NO.1.(i) to 1.(vi))

These appeals coming on for hearing this day, ***Hon'ble Shri Justice Vishal Mishra*** *passed the following:*

ORDER

Since these appeals are preferred against a judgment and decree dated 08.01.2004 passed by the District Judge, Narsinghpur in Civil Suit No.5-A of 1996 and an identical issue is involved in both these appeals, they are being heard together and are being disposed off by this common order. For the sake of convenience, the facts and grounds stated in First Appeal No.360 of 2004 are taken into consideration.

2. The plaintiff/appellant Manohar Lal Soni of First Appeal No.360 of 2004 filed a civil suit for specific performance of contract against the respondents on the basis of an agreement to sell dated 11.01.1993 with respect to purchase of a land ad-measuring 80x150 sq. feet, Patwari Halka No.116, Khasra No.111/4 and 112/11 for consideration of Rs.5,00,000/- which was paid by the plaintiff/appellant on the date of agreement in the presence of witnesses. The physical possession of the property was handed over by the defendant/respondent No.1 to the plaintiff/appellant with an assurance that in future as soon as the name of respondent No.1 is mutated in the revenue records, he will execute the registered sale deed in favour of the plaintiff/appellant.

3. It is the case of the plaintiff/appellant that the language of the agreement makes it clear that the respondent No.1 has sold his share of the property which was in his physical possession. His brother was having a share in the property to the extent of 95x250 sq. feet and he is in physical possession of his share. It is the case of the plaintiff/appellant that both the brothers are living separately, therefore, respondent No.1 was having a right to sell the property. The plaintiff/appellant approached the respondent No.1

to execute the sale deed in his favour but when no fruitful results were borne out, he has issued a legal notice asking for registration of a sale deed and thereafter adopted the legal process and filed a suit seeking specific performance of agreement and in the alternative a prayer was made to refund the amount already paid along with interest at the rate of 36% per annum.

4. The respondent/defendant filed the written statement denying the claim advancing a plea of loan transaction of Rs.2,00,000/- due to his family requirements showing the plaintiff/appellant to be a money lender. He had denied all the contents of the plaint.

5. On the basis of the pleadings, the learned Trial Court framed the issues and after recording the evidence of both the parties and considering the oral as well as documentary evidence available on record has passed the final judgment and decree dated 08.01.2004 dismissing the claim of the plaintiff/appellant and has directed for refund of Rs.5,00,000/- along with interest at the rate of 10% per annum from the date of institution of the suit till its payment.

6. Both plaintiff as well as defendant have filed two separate first appeals against the judgment and decree dated 08.01.2004. By filing First Appeal No.360 of 2004, the plaintiff/appellant has challenged the judgment and decree on the ground that the learned Trial Court, despite finding all the contents to be proved, as required for specific performance of an agreement, has not directed for execution of the sale deed and rather directed for refund of the amount which was paid by the plaintiff/appellant.

7. It is the case of the plaintiff/appellant that once the transaction was found to be proved and the factum of readiness and willingness was found to be proved, the Trial Court on the basis that the respondent/defendant was not having any right to execute the agreement or sale deed as the property is a joint family property and no partition has taken place at any point of time, has rejected the claim of the plaintiff/appellant to the extent of execution of sale

deed. The evidence available on record has not been taken care of wherein it was specific and clear that the partition has already taken place between the brothers and they are living separately. The vital piece of evidence was not considered by the learned Trial Court. It is further contended that the application for bringing the documents on record at a later stage was allowed by the learned Trial Court which was itself against the provisions of law and only on the basis of that document which discloses the property to be a joint property, the civil suit has been dismissed on these grounds.

8. By filing the First Appeal No. 214 of 2004, the defendant/appellant has challenged the judgment and decree on the ground that the learned Trial Court has erred in holding that an agreement to sell was executed which in fact was a transaction of loan of Rs.2,00,000/-. Plaintiff was a money lender, and for the personal need, the amount of Rs.2,00,000/- was lent and in lieu of the same, the agreement was executed in the form of a security. He has further challenged the award of interest stating it to be on a higher side whereas, the actual rate of interest as per the Bank norms was much less at the relevant point of time.

9. Heard learned counsels for the parties and perused the record.

10. From the perusal of the record, it is seen that on the basis of the pleadings, the learned Trial Court has framed as many as nine issues. Issue No.1 with respect to execution of agreement dated 11.01.1993 (Exibit P/1) is found to be proved. The defendant claimed that the agreement was executed for the reason that an amount of Rs.2,00,000/- was advanced but the property was kept as a security, was held not proved by the learned Trial Court. The evidence available on record clearly indicates that an amount of Rs.5,00,000/- has been paid in lieu of the property, as mentioned in the agreement (Exibit P/1) but whether the possession of the property is handed over or not could not be clarified. On the contrary, it was established by leading cogent evidence that the property in question is a joint family property and the

defendant No.1 alone was not having any authority or right to enter into an agreement to sell the aforesaid property. The statement of Fakir Chand (DW-1) speaks that there was a partition with respect to living and preparation of food (kitchen) etc. but as far as the property is concerned, the same was never partitioned and is still a joint property. It was further clarified that there are two joint houses and the disputed plot is a joint property. They are living jointly but their kitchens are separate and they prepare food separately. The aforesaid statement given by Fakir Chand (DW-1) could not be disputed at any point of time. The learned Trial Court has taken into consideration the aforesaid aspect of the case and has found that the property in question is a joint family property. Therefore, defendant No.1 alone was having no right to execute an agreement to sell. The documents which are brought on record show that the property is recorded jointly in revenue records.

11. Although the plaintiff has established the execution of the agreement and has shown his readiness and willingness to get a sale deed executed, but the fact remains that regarding the factum of handing over the possession of the property in question and the right and authority of the defendant to execute the agreement to sell, no document is available on record to show that the possession of the property was ever handed over to the plaintiff. Merely, an assertion in the *Iqrarnama* (Exibit P/1) regarding taking consideration of Rs.5,00,000/- and handing over the possession is not sufficient to prove the possession over the property, especially in the circumstances when the property is a joint family property. No document is placed on record to show that the joint holder of the property has given his consent at any point of time for either execution of the agreement to sell or to handover possession of the property in question. The aforesaid aspects were considered by the learned Trial Court which is reflected from paragraph 11 onwards of the judgment. The document (Exibit D/9) *khasra panchshala* shows that the property is a joint family property and the name of Gulab

Chand and Fakir Chand are recorded jointly in the revenue records. Therefore, a specific finding was recorded that the property is a joint family property and the defendant alone was not having any right to dispose off the same. The aforesaid document could not be disputed by the appellant/plaintiff by placing any material on record either before the Trial Court or before this Court. Under these circumstances, the relief with respect to execution of a sale deed was rightly not extended to the plaintiff/appellant.

12. The law with respect to transfer of joint family property was considered by the Hon'ble Supreme Court in large number of cases and it was categorically held that a sole person is not having any right to dispose off a joint family property. Therefore, no relief can be extended to the appellant/plaintiff. Merely proving the readiness and willingness is not sufficient for a decree of specific performance especially in the circumstances when the executor of the agreement to sell was not competent to execute the same. Even otherwise, a decree of specific performance of contract is always within the discretion of the Court. The Court can grant a decree for specific performance of contract to sell or even can go for an alternative prayer which has been made. The learned trial Court after appreciating the material and evidence on record has arrived at a conclusion that although an agreement to sell was established, but the fact that the executor of the agreement himself was not competent to enter into an agreement to sell as the property in question is a joint family property and never partitioned and, therefore, the exercising the discretion has directed for refund of an amount of Rs.5,00,000/- along with interest at the rate of 10% per annum in lieu of the agreement.

13. The law with respect to discretion by the Court in the case of specific performance is clear and the Hon'ble Supreme Court in the case of *Hemanta Mondal and Others Vs. Ganesh Chandra Naskar* reported in *(2016) 1 SCC 567* has held as under:

"14. Section 20 of Specific Relief Act, 1963 gives discretion to the court, and provides that the court is not bound to grant relief of specific performance merely because it is lawful to do so. It further provides that the discretion is not to be exercised arbitrarily but guided by judicial principles. Sub-section (2) of Section 20 enumerates three conditions when discretion is not to be exercised to grant decree of specific performance:-

"20(2)(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance."

15. Explanation (1) to sub-section (2) provides that mere inadequacy of consideration shall not be deemed to be an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b). Explanation (2) provides that the question whether the performance of a contract when involved hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent in the contract, be determined with reference to the circumstances accepting at the time of contract. Sub-section (3) provides that court may properly exercise discretion to decree specific performance in any case where plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

16. In the present case, it appears that possession was not given to the plaintiff at the time of execution of the agreement, nor the area of land agreed to be sold was clear, as such, it cannot be said that the plaintiff has done substantial acts or suffered losses due to expenditure in constructions etc., in consequence of a contract capable of specific performance. The direction given by High Court in the impugned order shows that the measurements of land actually agreed to be sold, are not final."

Therefore, the learned Trial Court was well within its jurisdiction and has rightly directed for refund of the amount of Rs.5,00,000/- as mentioned in the agreement to sell along with an interest at the rate of 10% from the date of filing of the suit. Therefore, the appeal filed by the appellant/plaintiff i.e. Manohar Lal Soni (dead) through LRs. being devoid of merit, is dismissed.

14. As far as the First Appeal No.214 of 2004 filed by late Fakir Chand Agrawal is concerned, the challenge is being made to the judgment and decree passed by the Trial Court on the ground that the so called agreement to sell was executed for the purpose of securing the amount of Rs.2,00,000/- which was lent by Manohar Lal to him when he was in need of money. He has tried to establish that Manohar Lal was a money lender. No document is placed on record to show that Manohar Lal was a money lender. In fact document (Exibit P/1) which is an *Iqrarnama* does not speak that the property was being kept as a security. It was very specific that an agreement to sell the property was executed for a consideration of Rs.5,00,000/-. In absence of any material available on record to establish that Manohar Lal is a money lender and the property was kept as a security for the money that was lent, the plea taken by the appellant/defendant could not be sustained. Accordingly, the plea to the aforesaid effect is rejected and no relief can be extended to him.

15. As far as grant of interest on Rs.5,00,000/- at the rate of 10% per annum is concerned, it is argued that the Bank rate at the relevant time was much less, therefore, a part of the order so far as it relates to refund of the amount along with the interest at the rate of 10% per annum be modified to the extent of interest at the prevailing Bank rates. The agreement to sell (Exibit P/1) was entered into on 11.01.1993. The rate of interest at the relevant point of time was on much higher side. The learned Trial Court has decided the civil suit vide judgment and decree dated 08.01.2004 and accordingly has imposed the rate of interest at the rate of 10%. No material is

placed on record to show that the rate of interest at the time of entering into the agreement was at the lesser side. Thus, no relief as far as it relates to change in the rate of interest can be extended to the appellant/defendant. The refund of amount of Rs.5,00,000/- along with interest at the rate of 10% is justified and well within the jurisdiction of the Court in view of the law laid down by the Hon'ble Supreme Court in the case of *Hemanta Mondal and Others* (supra). Under these circumstances, no relief can be extended to the appellant/defendants.

16. Appeals *sans* merit and are accordingly dismissed. No order as to costs.

(RAVI MALIMATH)
CHIEF JUSTICE

(VISHAL MISHRA)
JUDGE

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