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**(2017) 01 MP CK 0131**  
**MADHYA PRADESH HIGH COURT**  
**Case No:** 173 of 1999

Satyaprakash Aasure

APPELLANT

Vs

Smt. Kalpana Aasure

RESPONDENT

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**Date of Decision:** Jan. 17, 2017

**Acts Referred:**

- Code of Civil Procedure, 1908, Section 96, Order 41 Rule 31 - Appeal from original decree

**Hon'ble Judges:** Jarat Kumar Jain

**Bench:** Single Bench

**Advocate:** D S Panwar, Mangesh Bhachawat

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**Judgement**

**1.** THIS is plaintiff's first appeal against the judgment dated 27.02.1999 passed by Second Additional District Judge, Mandsaur in Civil Suit No.36-A/1997, whereby dismissed the suit for specific performance with alternative prayer for damages.

**2.** This Court vide judgment dated 21.03.2013 dismissed the appeal and affirmed the judgment and decree which was challenged before Hon'ble apex Court in Civil Appeal No.9681/2014. The apex Court allowed the appeal and set-aside the judgment of this Court and remanded the case for deciding the first appeal keeping in view the scope and powers conferred under Section 96 read with Order XLI Rule 31 of the Code of Civil Procedure. Hence, the appeal is decided afresh.

**3.** Brief facts of this case are that the appellant (plaintiff) filed a Civil Suit No.36-A/1997 in the Court of Second Additional District Judge, Mandsaur against the Respondent (defendant) for specific performance of contract for purchase of House No.9, Madhavganj, Mandsaur hereinafter referred to as the ["suit house"]. According to the appellant, Respondent was owner of the suit house and on

05.01.1992 he entered into a written agreement with the appellant to sale the suit house to the appellant for a consideration of Rs.1,48,001-00. The appellant, in terms of the agreement, offered Rs.9,989-00 to the Respondent towards part payment of sale consideration but he declined to accept the amount and avoided to perform his part of agreement. The appellant sent a notice to the Respondent to perform his part agreement and execute the sale deed of the suit house but the Respondent failed to ensure the compliance of the legal notice, hence, the appellant filed civil suit against the Respondent seeking specific performance of agreement in question. It was alleged that the appellant was ready and willing to perform his part of agreement but Respondent failed to perform his part and hence this suit.

**4.** The Respondent in the written statement specifically denied the allegations made in the plaint. According to the Respondent, there was no concluded agreement between the parties. On the contrary, the agreement was contingent upon certain terms and conditions which the appellant was required to fulfill. However, the appellant failed to perform his obligations, therefore, the suit was not maintainable. Even the appellant was never ready and willing to perform his part of the contract and appellant had no sufficient funds. Hence, he was not entitled to seek enforcement of such agreement against the Respondent. On the basis of the pleadings of the parties, the Trial Court has framed four issues, which reads as under :-

"VERNACULAR MATTER OMITTED"

**5.** In regard to the aforesaid issues, both the parties have led evidence. After hearing learned counsel for the parties, learned Trial Court gave a finding that the Respondent will get the suit of Babulal dismissed was not the condition precedent for final agreement [pucca souda]. Hence, gave a finding against the Respondent, however, gave a finding in favour of the Respondent that the appellant has failed to prove that he has having remaining part of sale consideration i.e. Rs.1,48,000-00 and he has tendered the sale consideration to the Respondent. On the other hand, the conduct and latches shown that the appellant was not continuous ready and willing to perform his part of contract. It is also held that the appellant is not entitled for any compensation. Hence, dismissed the suit. Being aggrieved, the appellant (plaintiff) has filed this appeal.

**6.** The first question for determination before this Court is whether the Respondent will get the suit of Babulal dismissed, was a condition precedent for executing final agreement [pucca souda] ?

**7.** Learned counsel for the appellant submits that in this regard finding of Issue No.1

is in favour of the appellant and Respondent has not filed any cross-objection, therefore, he cannot be permitted to assail such findings.

**8.** Refuting the arguments, learned counsel for the Respondent submits that Hon"ble apex Court in the case of Ravinder Kumar Sharma v/s State of Assam [AIR 1999 SC 3571] held that Respondent can question the adverse finding without filing cross-objection. Filing of crossobjection is optional and not mandatory. Hence, without filing the cross-objection the Respondent can challenge the finding of the Trial Court which is against him.

**9.** I have considered the submissions and I am of the view that in view of the judgment of Hon"ble apex Court, the Respondent can question the adverse finding in regard to Issue No.1 without filing cross-objection.

**10.** Now the question for consideration is whether the finding given by the Trial Court in regard to Issue No.1 is correct ? The Trial Court gave a finding that the Respondent will get the suit of Babulal dismissed was not a condition precedent for executing final agreement (pucca souda) and as per the averments made in the agreement, the kachchaa souda became the pucca souda. Learned counsel for the appellant supports this finding.

**11.** To decide this controversy, I would like to reproduce the agreement in question, which reads as under :-

"VERNACULAR MATTER OMITTED"

**12.** In this regard, the relevant pleadings in the plaint reads as under :-

"VERNACULAR MATTER OMITTED"

**13.** In the written-statement, the Respondent has specifically pleaded that there was an oral condition that the Respondent will get the suit of Babulal dismissed was a condition precedent for execution of final agreement. In the light of the pleadings, it is useful to refer the notice [Ex.P/2] which appellant served on the Respondent. The relevant portion reads as under :-

"VERNACULAR MATTER OMITTED"

**14.** From the aforesaid averments in the notice [Ex.P/2], it is clear that when the parties were entered into an agreement [Ex.P/1]. At that time there was some oral conditions agreed between the parties and the conditions would be included at the time of execution of final agreement. When in the cross-examination the question was asked that what was the oral conditions decided by the parties, then the appellant has avoided to reply the same and deposed that -

"VERNACULAR MATTER OMITTED"

(see para 11 and 12 of deposition of appellant) On the other hand, Respondent in reply to the notice averred that the aforesaid condition was the condition precedent for the final agreement.

**15.** The appellant has pleaded that such condition was an unimportant condition. Learned counsel for the appellant unable to convince that if the condition was unimportant, as to why such condition was introduced in the kachchaa agreement. It is also material fact that such condition is not an imaginary thing. There was a civil suit filed by Babulal and the disputed house is situated on the back side of the house sold by Heeralal. The disputed house has no entry from the front side, therefore, the idea in getting Babulal's suit dismissed, was that if the suit is dismissed the appellant's brother will get clear title of that house and the appellant will get the entry from the front side and then only the purchase of the disputed house will become advantageous to the appellant. To prove the location of the disputed house and Heeralal's house, Respondent has filed the scatch map [Ex.D/1] which is not disputed by the appellant.

**16.** Apart from this, if we think objectively that if there was no oral condition between the parties and in the agreement the condition that Respondent will try to resolve the dispute with Babulal is an unimportant and useless condition then why on the same day i.e. on 05.01.1992 the final agreement has not been executed by the parties. It indicates that the Respondent gets settled the dispute with Babulal is the condition precedent for the agreement. Learned Trial Court has failed to appreciate the facts and has not considered the averments made in the notice [Ex.P/2] and the reply [Ex.P/3] and the pleadings of the parties.

**17.** It is also one of the material fact that if under the agreement the Respondent was not to discharge any obligation, then why in the notice [Ex./P/2] it is mentioned that the Respondent has not performed his part of agreement which is agreed oral. Thus, the finding of learned Trial Court that the aforesaid condition was not the condition precedent and the kachchaa agreement, as per the terms and conditions, automatically became final agreement is not sustainable in law.

**18.** Learned counsel for the Respondent submits that the material condition of terms of bargain was not complied with by the Respondent, therefore, the agreement to sell cannot be said to be concluded agreement enforceable by law. For this purpose he placed reliance on the judgment of Jharkhand High Court in the case of Rajni Kumar Mahto v/s Smt. Uma Devi Budhia [AIR 2005 Jharkhand 13].

**19.** In this case the condition precedent for the contract that the Respondent will resolve the dispute with Babulal and will get the suit dismissed was not complied with, however, the appellant submits that as per the condition on 13.01.1992 he has tendered the amount i.e. Rs.9,989-00 to the Respondent, however, he refused to accept the same. Therefore, the kachchha agreement became pucca agreement. Considered the submissions. In the notice [Ex.P/2] it is mentioned that the pucca agreement has to be executed till 13.01.1992, till date the appellant was ready to pay Rs.9,989-00 as advance money. However, the Respondent has not received the same and executed a pucca agreement. In the notice it is nowhere stated that he has tendered the amount to the Respondent; whereas it is stated that the Respondent has not obtained the money; whereas in the plaint it is pleaded that on 13.01.1992 appellant tendered the amount to the Respondent, however, he has not accepted the same. The Respondent has specifically denied this fact that on 13.01.1992 appellant has tendered him Rs.9,989-00. On the other hand, he informed the appellant that the condition of settling the matter with Babulal could not be complied with, therefore, the agreement cancelled. This fact is mentioned in reply of notice [Ex.P/3], which reads as under :-

"VERNACULAR MATTER OMITTED"

**20.** The appellant in para 21 of his deposition deposed that -"VERNACULAR MATTER OMITTED" The appellant has examined one witness Chandra Kumar Khabiya (PW-2) who deposed that in the month of January, 1992 along with the appellant he has gone to Respondent, however, the Respondent has denied to receive the amount of Rs.10,000-00. This witness is an attesting witness of agreement [Ex.P/1], however, he is not in a position to depose about the terms and conditions of the agreement and he does not know that the appellant has tendered the amount to Respondent as advance money for purchasing the disputed house. Even the appellant has not deposed that on 13.01.1992 when he tendered the amount of Rs.9,989-00, at that time witness Chandra Kumar Khabiya had gone to Respondent's shop along with him. In such circumstances the evidence of Chandra Kumar Khabiya is not treated as corroborating the evidence of appellant.

**21.** With the aforesaid it is apparent that there was no concluded contract between

the parties. Hence, there is no question for specific performance of such agreement.

**22.** Now I have considered the finding in regard to Issue No.4. Learned Trial Court gave a finding against the appellant that he has failed to prove that he is having entire sale consideration i.e. Rs.1,48,000-00 with him and he is ready and willing to perform his part of contract.

**23.** Learned counsel for the appellant submits that readiness and willingness pleaded so also availability of funds is pleaded, it is not required to prove cash was in hand, only capacity to pay consideration is sufficient. For this purpose placed reliance on the judgment of Hon"ble apex Court in the case of Sukhbit Singh v/s Brij Pal Singh [1996 (II) MPWN 234 (SC)]. In a suit for specific performance of contract, it is the duty of the plaintiff to aver and prove that he was and is ready and willing to perform the essential terms of the contract. The appellant has made specific averments in this regard. For this purpose placed reliance on the judgment of Rajasthan High Court in the case of Kirpal Singh v/s Mst. Kartaro [AIR 1980 Rajasthan 212]. Also placed reliance on the judgment of Madras High Court in the case of Vairavan v/s K.S.Vidyanandam [AIR 1996 Madras 353] and judgment of Delhi High Court in the case of Sant Lal v/s Shyam Dhawan [AIR 1986 Delhi 275].

**24.** On the other hand, learned counsel for the Respondent submits that the appellant has not aver and prove that he was and is ready and willing to perform the essential terms of the contract. It is not proved that he was having Rs.1,48,000-00. FDRs [Exs.P/15 and P/16] are of only Rs.25,000-00 and Rs.15,000-00, total Rs.40,000-00 only. It shows that the appellant had arranged Rs.40,000-00 only; whereas he was required to pay Rs.1,47,900-00 as balance price of consideration. The appellant has not proved that he had made arrangement for purchasing stamps and registration expenses. For this purpose placed reliance on the judgments of this Court in the case of Nathansingh v/s Harcharanlal [1983 WN 245] and Karan Singh v/s Maya Ram [1985 WN 329].

**25.** Learned counsel for the Respondent further submits that the appellant has paid only Rs.101-00 as against the agreed price of Rs.1,48,001-00 and now wants to take unfair advantage by purchasing the disputed house which is of worth one crore rupees. In such circumstances he is not entitled for specific performance of contract. For this purpose placed reliance on the judgments of this Court in the case of Neerabai v/s Hanimantra [1978 (!) WN 116]; Abdul Hanif v/s Mohd. Sehjad [2006 (III) MPWN 67] and the judgment of Hon"ble apex Court in the case of Vimleshwar Nagappa Shet v/s Noor Ahmed Sheriff [AIR 2011 SC 2057]. It is also submitted that the equity is not in favour of the appellant in passing the decree for specific performance. For this purpose placed reliance on the judgment of Hon"ble apex Court in the case of HHM Shantidevi P. Gaikwad v/s Savjibhai Haribhai Patel [AIR 2001 SC 1462].

**26.** In the plaint, it is pleaded that the plaintiff was ready and willing to pay Rs.1,48,001-00 and also ready to bear the registration expenses. The appellant deposed that on 13.01.1992 he tendered the amount of Rs.9,989-00 to the Respondent, however, he has not accepted the amount. Thereafter for one year the appellant has not shown any anxiety; whereas after lapse of one year he has sent a notice [Ex.P/2] on 28.01.1993 and in that notice it is averted that you have not executed the pucca agreement till date, however, the appellant is ready to pay remaining amount and for complying the oral terms and conditions he is ready to get sale-deed registered in his favour. It is not mentioned that from the date of agreement he is having capacity to pay Rs.1,48,001-00. It is also not mentioned that why he has waited for one year when the Respondent has not executed pucca agreement in his favour. The appellant has sent a notice on 28.01.1993 [Ex.P/2], thereafter Respondent has sent a reply [Ex.P/3] on 21.04.1993 stating that the agreement is cancelled. Even though the appellant has filed the suit on 03.01.1995 i.e. about after two years and say after about three years from the refusal to execute the saledeed on 13.01.1992.

**27.** Thus, the appellant has failed to prove that he was always ready and willing to perform his part of contract.

**28.** With the aforesaid, I am of the view that it is an contingent contract and the Respondent could not manage to settle the matter with Babulal, therefore, the agreement between the parties was not the concluded contract and, therefore, specific performance of such contract cannot be ordered. Besides this, the appellant has failed to prove that he was having capacity to pay sale consideration. Hence it is not proved that the appellant was always ready and willing to perform his part of contract.

**29.** Thus, the appellant has failed to prove his case. Learned Trial Court has rightly dismissed the suit. Thus, the appeal is dismissed with costs. The appellant shall pay the litigation expenses to the Respondent. Counsel's fee be calculated as per the schedule. Decree be drawn up accordingly.