein it was observed by this Court that when the plaintiff had earlier filed a suit for permanent injunction and later filed another suit for specific performance and continued litigating both the suits and thereafter, suit for permanent injunction was withdrawn, in those circumstances the suit for specific performance was barred under Order II Rule 2 CPC, as the relief of specific performance was not availed of, when it was available and no such permission for reserving the right was obtained by him from the Court.

20.2 This authority is not at all applicable to the facts of the present case, as it is not the case of the defendants that plaintiffs had continued the suit for specific performance as well as the suit for permanent injunction side by side. Rather, the case of the defendants is that at the time of filing of the present suit for specific performance of agreement, one of the earlier suit for permanent injunction was got dismissed, and the plaint of two other suits were rejected.

20.3 Moreover, in ***Ishar Singh's case***, sale deed was to be completed on 25.04.1980 after receiving the balance sale consideration and suit for injunction

was filed on 28.04.1980 i.e. after the cause of action to file the suit for specific performance had arisen. However, in the present case, cause of action to file the suit for specific performance had not arisen, as defendant No.1 had neither obtained the income tax clearance certificate from the Income Tax Department as was required under the agreement to sell nor had got the partition proceedings mutated in the revenue record. Besides, plaint of earlier suit had not been rejected in previous suit, as is the situation in the present case.

21.1 Similarly, in ***Rao Narain Singh's case*** as cited by counsel for the appellants, it was observed by this Court that plaintiffs not only omitted to sue for specific performance of contract or recovery of the earnest money but also did not seek leave of the Court to sue for such relief afterwards i.e. by filing earlier suit for injunction, the plaintiffs had disentitled themselves from filing the suit for specific performance subsequently because the cause of the action in both the suits were the same.

21.2 This authority is again not applicable to the facts of this case, as plaint of earlier suit had not been rejected in previous suit, as is the situation in the present case.

22. In all other authorities as cited by Ld. Senior Advocate for the appellants in support of his contention regarding bar of Order II Rule 2 CPC, plaint of the previous suit had been rejected by the Court, as is the situation in the present case.

23. However, in the present case, the plaint of the earlier two suits instituted by the plaintiffs had been rejected, as has been observed earlier. In this regard, Order VII Rule 13 CPC is very relevant, which reads as under:

> ***"13. Where rejection of plaint does not preclude presentation of fresh plaint.*** —The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action."

24. In ***Delhi Waqf Board v. Jagdish Kumar Narang's case (supra),*** Hon'ble Supreme Court after referring to abovesaid Order VII Rule 13 CPC held

that in view of the clear bar contained in Order VII Rule 13, the subsequent suit was not barred by the earlier order rejecting the plaint in the earlier suit and so, courts were not justified in holding the present suit to be barred by virtue of rejection of earlier suit.

25. In view of above legal position, it is held that as the plaint in previous two suits filed by the plaintiffs had been rejected, therefore, it does not create bar in filing fresh suit on same cause of action.

26. As far as the third suit No.422 of 1986, which was filed by the plaintiffs against defendant Nos.2 and 3 is concerned, it was only to restrain these defendants from interfering in the possession of the plaintiffs. The suit was withdrawn after the institution of the present suit for specific performance.

27. In ***Sucha Singh Sodhi v. Baldev Raj Walia's case (supra),*** Hon'ble Supreme Court confronted the situation, when suit for permanent injunction filed by the plaintiff to restrain the defendant from interfering in the possession, claiming to have entered into agreement to sell with defendant, was withdrawn and subsequent suit was filed for specific performance. It was held by Hon'ble Supreme Court that cause of action to claim relief of permanent injunction and cause of action to claim relief of specific performance of agreement are independent. One cannot include other and vice versa. Plaintiff cannot claim relief for specific performance of the agreement against defendant on cause of action on which he has claimed the relief of permanent injunction. Hon'ble Supreme Court also observed that cause of action for permanent injunction and specific performance of agreement are governed by separate Articles of limitation Act and therefore, it is not possible to claim both reliefs together.

28. In view of the aforesaid facts and circumstances, it is held that Courts below did not commit any error in holding the present suit as filed by the plaintiffs to be not barred under the provisions of Order II Rule 2 CPC. Nor the present suit can be held to be barred by principles of res-judicata under Section 11 CPC, for the simple reason that none of the previous suits had been adjudicated on merits. As such, contention of Ld. Advocate in this regard is rejected.

Readiness and willingness – competency of power of attorney to depose:

29. The primary argument presented by the learned Senior Advocate for the appellants, challenging the findings of the lower courts, concerns the plaintiff's readiness and willingness to fulfil their contractual obligations. It is contended that none of the plaintiffs personally testified to establish this aspect. Instead, they relied on the deposition of Sh. Sampooran Singh (PW-7), who appeared as their attorney based on a General Power of Attorney (GPA) dated 03.12.1991 (Ex.P17). Attention is drawn to the initial agreement to sell, dated 28.04.1984 (Ex.P18), which was executed and signed by one of the plaintiffs, Balbir Singh, on their behalf. The subsequent agreement (Ex.P20), dated 10.06.1985, was signed by Sampooran Singh representing the plaintiffs; however, at that time, he had not yet been appointed as their General Power of Attorney. Given these circumstances, it is argued that PW-7 Sampooran Singh was not a competent witness to establish the plaintiffs' readiness and willingness to perform their contractual duties.

30. Conversely, the learned Senior Counsel for the respondents-plaintiffs argues that Sampooran Singh is not merely their Attorney but also closely related to them, being the husband of one plaintiff and the father of two others. It is contended that it is not mandatory for all plaintiffs to testify individually, as the statement of even one is sufficient. In this case, PW-7 Sampooran Singh, as the husband of a plaintiff, was competent to depose on her behalf under Section 120 of the Indian Evidence Act, regardless of whether he held the General Power of Attorney at the relevant time.

31. In ***Rajesh Kumar Vs. Anand Kumar (supra),*** in a suit for specific performance, based upon agreement to sell dated 26.09.1995 followed by subsequent agreement dated 26.12.1996. The plaintiff – vendee did not testify and instead had his Power of Attorney holder, examined as PW-1. This GPA got recorded his statement on 05.09.2002, whereas the Power of Attorney was executed on 26.08.2002. Notably, the suit was not instituted by the Power of Attorney holder; he appeared solely to provide evidence as the plaintiff's Special Power of Attorney holder. It was in this factual background that Hon'ble

Supreme Court examined the issue relating to admissibility of a Power of Attorney holder's testimony. It was held as under:

> "8. ……The legal position as to when the deposition of a Power of Attorney Holder can be read in evidence has been dealt with by this Court in several decisions.
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> 9. In ***Janki Vashdeo Bhojwani v. Indusind Bank Ltd. AIR 2005 SC 439***, it is held that a Power of Attorney Holder cannot depose for principal in respect of matters of which only principal can have personal knowledge and in respect of which the principal is liable to be cross-examined. It is also held that if the principal to the suit does not appear in the witness box, a presumption would arise that the case set up by him is not correct. This Court has discussed the legal position in the following words in paras 13 to 22:
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> > "13. Order 3 Rules 1 and 2 CPC empower the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in Order 3 Rules 1 and 2 CPC confines only to in respect of "acts" done by the power-of-attorney holder in exercise of power granted by the instrument. The term "acts" would not include deposing in place and instead of the principal. In other words, if the power-of-attorney holder has rendered some "acts" in pursuance of power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter of which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.
> >
> > 14. Having regard to the directions in the order of remand by which this Court placed the burden of proving on the appellants that they have a share in the property, it was obligatory on the part of the appellants to have entered the box and discharged the burden. Instead, they allowed Mr Bhojwani to represent them and the Tribunal erred in allowing the power-of-attorney holder to enter the box and depose instead of the appellants. Thus, the appellants have failed to establish that they have any independent source of income and they had contributed for the

purchase of the property from their own independent income. We accordingly hold that the Tribunal has erred in holding that they have a share and are co-owners of the property in question. The finding recorded by the Tribunal in this respect is set aside.

15. Apart from what has been stated, this Court in the case of ***Vidhyadhar v. Manikrao [(1999) 3 SCC 573]*** observed at SCC pp. 583-84, para 17 that:

> "17. Where a party to the suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct…."

16. In civil dispute the conduct of the parties is material. The appellants have not approached the Court with clean hands. From the conduct of the parties, it is apparent that it was a ploy to salvage the property from sale in the execution of decree.

17. On the question of power of attorney, the High Courts have divergent views. In the case of ***Shambhu Dutt Shastri v. State of Rajasthan [(1986) 2 WLN 713 (Raj)***] it was held that a general power-of-attorney holder can appear, plead and act on behalf of the party but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in the witness box on behalf of himself. To appear in a witness box is altogether a different act. A general power-of-attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff.

18. The aforesaid judgment was quoted with approval in the case of ***Ram Prasad v. Hari Narain [AIR 1998 Raj 185 : (1998) 3 Cur CC 183]***. It was held that the word "acts" used in Rule 2 of Order 3 CPC does not include the act of power-of-attorney holder to appear as a witness on behalf of a party. Power-of-attorney holder of a party can appear only as a witness in his personal capacity and whatever knowledge he has about the case he can state on oath but he cannot appear as a witness on

behalf of the party in the capacity of that party. If the plaintiff is unable to appear in the court, a commission for recording his evidence may be issued under the relevant provisions of CPC.

19. In the case of ***Pradeep Mohanbay (Dr.) v. Minguel Carlos Dias [(2000) 1 Bom LR 908]*** the Goa Bench of the Bombay High Court held that a power of attorney can file a complaint under Section 138 but cannot depose on behalf of the complainant. He can only appear as a witness.

20. However, in the case of ***Humberto Luis v. Floriano Armando Luis [(2002) 2 Bom CR 754]*** on which reliance has been placed by the Tribunal in the present case, the High Court took a dissenting view and held that the provisions contained in Order 3 Rule 2 CPC cannot be construed to disentitle the power-of-attorney holder to depose on behalf of his principal. The High Court further held that the word "act" appearing in Order 3 Rule 2 CPC takes within its sweep "depose". We are unable to agree with this view taken by the Bombay High Court in Floriano Armando [(2002) 2 Bom CR 754].

21. We hold that the view taken by the Rajasthan High Court in the case of Shambhu Dutt Shastri [(1986) 2 WLN 713 (Raj)] followed and reiterated in the case of Ram Prasad [AIR 1998 Raj 185 : (1998) 3 Cur CC 183] is the correct view. The view taken in the case of Floriano Armando Luis [(2002) 2 Bom CR 754] cannot be said to have laid down a correct law and is accordingly overruled.

22. In the view that we have taken, we hold that the appellants have failed to discharge the burden that they have contributed towards the purchase of property at 38, Koregaon Park, Pune from any independent source of income and failed to prove that they were co-owners of the property at 38, Koregaon Park, Pune. This being the core question, on this score alone, the appeal is liable to be dismissed."

10. Thereafter, in ***Man Kaur v. Hartar Singh Sangha, 2010 (10) SCC 512,*** this Court referred to its earlier decisions including ***Janki Vashdeo Bhojwani (supra)*** and concluded thus in paras 17 & 18:

"17. To succeed in a suit for specific performance, the plaintiff has to prove: (a) that a valid agreement of sale was entered into by the defendant in his favour and the terms thereof; (b) that the defendant committed breach of the contract; and (c) that he was always ready and willing to perform his part of the obligations in terms of the contract. If a plaintiff has to prove that he was always ready and willing to perform his part of the contract, that is, to perform his obligations in terms of the contract, necessarily he should step into the witness box and give evidence that he has all along been ready and willing to perform his part of the contract and subject himself to cross-examination on that issue. A plaintiff cannot obviously examine in his place, his attorney-holder who did not have personal knowledge either of the transaction or of his readiness and willingness. Readiness and willingness refer to the state of mind and conduct of the purchaser, as also his capacity and preparedness on the other. One without the other is not sufficient. Therefore, a third party who has no personal knowledge cannot give evidence about such readiness and willingness, even if he is an attorney-holder of the person concerned.

18. We may now summarise for convenience, the position as to who should give evidence in regard to matters involving personal knowledge:

(a) An attorney-holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.

(b) If the attorney-holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney-holder alone has personal knowledge of such acts and transactions and not the principal, the attorney-holder shall be examined, if those acts and transactions have to be proved.

(c) The attorney-holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions

or dealings of the principal, of which principal alone has personal knowledge.

(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney-holder, necessarily the attorney-holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorised managers/attorney-holders or persons residing abroad managing their affairs through their attorney-holders.

(e) Where the entire transaction has been conducted through a particular attorney-holder, the principal has to examine that attorney-holder to prove the transaction, and not a different or subsequent attorney-holder.

(f) Where different attorney-holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney-holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his “state of mind” or “conduct”, normally the person concerned alone has to give evidence and not an attorney-holder. A landlord who seeks eviction of his tenant, on the ground of his “bona fide” need and a purchaser seeking specific performance who has to show his “readiness and willingness” fall under this category. There is however a recognised exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or “readiness and willingness”. Examples of such attorney-holders are a husband/wife exclusively managing the affairs of

his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad."

11. In a more recent judgment of this Court in the matter of ***A.C. Narayanan v. State of Maharashtra (2014) 11 SCC 790***, this Court again considered the earlier judgments, particularly, ***Janki Vashdeo Bhojwani (supra)*** and having noticed that Janki Vashdeo Bhojwani relates to Power of Attorney Holder under CPC, whereas in the matter of (A.C. Narayanan), the Court was concerned with a criminal case. It was observed that since criminal law can be set in motion by anyone, even by a stranger or legal heir, a complaint under Section 138 of the Negotiable Instruments Act, 1881 preferred by the Power of Attorney Holder is held maintainable and also that such Power of Attorney Holder can depose as complainant.

12. Having noticed the three judgments of this Court in ***Janki Vashdeo Bhojwani (supra), Man Kaur (supra) & A.C. Narayanan (supra),*** we are of the view that in view of Section 12 of the Specific Relief Act, 1963, in a suit for specific performance wherein the plaintiff is required to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract, a Power of Attorney Holder is not entitled to depose in place and instead of the plaintiff (principal). In other words, if the Power of Attorney Holder has rendered some 'acts' in pursuance of power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the act done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter of which only the principal can have personal knowledge and in respect of which the principal is entitled to be cross-examined. If a plaintiff, in a suit for specific performance is required to prove that he was always ready and willing to perform his part of the contract, it is necessary for him to step into the witness box and depose the said fact and subject himself to cross-examination on that issue. A plaintiff cannot examine in his place, his attorney holder who did not have personal knowledge either of the transaction or of his readiness and willingness. The term 'readiness and willingness' refers to the state of mind and conduct of the purchaser, as also his capacity and preparedness, one without the other being

not sufficient. Therefore, a third party having no personal knowledge about the transaction cannot give evidence about the readiness and willingness."

32. Thus, when the law requires a party to prove an aspect related to their "state of mind" or "conduct," the individual concerned must typically provide evidence personally, rather than through an attorney-holder. This applies, for instance, to a landlord seeking eviction based on "bona fide" need or a purchaser demonstrating "readiness and willingness" in a specific performance case. Hon'ble Supreme Court in ***Rajesh's case*** after referring to various precedents emphasized that the plaintiff must personally testify under oath. Failure to do so or to undergo cross-examination may lead to an adverse inference. While the plaintiff's Power of Attorney holder can also testify, but he cannot speak on matters beyond his personal knowledge. In other words, he cannot depose on facts known only to the plaintiff. However, as explained by Hon'ble Supreme Court in ***Man Kaur's Case (supra),*** an exception exists when an attorney-holder, such as a close family member, exclusively manages the party's affairs. In such cases, their testimony may be accepted even on matters of bona fides or readiness and willingness—for example, a spouse solely handling the affairs of the other.

33. Notably, neither in ***Rajesh's case (supra)*** nor in ***Janki Vashdeo Bhojwani (supra), Man Kaur (supra) & A.C. Narayanan (supra),*** the effect of Section 120 of the Indian Evidence Act was considered qua competency of a spouse to testify for the other.

34. Section 120 of the Indian Evidence Act provides for the competency of the husband to appear as witness for the wife and vice versa. It reads as under:

> ***"120. Parties to civil suit, and their wives or husbands. Husband or wife of person under criminal trial.*** — In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness."

35. This provision affirms the competency of parties and their spouses as witnesses in both civil and criminal proceedings. It establishes that individuals directly involved in a case, along with their spouses, are legally permitted to testify. In civil disputes concerning rights, obligations, or property, both parties are considered competent witnesses, and their spouses may also testify, if their evidence is relevant. This means that either party can provide testimony in support of their claims or defense, and their spouse can do the same if relevant to the case. The law does not bar spousal testimony, acknowledging its potential significance to the case.

36. The above rule of law appears to be enunciated on the well-founded Indian mythology, as per which husband and wife are believed to be one person and not separate. It is in consonance with the concept of *Ardha Nareshwar*. Even in the western culture, wife is referred as a better half i.e., to be the part of same person. In these circumstances, this Court is of the view that while considering Section 120 of the Indian Evidence Act, viz-a-viz the decisions of Hon'ble Supreme Court in ***Rajesh Kumar v. Anand Kumar*** and ***Janki Vashdeo Bhojwani v. Indusind Bank Ltd. and Ors. etc,*** the husband and wife can depose for one another and as such, husband of the plaintiff can give oral evidence, which shall be confined to the facts within his knowledge. There is no bar on the part of the husband to depose on behalf of the plaintiff-wife, though the statement is to be confined to the facts within his knowledge. Same view has been taken by Allahabad High Court in ***"Rajni Shukla v. The Special Judge Banda" 2007 (40) AWC 4176*** and in ***"Munni Devi v. Sona Devi" Writ Appeal No.11660 of 2009 decided on 09.09.2014.***

37. In ***Shenbagavalli Vs Kallaichelvi S.A.No.120 of 2008 decided on 30.11.2020*** by High Court of Judicature at Madras, it has been held as under:

> "21. For close to a century and a half, Courts in India have generally accepted the view that a spouse is a competent witness for the other spouse, though without raising a pointed issue on the possibility of Sec.120 breaching best evidence rule. See: ***T. Rangaswami. v. T. Aravindammal*** [AIR 1957 Madras 243], ***K. Saroja Vs Valliammal Ammal*** [1996-II-MLJ 199], ***T.J Ponnen v M.C***

Varghese [AIR 1967 Kerala 228], ***Kurella Naga Druva Vudaya Bhaskar Rao v Galla Jankiamma*** [(2009) 6 ALT 164], ***Muralidhar Pinjani v Sheela Tandon*** of [(2007) 3 MP LJ 506), ***Sant Footwear v Daya Bindra*** [2014 AIR CC 1154] to mention a few. A harmonious and a literal interpretation of Sec.120 with the rest of the provisions of the Evidence can only lead to a position that the spousal competency granted under it is unrestricted, and this has stabilized firmly as the generally accepted view."

38. Still further, even Hon'ble Supreme Court in ***Rajesh's case*** after referring to various precedents though emphasized that the plaintiff must personally testify under oath and the plaintiff's Power of Attorney holder cannot speak on matters beyond his personal knowledge, but as explained by Hon'ble Supreme Court in ***Man Kaur's Case (supra),*** an exception exists when an attorney-holder, such as a close family member, exclusively manages the party's affairs. In such cases, their testimony may be accepted even on matters of bona fides or readiness and willingness—for example, a spouse solely handling the affairs of the other.

39. Thus, though there cannot be any dispute as to the principles of law enunciated in ***Janki Vashdeo Bhojwani's case; Man Kaur's case and Rajesh Kumar's case*** but when husband or wife depose on behalf of the plaintiff-spouse, then the said principle of law will not be applicable. A non-litigant spouse is a competent witness for the other spouse to litigation. Section 120 of the Indian Evidence Act permits the husband to give evidence in place and instead of his wife and vice versa even in the absence of a written Authority or Power of Attorney. Such a witness is entitled to depose not only the facts within his/her knowledge but also within the knowledge of his/her spouse.

40. In view of legal position as above, it is held that PW7 Sampooran Singh being the husband of one of the plaintiffs Smt. Surinder Kaur was competent to depose on behalf of the said plaintiff.

41. Apart from above, it is very important to notice that Sampooran Singh has been involved in the transaction since beginning. So much so, since beginning, defendant No.1 Kishan Chand (Vendor) himself has been

acknowledging Sampooran Singh to be the person representing the plaintiffs. As is evident from the record, subsequent agreement dated 10.06.1985 Ex.P20 was executed by defendant No. 1-Kishan Chand and it was signed on behalf of the plaintiffs by Sampooran Singh.

42. The most important circumstance showing that defendant No.1-Kishan Chand was acknowledging Sampooran Singh as the person representing the plaintiffs is the legal notice dated 23.04.1986 (Ex.PW3/A), which was sent by defendant No.1 himself through his counsel. This legal notice was addressed to Sampooran Singh. It is important to notice para Nos.1, 2 and 3 of this notice, which read as under:

> *"1. That you on behalf of others had entered into an agreement on 10.6.1985 with my client for the purchase of land situated at village Dulhepur, Tehsil Ballabgarh, Distt. Faridabad from my client in support of which the agreement had been signed by you.*
>
> *2. It had been settled in the said agreement entered between the parties that you shall be bound down to make the sale-deed in favour of the purchaser within a period of one month from the date of decision of the partition proceedings in respect of the lands in question.*
>
> *3. That though an earlier agreement had been entered by Shri Balbir Singh on 28.4.84 with my client in respect of the same lands situated at village Dulhepur, Tehsil Ballabgarh, Distt. Faridabad owned and possessed by my client, after agreement dt. 28.4.84 wherein the purchaser was under obligation to get the sale-deed executed in his favour within a period of one month from the date of decision of the partition proceedings finally decided in favour of my client, but another agreement was entered by you in respect of the same land in question on 10.6.85 consequent upon which the earlier agreement dt. 28.4.84 stood terminated."*

43. It is clear from the above notice Ex.PW3/A that defendant No. 1 acknowledged the fact that Sampooran Singh had entered into the agreement dated 10.06.1985 with him i.e. Kishan Chand for purchase of the suit land vide agreement dated 10.06.1985 and that it had been settled amongst them that

parties will be bound down to make sale deed in favour of the purchaser within a period of one month from the date of decision of the partition proceedings. Further, there is clear reference of the earlier agreement dated 28.04.1984, as per which the purchaser was under obligation to get the sale deed executed in his favour within a period of one month from the date of decision of the partition proceedings finally decided in favour of the other party but another agreement was entered by him i.e. Sampooran Singh in respect of the same land in question on 10.06.1985.

44. Although in this legal notice Ex.PW3/A, it is claimed by defendant No.1 that earlier agreement dated 28.04.1984 stood terminated but as has earlier been noticed that the agreement to sell dated 10.06.1985 (Ex.P20) clearly stipulates that all other conditions of agreement dated 28.04.1984 shall remain as it is, which clearly shows that the earlier agreement was also alive.

45. Even the reply dated 30.06.1986 (Ex.P23) to the above legal notice was sent by Sampooran Singh on behalf of the plaintiffs, which fact is not disputed by the defendant No.1.

46. Still further, when on completion of the partition proceedings, formal possession of the land allotted to the defendant No.1-Kishan Chand was given to him, Rapat No.460 dated 30.05.1986 Ex.P34 was duly signed by Sampooran Singh, showing the completion of the term of the agreement dated 28.04.1984, as per which the plaintiffs will be bound to take possession of the land, which will be allotted to defendant No.1 on partition. In case, Sampooran Singh had nothing to do with the transaction, he would not have signed the Rapat Roznamcha regarding the delivery of possession, along with Kishan Chand - vendor.

47. All the aforesaid facts and circumstances clearly indicate that Sampooran Singh had all along been associated with the transaction executed between the parties and now, the defendant No.1 is estopped from claiming that Sampooran Singh could not appear as a witness on behalf of the plaintiffs.

It is so held also in view of the Section 120 of the Indian Evidence Act, as has already been discussed.

48. Moving ahead, as per the terms and conditions of the agreement to sell dated 28.04.1984 to be read with supplementary agreement dated 10.06.1985 executed between the parties, defendant No. 1-Kishan Chand was required to obtain Income Tax Clearance Certificate from competent authority. Not only this, he was required to get the mutation regarding partition order incorporated in the Revenue Record.

49. There is nothing on record to suggest that defendant No. 1 completed any of the above pre-conditions for execution of the sale deed as per the terms and conditions of the agreement. It has been held by Hon'ble Supreme Court in ***P. D'Souza v. Shondrilo Naidu 2005(1) CCC 131*** that question of readiness and willingness also depends upon the question as to whether the defendant did everything, which was required of him to be done in terms of the agreement to sell.

50. Thus, where performance of intending sale is conditional upon certain acts to be performed by the seller, buyer needs to perform his part only after those acts are performed by the seller.

51. In the present case, defendant No.1-vendor himself having not performed his part of contract, he cannot question the readiness and willingness of the plaintiffs to perform their part of contract.

52. On account of the entire discussion as above, it is held that Courts below did not commit any error in coming to the conclusion that plaintiffs had successfully proved readiness and willingness on their part to perform their part of contract and rather, it is defendant No.1-owner, who was at fault in not taking steps to complete the terms required for execution of sale deed as mentioned in the agreements to sell Ex.P18 and P20.

Plea relating to limitation:

53. The contention of Ld. Senior Advocate to the effect that the suit was barred by limitation, has also no merit. None of the agreements Ex.P18 and P20 specifies any specific date for execution of the sale deed. It is dependent upon the performance of some of the terms by the defendant-vendor, inasmuch as he was required to obtain Income Tax Clearance Certificate and to get the mutation sanctioned regarding the partition.

54. Vide notice dated 23.04.1986 Ex.PW3/A sent by defendant No.1 to Sh. Sampooran Singh on behalf of the plaintiffs, though it was stated by the vendor that he was ready to execute the sale deed within 15 days but it was mentioned that he had applied for the Income Tax Clearance Certificate. It was not mentioned that he had obtained the Income Tax Clearance Certificate. This fact was specifically stated in the reply dated 30.06.1986 Ex.P23 sent by Sampooran Singh on behalf of the plaintiffs to Kishan Chand – defendant N: 1, stating that as per the information collected by him, he (defendant No.1) had not got the mutation sanctioned regarding the partition nor had obtained the Income Tax Clearance Certificate.

55. In these circumstances, when defendant himself had to fulfil some of the conditions, which he failed to do, so cause of action to file the suit for specific performance had not arisen till the date of refusal by the defendant vendor. As such, suit filed by the plaintiffs cannot be held to be barred by limitation and so, the Courts below did not commit any error in holding the suit to be within limitation.

Dispute relating to possession :

56. There is also dispute relating to possession, inasmuch as it is plaintiffs' claim that they are in possession of suit land, whereas on the other hand, it is claimed that pursuant to an agreement to sell dated 17.07.1986 Ex.DW3/A, Kishan Chand had handed over the possession to defendant No.2 through his Attorney- defendant No. 3.

57. The lower courts correctly observed that, under the agreement to sell dated 28.04.1984, vendor Kishan Chand explicitly transferred possession of

his share of the land to the vendees (plaintiffs). This was reaffirmed in the subsequent agreement dated 10.05.1985 (Ex.P20). Since partition proceedings were ongoing, it was agreed that the plaintiffs would accept possession of the land ultimately allotted to defendant No.1 without objection. Upon the conclusion of the partition, formal possession was granted to Kishan Chand, as recorded in the Rapat Roznamcha, with Sampooran Singh representing the vendees at the time. Consequently, the plaintiffs received the specific portion of land that had been allocated to Kishan Chand's share.

58. Not only this, regarding the existence of tubewell, plaintiffs have produced the electricity bills and receipts thereof, which have been duly proved by the testimony of PW-2 Mahinder Singh, an official of HSCB, as per which the electricity connection was sanctioned in favour of Balbir Singh (plaintiff) for a tubewell, which is situated in Killa No. 16 as per the application dated 24.08.1987 on deposition of necessary security. The said killa is part of the suit land. This Killa had come to the share of brother of defendant No.1 in the partition proceedings, for which he was duly compensated.

59. Still further, the agreement to sell dated 17.07.1986 (Ex.DW-3/A) indicates that as per it, defendant No. 1 had handed over only the *Malkana* possession to defendant No. 2 i.e. only the symbolic possession was given and not the actual physical possession. In fact, actual physical possession could not have been given by defendant No.1 to defendant No.2, since the actual possession had already been given by him to the plaintiffs.

60. In no way, defendant N: 2 can be held as a bonafide purchaser in the above facts and circumstances. Said defendant has not even sought specific performance based upon agreement dated 17.07.1986 (Ex.DW-3/A) till date. Said agreement has been rightly found to be collusive between defendants *inter se* to deprive the plaintiffs the fruits of prior agreements in their favour.

61. As such, it is held that Courts below rightly concluded that it was the plaintiffs, who were in possession of the suit land pursuant to the agreement to sell.

Conclusion:

62. On account of the entire discussion as above, this Court does not find any merit in the present appeal. The findings returned by the Courts below are based upon proper appreciation of evidence. Learned counsel for the appellants could not point out any misreading of evidence or misappreciation of evidence on the part of the Courts below. This Court does not find anything, which is contrary to the legal position.

63. As such, holding the present appeal to be devoid of merit and finding no scope for interference in the concurrent findings, the present appeal is hereby dismissed.

Pending application(s), if any, also stands disposed of.

(DEEPAK GUPTA)
JUDGE

01.04.2025
Neetika Tuteja

Whether speaking/reasoned? Yes
Whether reportable? Yes